LAW OF EVIDENCE

by
JASWANT SINGH
Advocate
DEEPAK ARORA
Advocate
R.S. DOGRA
Advocate

M. VAIDYANATH & CO.
CHARTERED ACCOUNTANTS
No. 1, FIRST MAIN ROAD,
SHOPPUR GARDENS
MADRAS - 600 083.

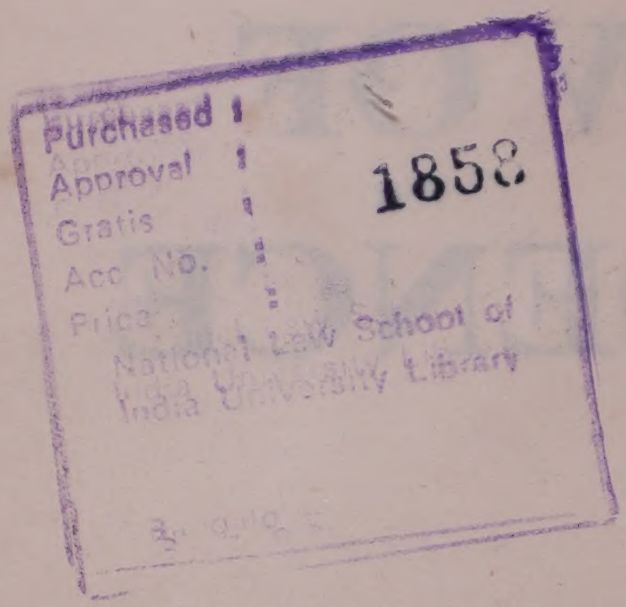
In 2 Volumes

VOLUME 1

SECTION 1 TO SECTION 100

1996
MADRAS LAW JOURNAL OFFICE
MADRAS

New Edition—January 1996*



Volume 1

Price Rs. 430
(Complete set of 2 Volumes for Rs. 860)

Although every care has been taken in the publication of this book, the authors, the publishers, the distributors and the printers shall not be responsible for any loss or damage caused to any person on account of errors or omissions which might have crept in.

WITH THE BLESSINGS OF TIRUPATI BALAJI
MARKETED BY PROFESSIONAL BOOK PUBLISHERS
(FORMERLY H.L.H. PUBLICATIONS), 36/12, EAST PATEL NAGAR, NEW DELHI
PRODUCED BY SMT. VEENA ARORA ON BEHALF OF
PROFESSIONAL BOOK PUBLISHERS, NEW DELHI FOR M.L.J. OFFICE, MADRAS
TYPESETTING AT PROFESSIONAL BOOK PUBLISHERS (COMPUTER DIVISION),
NEW DELHI & PRINTED AT INDER OFFSET PRESS, NEW DELHI

* REPRODUCTION OF CIVIL COURT MANUAL (CENTRAL ACTS), TWELFTH EDITION

CONTENTS

THE
INDIAN EVIDENCE ACT, 1872

PART I

RELEVANCY OF FACTS

CHAPTER I

PRELIMINARY

SECTIONS		PAGES
1. Short title	...	1
Extent	...	1
Commencement of Act	...	1
2. [*Repealed*]	...	11
3. Interpretation clause	...	11
4. "May presume"	...	149
"Shall presume"	...	149
"Conclusive proof"	...	149

CHAPTER II

OF THE RELEVANCY OF FACTS

5. Evidence may be given of facts in issue and relevant facts	...	153
6. Relevancy of facts forming part of same transaction	...	158
7. Facts which are the occasion, cause or effect of facts in issue	...	163
8. Motive, preparation and previous or subsequent conduct	...	165
9. Facts necessary to explain or introduce relevant facts	...	184
10. Things said or done by conspirator in reference to common design	...	225
11. When facts not otherwise relevant become relevant	...	233
12. In suits for damages, facts tending to enable Court to determine amount are relevant	...	239
13. Facts relevant when right or custom is in question	...	240
14. Facts showing existence of state of mind, or of body, or bodily feeling	...	257
15. Facts bearing on question whether act was accidental or intentional	...	262
16. Existence of course of business, when relevant	...	264

ADMISSIONS

17. Admission defined	...	267
18. Admission—		
by party to proceeding or his agent	...	277
by suitor in representative character	...	277
by party interested in subject-matter	...	278
by person from whom interest derived	...	278

SECTIONS PAGES

19. Admissions by persons whose position must be proved as against party to suit ... 294
20. Admissions by persons expressly referred to by party to suit ... 294
21. Proof of admissions against persons making them, and by or on their behalf ... 296
22. When oral admissions as to contents of documents are relevant ... 311
23. Admission in civil cases when relevant ... 311
24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding ... 312
25. Confession to police officer not to be proved ... 372
26. Confession by accused while in custody of police not to be proved against him ... 392
27. How much of information received from accused may be proved ... 401
28. Confession made after removal of impression caused by inducement, threat or promise, relevant ... 453
29. Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc ... 453
30. Consideration of proved confession affecting person making it and others jointly under trial for same offence ... 454
31. Admissions not conclusive proof, but may estop ... 474

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES

32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant ... 482
when it relates to cause of death ... 482
or is made in course of business ... 483
or against interest of maker ... 483
or gives opinion as to public right or custom, or matters of general interests ... 483
or relates to existence of relationship ... 484
or is made in will or deed relating to family affairs ... 484
or in document relating to transaction mentioned in section 13, clause (*a*) ... 484
or is made by several persons and expresses feelings relevant to matter in question ... 484
33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated ... 569

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES

34. Entries in books of account when relevant ... 585
35. Relevancy of entry in public record made in performance of duty ... 597
36. Relevancy of statements in maps, charts and plans ... 632

SECTIONS PAGES

37. Relevancy of statement as to fact of public nature contained in certain Acts or notifications ... 634
38. Relevancy of statements as to any law contained in law books ... 635

HOW MUCH OF A STATEMENT IS TO BE PROVED

39. What evidence to be given when statement forms part of a conversation, document, books or series of letters or papers ... 635

JUDGMENTS OF COURTS OF JUSTICE WHEN RELEVANT

40. Previous judgments relevant to bar a second suit or trial ... 636
41. Relevancy of certain judgments in probate, etc., jurisdiction ... 642
42. Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41 ... 650
43. Judgments, etc., other than those mentioned in sections 40 to 42, when relevant ... 651
44. Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved ... 657

OPINIONS OF THIRD PERSONS WHEN RELEVANT

45. Opinions of experts ... 664
46. Facts bearing upon opinions of experts ... 710
47. Opinion as to handwriting, when relevant ... 711
48. Opinion as to existence of right or custom, when relevant ... 715
49. Opinion as to usages, tenets, etc., when relevant ... 717
50. Opinion on relationship, when relevant ... 718
51. Grounds of opinion, when relevant ... 730

CHARACTER, WHEN RELEVANT

52. In civil cases character to prove conduct imputed, irrelevant ... 730
53. In criminal cases previous good character relevant ... 731
54. Previous bad character not relevant, except in reply ... 732
55. Character as affecting damages ... 734

PART II

ON PROOF

CHAPTER III

FACTS WHICH NEED NOT BE PROVED

56. Fact judicially noticeable need not be proved ... 734
57. Facts of which Court must take judicial notice ... 734
58. Facts admitted need not be proved ... 748

CHAPTER IV

OF ORAL EVIDENCE

59. Proof of facts by oral evidence ... 753
60. Oral evidence must be direct ... 755

SECTIONS PAGE

CHAPTER V

OF DOCUMENTARY EVIDENCE

61. Proof of contents of documents ... 76
62. Primary evidence ... 76
63. Secondary evidence ... 77
64. Proof of documents by primary evidence ... 78
65. Cases in which secondary evidence relating to documents may be given ... 78
66. Rules as to notice to produce ... 81
67. Proof of signature and handwriting of person alleged to have signed or written document produced ... 81
68. Proof of execution of document required by law to be attested ... 82
69. Proof where no attesting witness found ... 84
70. Admission of execution by party to attested document ... 84
71. Proof when attesting witness denies the execution ... 85
72. Proof of document not required by law to be attested ... 85
73. Comparison of signature, writing or seal with others admitted or proved ... 85

PUBLIC DOCUMENTS

74. Public documents ... 86
75. Private documents ... 87
76. Certified copies of public documents ... 87
77. Proof of documents by production of certified copies ... 87
78. Proof of other official documents ... 88

PRESUMPTIONS AS TO DOCUMENTS

79. Presumption as to genuineness of certified copies ... 8
80. Presumption as to documents produced as record of evidence ... 8
81. Presumption as to Gazettes, newspapers, private Acts of Parliament and other documents ... 8
82. Presumption as to document admissible in England without proof of seal or signature ... 8
83. Presumption as to maps, or plans made by authority of Government ... 8
84. Presumption as to collections of laws and reports of decisions ... 8
85. Presumption as to powers-of-attorney ... 8
86. Presumption as to certified copies of foreign judicial records ... 8
87. Presumption as to books, maps and charts ... 8
88. Presumption as to telegraphic messages ... 8
89. Presumption as to due execution, etc., of documents not produced ... 8
90. Presumption as to documents thirty years old ... 8

SECTIONS PAGES

CHAPTER VI

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE

91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document ... 922
92. Exclusion of evidence of oral agreement ... 947
93. Exclusion of evidence to explain or amend ambiguous document ... 989
94. Exclusion of evidence against application of document to existing facts ... 990
95. Evidence as to document unmeaning in reference to existing facts ... 992
96. Evidence as to application of language which can apply to one only of several persons ... 993
97. Evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies ... 993
98. Evidence as to meaning of illegible characters, etc. ... 994
99. Who may give evidence of agreement varying terms of document ... 994
100. Saving of provisions of Indian Succession Act relating to wills ... 994
SUBJECT INDEX ... 995

THE INDIAN EVIDENCE ACT, 1872

[15*th March*, 1872]

Preamble—WHEREAS it is expedient to consolidate, define and amend the law of Evidence; It is hereby enacted as follows:—

PART I

RELEVANCY OF FACTS

CHAPTER I

PRELIMINARY

1. Short title.—This Act may be called THE INDIAN EVIDENCE ACT, 1872*.

---

*For Statement of Objects and Reasons *see* Gazette of India, 1868, p. 1574; for the draft or preliminary Report of the Select Committee, dated 31st March, 1871, *see* Gazette of India, 1871, Pt.V, p. 273 and for the second Report of the Select Committee, dated 30th January, 1872, *see* Gazette of India, 1872, Pt.V, p. 34; for discussion in Council, *see* Gazette of India, 1868, supplement, pp. 1060 and 1209, Gazette of India, 1871, extra supplement, p. 42, and supplement, p. 1641 and Gazette of India, 1872, pp. 136 and 230.

Preamble—Notes.

The Evidence Act is, as it was intended to be, a complete Code of the law of evidence: I.L.R. 14 Cal. 721 (F.B.); A.I.R. 1920 Cal. 500: 21 Cr.L.J. 849 (F.B.); A.I.R. 1938 Rang. 177: 39 Cr.L.J. 581 (F.B.). But *see* A.I.R. 1916 Mad. 851; 12 Cr.L.J. 505 (Cal.) (S.B.).

The Evidence Act is little more than an attempt to reduce the English law to the form of express propositions arranged in their natural order, with some modifications: A.I.R. 1941 All. 402: 43 Cr.L.J. 177 (F.B.).

The Divorce Act was already in force when the Evidence Act came into force. Consequently Ss. 7, 12, 13 and 14 of the Divorce Act as to the requisites for a decree for divorce cannot be overridden by such section as S. 58 of the Evidence Act: A.I.R. 1925 Bom. 231 (S.B.).

Section 1—Synopsis.

1. Law of Evidence—Scope and objects of.
2. Construction of Act.
3. Guidance from English Law.
4. Application of section.
5. Affidavits—Act not applicable.
6. Arbitration proceedings.

---

1. Law of Evidence—Scope and objects of.—Rules in this Act are rules of logic: 1914 M.W.N. 931. The mode of taking evidence is usually regarded as a purely procedural matter: 1943 Nag.L.J. 16: A.I.R. 1943 Nag. 36. Act is not exhaustive: I.L.R. 39 Cal. 164: 15 Cal.W.N. 1053; I.L.R. 14 Cal. 721.

The provisions of the Act are independent of the rules of procedure contained in the Criminal Procedure Code and must have full scope, unless clearly repealed or altered by another statute: I.L.R. 7 Lah. 84: A.I.R. 1926 Lah. 88.

Law of Evidence is an adjective law and, as such, has retrospective effect: 1967 Cr.L.J. 52: A.I.R. 1967 Goa 4 (F.B.).

The law of evidence is a part of procedural law; it deals with the facts that may or may not be proved and the sort of evidence which may or may not be given: (1990-1) 38 B.L.J.R. 51 (F.B.).

The law of evidence does not affect the partners' substantive rights; it only lays down the law to facilitate the course of justice; it embodies the rules of evidence for the Court's guidance; it is procedural law providing, *inter alia*, how a fact is to be proved: A.I.R. 1980 All. 385 (F.B.).

2. Construction of Act.—In construing a statute like the Evidence Act which is exhaustive where any fact intended to be established has to be in accordance with the scheme of the Act, found to be relevant under a provision contained in the Act before it

Extent.—It extends[1] to [2][the whole of India [3][except the State of Jammu and Kashmir]] and applies to all judicial proceedings in or before any Court, including Courts-martial, [4][other than Courts-martial convened under the Army Act,] (44 & 45 Vict., c. 58) [5][the Naval Discipline Act (29 and 30 Vict., c. 109) of [6][***] the Indian Navy (Discipline) Act, 1934 (34 of 1934)][7] [8][or the Air Force Act] (7 Geo. 5, c. 51) but not to affidavits presented to any Court or Officer, nor to proceedings before an arbitrator.

Commencement of Act.—And it shall come into force on the first day of September, 1872.

---

1. The Act has been extended to the new provinces and merged States by the Merged States (Laws) Act, 1949 and to the States of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950.

2. Substituted for "all the Provinces of India", by A.O. 1950.

3. Substituted for "except Part B States", by Act 3 of 1951.

4. Inserted by Act 18 of 1919.

But *see* the Army Act (44 & 45, Vict., C. 58) S. 127, which is as follows:— "A Court-martial under this Act shall not as respects the conduct of its proceedings, or the reception or rejection of evidence or as respects any other matter or thing whatsoever be subject to the provisions of the Indian Evidence Act, 1872, or to any Act, law or ordinance of any Legislature whatsoever, other than Parliament of the United Kingdom." Act I of 1872 is (subject to such modifications as the Governor-General in Council may direct) applicable to all proceedings before the Indian Marine Courts. *See* the Indian Marine Act (14 of 1887), S. 68.

5. Inserted by Act 35 of 1934.

6. The words "that Act as modified by", omitted by A.O. 1950.

7. *See* now the Navy Act, 1957 (64 of 1957).

8. Inserted by Act 10 of 1927.

---

can be allowed to be proved, any argument based on plausibility can have no effect. The Court must, therefore, ignore any other consideration and confine itself strictly to the provisions of the Act and come to a conclusion as to the relevancy of a fact on the interpretation of the provisions of the Act regardless of the fact whether the conclusion ultimately arrived at, is in accordance with commonsense view of things or not: A.I.R. 1945 Lah. 23: 46 Cr.L.J. 296 (F.B.). Act to be construed literally—Reference to English rules of evidence not permissible if thereby meaning of statute be varied or denied effect: A.I.R. 1916 P.C. 242.

3. Guidance from English Law.—In questions relating to matters expressly provided for in the Act, it must not be dealt with as a mere modification of the law of evidence prevailing in England. The Act is no doubt mainly based upon the English Law; but it is by no means an exact reproduction of it. The English Law of Evidence also has never been codified, and judicial decisions may well have developed or expanded some of its principles since 1872. Caution is, therefore, necessary in the application of English authorities on the subject in an Indian Court: I.L.R. (1942) Kar. (F.C.) 56: 46 Cal.W.N. (F.R.) 9: 5 F.L.J. 47: A.I.R. 1942 F.C. 22.

When the law relating to a topic has been codified into statute as in the Evidence Act, the duty of the Court is merely to interpret the statute. Recourse to decisions in other jurisdictions (Privy Council and House of Lords in England) laying down principles applicable there though they might be of the highest tribunals is not very profitable. Of course, if there had been legislation in those jurisdictions using the same or similar expressions as in the Indian enactment, the guidance afforded by such decisions would indeed be valuable: (1954) 2 M.L.J. 236: A.I.R. 1954 Mad. 926. *See* also A.I.R. 1954 Cal. 258 (D.B.).

Our law of evidence which is a complete Code does not permit the importation of any principle of English Common Law relating to evidence in criminal cases to the contrary. Therefore, the maxim of the English Common Law, *"nemo tenetur se pusum accusare"*, can have no application here: A.I.R. 1971 S.C. 44.

It has been acknowledged generally with some exceptions, that the Indian Evidence

Act was intended to and did in fact consolidate the English Law of Evidence. In case of doubt or ambiguity over the interpretation of any of the sections of the Evidence Act the Court can with profit look to the relevant English Common Law for ascertaining their true meaning: (1962) 2 S.C.J. 691: (1961) 2 M.L.J. (S.C.) 203: (1961) 2 S.C.R. 371: A.I.R. 1961 S.C. 493 [Overruled on another point in A.I.R. 1982 S.C. 149]. *See* also A.I.R. 1970 All. 51: 1969 All.L.J. 657: I.L.R. (1969) 1 All. 362 (F.B.); A.I.R. 1941 All. 402 (F.B.); A.I.R. 1935 Mad. 528 (F.B.).

Act not exhaustive of the rules of evidence and the Courts can invoke the aid of the principles of jurisprudence of English law as supplementing and explaining the rules given in the Act: I.L.R. 39 Mad. 449: 28 M.L.J. 329.

4. Application of section.—S. 1 lays down that the Act applies to judicial proceedings in or before any 'Court' which according to definition in S. 3, includes all persons legally authorised to take evidence: A.I.R. 1958 Cal. 226: (1957-58) 62 Cal.W.N. 867: (1958) 2 L.L.J. 580.

Scope and principle of—Power to compel accused person to be witness against himself—Cl. (3) of Art. 20 embodies an exception—Testimonial compulsion is the general rule: A.I.R. 1957 Cal. 520.

Execution proceeding is a judicial proceeding: 11 Cr.L.J. 407 (Cal.) (F.B.).

The Act deals with the law of evidence applicable to both civil and criminal proceedings; it is comprehensive in its nature; the Codes of Civil and Criminal Procedure are separate and distinct by nature; the definition of 'Court' under the Act cannot be invoked in the proceedings under S. 145 of the Code of Criminal Procedure nor can S. 148-A of the Code of Civil Procedure be invoked in criminal proceedings: (1990) 3 An.L.T. 491.

Proceedings under S. 145, Code of Criminal Procedure, 1973, being judicial, *held*, the Evidence Act is applicable to it: 1976 Assam L.R. 106 (D.B.).

Evidence Act does not apply to an enquiry under S. 15(1) of the A.P. (Andhra Area) Estates (Abolition and Conversion into Ryotwari) Act, 1948: (1972) 2 An.L.T. 30 (D.B.).

Applicability to proceedings under Foreign Exchange Regulations Act: (1963) 2 S.C.R. 297: A.I.R. 1962 S.C. 1764. *See* also 1986 Cr.L.J. 677 (Andh. Pra.).

As the proceedings under the Foreign Exchange Regulation Act, 1973 are governed by the Evidence Act, 1872, it cannot be said that the statements made in the proceedings are not expressly authorised to be admitted by the statutory provisions: 1989 Cr.L.J. 2138 (Mad.).

The parties might be excused, if they adjusted the evidence to the principles which they found in vogue in the tribunal where they were leading their evidence. Yet, findings arrived at on irrelevant evidence ought not to be allowed to stand: A.I.R. 1957 Cal. 660.

Applicability to contempt proceedings.—Law of evidence is a part of the law of procedure; contempt proceedings are not governed by any particular law of evidence. Contempt proceedings are usually decided on the basis of affidavits and it is not illegal to find a person guilty on the strength of affidavits alone. It is, therefore, not true to say that contempt must be proved in the manner laid down in the Evidence Act; the Court is competent to adopt its own procedure for deriving satisfaction; there cannot be any law as to the onus of proof, or the method of proof in contempt proceedings. In cases of criminal contempt the facts can be proved by affidavit. R. 12 of Chapter IX of the Rules of Court, 1952, allows contempt to be proved through an affidavit. Since the practice in this country, in England and in America has always been that contempt can be proved through an affidavit, that is the procedure established by law and holding a person guilty of contempt on the basis of an affidavit only does not infringe his constitutional right under Art. 21 of the Constitution: A.I.R. 1955 All. 638: 1955 Cr.L.J. 1451.

Applicability of Act to proceedings under Contempt of Courts Act: 1960 Cr.L.J. 1254: A.I.R. 1960 Pat. 430 (F.B.). *See* also 1983 Cr.L.J. 1153 (All.).

Applicability to income-tax proceedings.—Income-tax authorities not strictly bound by rules of evidence: A.I.R. 1967 S.C. 768. *See* also (1976) 1 Cut.W.R. 28 (D.B.); 1981 Tax.L.R. 1239 (Raj.) (D.B.).

The Evidence Act does not apply to proceedings under the Income-tax Act. Proceedings under the Indian Income-tax Act are not

'judicial proceedings' within the meaning of S. 1 of the Evidence Act or in the sense in which the expression 'judicial proceedings' is ordinarily used. That being so, it is within competency of the Appellate Tribunal to rest the decision *inter alia* on information gathered by the Tribunal from judgments of criminal Courts which are before them, in determining questions of fact: (1951) 20 I.T.R. 562: A.I.R. 1952 Punj. 46.

Reference to High Court—When open—Enquiries by taxing officers—Standards set by Evidence Act not applicable—Appreciation of evidence: 1960 Ker.L.T. 1171.

Applicability to proceedings before Industrial Tribunal.—The Industrial Disputes Act authorises the Tribunal to take evidence. Under S. 11(3) of the Act every Board, Court and Tribunal has been granted the same powers as are vested in the Civil Courts under the C.P. Code when trying a suit in respect of enforcing the attendance of any person and examining him on oath. Hence, a Tribunal is a Court within the definition of S. 3, Evidence Act, and is bound by its provisions: A.I.R. 1958 Cal. 226: (1957-58) 62 Cal.W.N. 867: (1958) 2 L.L.J. 580. *See* also A.I.R. 1959 Cal. 650; 1980 Lab.I.C. 669 (Pat.) (D.B.); A.I.R. 1966 Cal. 504. But *see* A.I.R. 1962 Cal. 375: (1960-61) 65 Cal.W.N. 1029 [Proceedings before Industrial Tribunal — Nature of — Provisions of Evidence Act not applicable — Tribunal can consider evidence not strictly admissible under Evidence Act].

Technical rules of evidence as contained in the Evidence Act, 1872 are not applicable to the proceedings under the Industrial Disputes Act, 1947: (1995-2) 110 Punj.L.R. 128 (D.B.).

Applicability to industrial adjudication—Strict rules of evidence do not apply in industrial adjudication, but rules of natural justice are to be observed—Document raising an inference against employer, put in evidence by workmen—Employer not adducing evidence to rebut such inference—*Held* that Tribunal was justified in basing its findings on such document: (1967) 1 L.L.J. 108: 31 F.J.R. 186: 1967 B.L.J.R. 461: A.I.R. 1967 Pat. 12.

Proceeding regarding industrial dispute before Labour Court—Nature of—It is not strictly judicial but is quasi-judicial—Evidence Act does not apply: (1963) 6 F.L.R. 161 (Cal.).

Though it is true that merely because a figure is found in the audited balance sheet of a company an Industrial Tribunal is not bound to accept the said figure if challenged but where such figure for an expense is also deposed to by a witness without being cross-examined, *held*, the Tribunal should not have discarded his evidence on this point: A.I.R. 1971 S.C. 2521.

In an industrial adjudication it is not as if an arbitrator is restricted to the pleadings of the parties and the evidence that may be led. He is not hampered by any strict rules of evidence or pleadings or for the matter of that, technicalities of procedure. An arbitrator is in a better position to collect information which has any bearing and relevance in determining the issues raised before the arbitrators, and these powers are required to be exercised in order that the matter raised in an industrial dispute may be satisfactorily adjudged. If after a detailed investigation it is found that a change is or is not necessary, the party against whom the award may be pronounced, may find considerable difficulty in challenging the adjudication before any other tribunal: 1966 Mah.L.J. 1060: (1966) 68 Bom.L.R. 731: (1967) 1 L.L.J. 168: A.I.R. 1967 Bom. 174.

An Industrial Tribunal, finding that the oral evidence of the management as well as of the workman is interested, *held*, is justified in disregarding the same: 1972 L.L.J. 1151.

Strict principles and rules under the Act do not apply *in toto* to the proceedings under the Workmen's Compensation Act; the degree of proof therein is not as high as in other ordinary civil disputes: (1991-1) 11 Guj.L.H. 310.

The Evidence Act has no application to enquiries conducted by tribunals, even though they may be judicial in character. The law requires that such tribunals should observe rules of natural justice in the conduct of the enquiry and if they do so, their decision is not liable to be impeached on the ground that the procedure followed was not in accordance with that which obtains in a Court of law. Stating it broadly and without intending it to be exhaustive it may be observed that rules of natural justice require that a party should have opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence and that he should be

given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them. If these rules are satisfied, the enquiry is not open to attack on the ground that the procedure laid down in the Evidence Act for taking evidence was not strictly followed: A.I.R. 1966 Manipur 18; A.I.R. 1957 S.C. 882

The Courts and Tribunals have to judge the evidence before them by applying the test of human probabilities: A.I.R. 1971 S.C. 2439.

Applicability to departmental proceedings.— In departmental proceedings the strict laws of evidence according to the Evidence Act are not applicable: (1953-54) 58 Cal.W.N. 952: A.I.R. 1955 Cal. 183; I.L.R. (1957) Andh. Pra. 80: (1957) 1 An.W.R. 370: A.I.R. 1957 Andh. Pra. 794. Nevertheless, the ordinary principles of proof and also the rules of natural justice must be applied: (1958-59) 63 Cal. W.N. 702. *See* also (1974) 1 L.L.J. 422 (Mad.); (1980) 50 Cut.L.T. 450 (D.B.).

Enquiries before Officers—Strict rules of Evidence Act are not applicable to such enquiries—Even then officers are bound to decide cases on basis of well settled legal principles of appreciating evidence: (1966) 68 Bom.L.R. 375.

It is well settled that strict and sophisticated rules of evidence under the Act do not apply in a domestic enquiry; all materials logically probative to a prudent mind may be relied upon; there is no allergy to hearsay evidence either if it has reasonable nexus and credibility; but care must be taken in evaluating such materials and they should not be glibly swallowed because they are, strictly speaking, not relevant under the Act. Sufficiency of evidence cannot be scrutinised but absence of evidence can certainly be. That would amount to an error apparent: A.I.R. 1977 S.C. 1512: 1977 U.J. (S.C.) 298: (1977) 2 S.C.C. 491.

It is well settled that strict rules of evidence and standards of proof envisaged in the Act do not apply to departmental proceedings or domestic tribunals; it is open to the authorities to receive and place on record all necessary, relevant, cogent and acceptable material facts though not proved strictly; but they must be germane and relevant to the facts in issue. In grave cases like forgery, fraud, conspiracy, misappropriation, etc., direct evidence is seldom available; only circumstantial evidence can furnish the proof. Inferences from evidence and circumstances must, however, be carefully distinguished from conjectures or speculation; there must be evidence, direct or circumstantial, to deduce necessary inferences in proof of the facts in issue; there can be no inferences unless there are objective facts: The standard of proof required is not proof beyond reasonable doubt "but" the preponderance of probabilities tending the inference that the fact must be more probable; it cannot be put in a strait-jacket formula; the probative value could be gauged from facts and circumstances of each case though the standard of proof is the same both in civil cases and domestic enquiries: (1991) 2 S.C.C. 716: (1991) 2 Serv.L.R. 682.

The domestic tribunals are not bound by the technical rules of procedure contained in the Evidence Act; but whenever any fact is sought to be proved even before a domestic tribunal, the same must be supported by statements made in the presence of the persons against whom an enquiry is held: 1973 Lab.I.C. 771 (Del.) (D.B.).

Departmental proceedings are decided on the basis of the materials on record, not upon evidence as understood under the Act; if the allegations of fact are accepted, whatever their implications, no evidence, oral or documentary, need be adduced; it is absolutely proper to base a finding safely upon the delinquent's admission: A.I.R. 1976 Pat. 158 (D.B.). *See* also 1975 Lab.I.C. 170 (Andh. Pra.) (D.B.); 1974 Lab.I.C. 1447 (Madh. Pra.) (D.B.).

It is well settled that in departmental enquiries the principles of the 'law of evidence' do not apply; as held in A.I.R. 1977 S.C. 1512, even hearsay evidence may be accepted in a departmental enquiry: (1978) 91 Mad.L.W. 390.

Domestic tribunals, in the absence of statutory guidance, have the right to regulate their own procedure consistent with the principles of natural justice; they are also not bound by the strict rules of evidence. The rules of procedure and the rules of evidence followed in Courts are inappropriate to domestic enquiries; the domestic Tribunals are free to receive evidence from whatever source, if it is 'logically probative', including

hearsay, evidence, though its probative, value would depend on the facts and circumstances of each case. Thus, where several passengers stated, in the conductor's presence that though they had paid the fare, but tickets were not issued to them, the checker's statement to this effect is sufficient even without examining the passengers in the enquiry, the finding of guilt in such a case would be based on (*i*) the checker's statement that he had found the passengers travelling without tickets, (*ii*) the statements made by the passengers to the checker at the time of checking. The second part alone would be hearsay but of a high probative value. [1975 Lab.I.C. 986 (P.&H.), Overruled]: A.I.R. 1976 P.&H. 381: (1976) 78 Punj.L.R. 842: (1976) 2 Serv.L.R. 690 (F.B.).

Where a conductor was terminated on the charge of not issuing tickets after receiving fare from some passengers, *held*, merely because the statements of the ticketless passengers were not recorded in the enquiry, the order of termination would not be invalid when there was sufficient evidence of the Inspector of the Flying Squad discovering the ticketless passengers: A.I.R. 1977 S.C. 1512: (1977) 2 S.C.C. 491.

Quasi-judicial Tribunals are not bound by technical rules of evidence; the shutting out of hearsay evidence is not a technical rule coined by the Act but a rule of natural justice binding even a quasi-judicial authority. For oral evidence to be of any value, it must ordinarily be of a witness who can be held responsible for its truth (to be sifted through cross-examination); but when there is no *prima facie* assurance of its credibility, it would be dangerous to act upon such evidence and hearsay evidence is of such a type; it has to be excluded whether or not the case is governed by the Act: (1977) 2 M.L.J. 47.

Departmental proceedings—Rule of evidence that accomplice is unworthy of credit has no application—If delinquent public servant is made aware that accomplice's report would be used against him and is given opportunity to cross-examine the accomplice, authorities can act upon report of accomplice: 1966 B.L.J.R. 825.

A fact sought to be proved, even before a domestic Tribunal, must be supported by statements made in the presence of persons being enquired against; statements made behind their back ought not to be treated as substantive evidence; being one of the basic principles, it cannot be ignored merely because the domestic Tribunals are not bound by the technical and procedural rules of evidence: (1972) 42 F.J.R. 401.

The sufficiency of evidence to justify dismissal from service is not for the Supreme Court to determine; departmental proceedings do not require a high degree of proof required in criminal prosecutions; they are not governed by the strict rules of evidence; thus, merely because certain witnesses, whose statements were relied upon by the Department in support of the charges and who had also been cross-examined by them, had resiled from those statements would not vitiate either the enquiry or the dismissal: A.I.R. 1976 S.C. 1080: (1976) 3 S.C.R. 913: (1976) 3 S.C.C. 76.

Government servant—Dismissal—Powers of Court—High Court cannot examine evidence as Court of appeal—Evidence Act does not strictly apply to departmental enquiry—High Court when can interfere with order passed in departmental enquiry: 1968 Lab.I.C. 1145 (Manipur).

Departmental inquiry against delinquent public servant—Rules of natural justice to be followed—Requirements of the rule: I.L.R. (1962) Cut. 125: A.I.R. 1963 Ori. 73.

Domestic enquiry — Leading questions put to delinquent — Propriety — Too much legalism cannot be expected from a domestic enquiry: 1968 Lab.I.C. 212: A.I.R. 1968 S.C. 236.

Proceedings before Commission of enquiry.—Proceedings before Commission under J.&K. Commission of Enquiry Act (32 of 1962) are not judicial proceedings: 1965 Kash.L.J. 160: (1965) 2 Cr.L.J. 212: A.I.R. 1965 J.&K. 75.

An enquiry under the Commissions of Enquiry Act is only a fact finding enquiry. It is "inquisitorial" and not accusitorial. The findings are not enforceable. After a report of fact finding is submitted to the Government, it takes a decision on the report. The provisions of the Evidence Act do not apply to these proceedings, hence, the law relating to burden of proof does not apply: A.I.R. 1993 All. 343. *See* also A.I.R. 1960 Punj. 86.

Proceedings before Election Tribunal.—Election Tribunals under the U.P. Municipalities Act are 'Courts' and the Act is applicable—

Hearsay evidence, therefore, not admissible—Two out of fifty petitioners speaking to the facts that they were all misled by a mistake in the spelling of the name of a candidate—Statement of two on behalf of others is hearsay evidence not admissible—U.P. Municipalities Act (2 of 1916), S. 19(2)(*b*): 1967 All.L.J. 5.

A Sub-Divisional Officer hearing an election petition under R. 25 of the U.P. Panchayat Raj Rules, 1947, is not a Court, but is merely a Tribunal. So provisions of the Indian Evidence Act are not applicable to the hearing of an election petition under R. 25: 1958 All.L.J. 274: A.I.R. 1959 All. 43.

Proceedings before rehabilitation authorities.—Displaced Persons (Claims) Act, 1950, Ss. 6, 7 and 16 and Rules framed under—Displaced Persons (Claims) Supplementary Act, 1954, Ss. 4, 5, 6 and 12—Nature of functions discharged by officers—Applicability of Evidence Act (1872) to enquiries before officers—Officers are not Courts: (1966) 68 Bom.L.R. 375.

Displaced Persons (Compensation and Rehabilitation) Act, 1954, Ss. 7, 8, 22, 23, 24 and 25—Proceedings before Rehabilitation Authorities—Even if strict rules of evidence may be deemed to apply to proceedings, Authorities have no jurisdiction to ask for any other mode of proof for providing public document of a foreign country than one prescribed by S. 78(6) of Evidence Act, 1872: 1967 Cur.L.J. 836 (Punj.).

Proceedings before custodian.—Undoubtedly, proceedings before the Custodian are not proceedings before a Civil Court, the Custodian, being a quasi-judicial authority, has to follow the principles of natural justice, in a proceeding under the Evacuees (Administration of Property) Act, pending before them. Whenever the principles of natural justice demand, the provisions of the Evidence Act or any other enactment can and should be made applicable to the proceedings before the quasi-judicial tribunals: 1978 Kash.L.J. 314.

Land acquistion proceedings.—In land acquisition proceedings it is for the appellant to satisfy the Court that there has been a colourable exercise of power and in that sense the onus of proof is on the appellant. Though, however, the Evidence Act does not, in terms, apply to affidavits, the principle underlying the illustration to S. 114(*g*), that is, the presumption that evidence which could be and is not produced would, if produced be unfavourable to the person who withholds it, is of general application.

Therefore, where a proposed acquisition is impugned as acquisition in colourable exercise of power and there is a specific allegation of the real purpose of the acquisition, it is for the respondents to disclose except for good reasons, the relevant material or information, to enable the Court to pronounce on the matter and not to maintain a meaningful silence or indulge in equivocations and rely on the doctrine of onus of proof and deflect the course of justice: (1966-67) 71 Cal.W.N. 499. *See* also I.L.R. 32 Cal. 605 (P.C.).

Proceedings before revenue authorities.—The Revenue Officer and the appellate and revisional authorities under the Orissa Land Reforms Act, 1965 are Courts in strict sense; the proceedings thereunder are judicial and S. 1 of the Act is applicable to them; all oral evidence adduced therein is subject to cross-examination. The Revenue Officer cannot collect any materials confidentially and without disclosing them to the opposite parties, and he cannot use such material to arrive at his conclusions affecting the *lis*: A.I.R. 1974 Ori. 127: (1973) 1 Cut.W.R. 697 (D.B.). *See* also (1990) 69 Cut.L.T. 164 (D.B.).

A Revenue Court has no jurisdiction to declare a woman to be a daughter of a particular person; the revenue records are much more akin to fiscal enquiries made in the interest of the State; their purpose is to ascertain as to which of several claimants may with greater confidence be put in occupation of lands so that revenue will be paid; a mutation order is not evidence of the successful applicant in possession as the sole legal owner in the proprietary sense, to the exclusion of all others; the revenue authorities have no jurisdiction to pronounce upon the validity of such claims or even about the jointness or separation of the parties: (1975) 2 Cut.W.R. 624.

Others.—Error apparent on face of record—Quasi-judicial proceedings—Proceedings under S. 32 of Rajasthan Act (6 of 1952), for determination of compensation payable to expropriated Jagirdar — Jagir Commissioner in deciding compensation claims has to act in quasi-judicial manner—

Neither Evidence Act nor C.P. Code applies—Board of Revenue disallowing claim by erroneously holding that it was not proved according to S. 34 of Evidence Act which was attracted—*Certiorari* can issue: 1964 Raj.L.W. 83: I.L.R. (1964) 14 Raj. 90.

Collector of Central Excise is not Court — Discharges quasi-judicial function — Principles of natural justice apply — Order under S. 167(8), Sea Customs Act — Interference by High Court: (1963) 2 Cr.L.J. 467 (Mys.).

Applicability to release proceedings under S. 21 of the U.P. Urban building (Regulation of Letting, Rent and Eviction) Act, 1972. *See* (1991) 18 All.L.R. 389.

S. 1 and definition of the term 'Court' read together make it amply clear that the Act applies to all judicial proceedings before the authorities legally authorised to take evidence, barring arbitrators and Courts martial convened under the Acts mentioned in S. 1. Since the Haryana Urban (Control of Rent and Eviction) Act, 1973, as well as the rules thereunder clearly lay down that the Rent Controller and the appellate authority are under an obligation to record evidence and examine the parties' witnesses, *held*, they are certainly governed by the Act. [(1969) 71 Punj.L.R. 68 and (1981) 83 Punj.L.R. 59, Overruled]: (1986-1) 89 Punj.L.R. 417 (D.B.).

5. Affidavits—Act not applicable.—Affidavits do not fall within the term 'evidence' in S. 1 and S. 3; S. 1 rather excludes them expressly from the definition: A.I.R. 1968 Cal. 532. Affidavits as such cannot be taken in evidence under any provision of the Evidence Act and, thus, copies thereof cannot also be allowed to be produced in evidence: A.I.R. 1977 Del. 73; 1983 All.L.J. 1273.

Affidavits that are admissible under provisions of other Acts are not excluded by the Evidence Act but affidavits not admissible otherwise cannot be admitted or used as evidence under S. 32 or S. 33, Evidence Act, for the Act does not apply to affidavits and an affidavit is not evidence within the meaning of S. 3 of the Act: (1910) 4 S.L.R. 88.

Affidavits do not fall within the definition of "evidence" in S. 3; they can be used as evidence only when the Court, for sufficient reasons, passes an order under O. 19, R. 1 or R. 2 of the Code of Civil Procedure: A.I.R. 1988 S.C. 1381; 1979 All.Cr.C. 238; (1972) 1 Cut.W.R. 318; A.I.R. 1964 Bom. 38: I.L.R. (1963) Bom. 436.

Affidavit evidence is not permitted except (*a*) when there is an agreement between parties that evidence may be taken by affidavit or (*b*) under O. 19, R. 1 of the Code there is an order of Court that particular facts may be proved by an affidavit or that the affidavit of any witness may be read at the hearing. Such evidence can be acted upon as admissible evidence only if it is relevant. Though there may be waiver of an objection as to admissibility, the relevancy of the evidence would still be matter for the consideration of the Courts: A.I.R. 1949 Mad. 680: (1948) 1 M.L.J. 434.

Affidavit not properly drawn up or verified should not be received in evidence: I.L.R. (1963) Bom. 436: A.I.R. 1964 Bom. 38; (1989) 1 Bom.C.R. 112.

An affidavit verified in contravention of O. 19, R. 3(1) of the Code of Civil Procedure, *held*, cannot be used as evidence. [A.I.R. 1944 Nag. 161, Foll.]: 1986 M.P.L.J. 280.

Affidavit filed with an application under S. 17 of the W.B. Premises Tenancy Act but not tendered in evidence in the suit for eviction, *held*, could not be admitted in evidence in appeal against decree for eviction: A.I.R. 1968 Cal. 532.

The provisions contained in S. 3, Evidence Act and O. 19, R. 1, C.P. Code lay down an exception to the general rule that an affidavit shall not be evidence of the fact stated therein. Both of those provisions require an order of the Court permitting a party to prove any particular fact or facts by affidavit. Whether an endorsement on the reverse of a document filed in Court is an interpolation is a matter of vital importance to the case and the Court should not permit such a fact to be proved by affidavit.

Whether the defendant filed an affidavit in Court *suo motu* stating that the endorsement on the reverse of a document filed in Court was interpolation;

Held, that the affidavit could not be treated as evidence: 1962 M.P.L.J. (Notes) 151: 1962 Jab.L.J. 197.

Where a tenant had only filed affidavits for claiming restoration of possession taken from him in disobedience of an injunction but without an order of the Court under O. 19, R. 1 of the Code of Civil Procedure, the affidavits filed without an opportunity of cross-examining the deponents, *held*, constitute no evidence; the trial Court had no

material before it to conclude that the landlord had dispossessed the tenant: A.I.R. 1990 Raj. 127.

Question regarding age of girl—Certified copies from school register and affidavit by father stating date of her birth and statement by girl to police with regard to her age amount to evidence under Evidence Act: I.L.R. (1964) 2 All. 423: (1964) 5 S.C.R. 86: (1964) 2 Cr.L.J. 590: A.I.R. 1964 S.C. 1625.

Where an affidavit sworn by a complainant disclosing contempt of Court by the Deputy Superintendent of Police by interfering with the trial of the complaint was sought to be impugned as not legal evidence of contempt on the ground that the Act does not apply to affidavits presented to any Court and serves only the purpose of initiating the proceedings and material facts can only be proved by *viva voce* evidence, *held*, as the Act also provides that it applies to all judicial proceedings before Courts, it only means that in case of *viva voce* evidence recorded before it, the Court can control evidence by disallowing inadmissible evidence or leading questions in examination-in-chief; it is only in that sense that affidavits do not attract the Act; that does not render affidavits as not a proper mode of proof; however, if the other party so desires, it has the right to cross-examine the deponent: A.I.R. 1955 All. 638: 1955 Cr.L.J. 1451 (D.B.).

As clearly suggested in A.I.R. 1956 S.C. 554, if an authority desires to challenge the correctness of the contents of an affidavit, he should normally call its deponent for cross-examination or test its correctness by other means open to it; it cannot reject it as incorrect in an arbitrary manner: 1979 E.L.T. 212 (Bom.).

Appreciation of affidavit evidence: A.I.R. 1965 S.C. 1303.

Affidavit filed—Person filing affidavit in certain proceeding—Evidence of such affidavit sought to be given in other suit—Person alive and could be examined—Court not directing proof of facts by affidavit—Opposite party having no opportunity to cross examine such person—*Held*, this was no evidence on which the Court could act: (1963) 3 S.C.R. 22: A.I.R. 1963 S.C. 1.

Affidavit of a person not produced for examination in Court is no evidence: I.L.R. (1964) 16 Assam 395: A.I.R. 1967 Assam 74.

Affidavits produced before the Court cannot be read as evidence to prove facts; a decree based solely and wholly on such affidavits filed cannot be treated as a decree based on evidence; it would be a nullity: A.I.R. 1990 Raj. 87.

S. 3 contemplates both oral as well as documentary evidence; a living witness must be called to the witness stand and examined; his evidence cannot be substituted by an affidavit unless the law so permits as under Ss. 295 and 407(3) of the Code of Criminal Procedure or the Court expressly allows it: A.I.R. 1989 S.C. 705.

Affidavits filed in proceedings under S. 145 of the Code of Criminal Procedure, *held*, are not admissible; they are not evidence under S. 80. Evidence in criminal cases has to be recorded as laid down in Chap. 25 of the Code: (1972) 1 Cut.W.R. 318.

Where affidavits filed in an enquiry under S. 145(1) of the Code of Criminal Procedure were not sworn before a Magistrate, *held*, they were validly not taken into consideration: 1979 All.Cr.C. 238.

Matters arising under S. 24 of the Hindu Marriage Act, 1955 are, by and large, to be decided on affidavits; it is only in exceptional cases that the Court may call upon the party to adduce evidence otherwise than by affidavits: (1990) 2 Hindu L.R. 149; A.I.R. 1973 Raj. 32.

Where against an application for litigation expenses and alimony pendente lite by the wife, an Advocate, alleging no source of income, the husband filed affidavits of three Advocates attested by an Oath Commissioner and deposing that the wife had admitted before them that her monthly earnings were about Rs. 7,000, but without indicating either the date of the admission or the period to which it related, *held*, the affidavits could not be relied on: (1991) 1 Hindu L.R. 357 (P.&H.).

Just because a Central Government Officer files an affidavit deposing to certain facts, not known to him personally, *held*, his affidavit cannot be presumed to be true: A.I.R. 1990 Mad. 312.

Affidavit sworn in foreign country—Admissibility—Affidavit is not admissible in evidence before Custodian of Evacuee Property when no evidence is adduced to prove identity or signature of persons swearing it or that it was sworn in presence of witnesses produced before the Custodian: A.I.R. 1970 J.&K. 159.

It is always open to the Court to take into consideration all the facts alleged in the complaint as well as in the affidavit if they have not been controverted by any counter-affidavit: 1957 All.W.R. (H.C.) 79: 1957 All.L.J. 228.

Where in a creditor's winding up petition, the Company had not been filing for several years its balance sheets as required by law and it merely filed affidavits in the Court without annexing thereto the *pro forma* balance sheets or other documents to corroborate its claim about the Company's financial liability, *held*, the affidavits alone were not acceptable evidence: 1984 Tax.L.R. (N.O.C.) 69 (Cal.).

Affidavit evidence in support of a contention that the order of appointment of an official liquidator was in substance a consent order, is not admissible: A.I.R. 1953 Nag. 288: I.L.R. (1953) Nag. 787.

Companies Act, 1956 (as amended in 1963), Ss. 397, 398, 388-B to 388-E, 10-A to 10-D and 643—Supreme Court Rules framed under — Companies (Courts) Rules, 1959, Rr. 21, 8 and 9—Oppression and mismanagement—Affidavit sworn on information received and believed true by deponent—Validity—Subsequent tendering of oral evidence and affidavits by other persons—Admissibility — Requirements of verification: (1966) 68 Bom.L.R. 431.

Where after the accused had been charged for offences in the Court under Ss. 120-B, 417, 511, 462, 468 and 471 read with S. 34 of the Indian Penal Code, the complainant by his affidavit filed in the Court averred that he had falsely implicated the accused at some official's instance and the trial Court characterising the entire prosecution evidence as unbelievable discarded it and thereby condemned all the witnesses even before they could enter the witness-box and even before the affidavit was formally proved and tested by cross-examination, *held*, assuming that the affidavit was filed *bona fide*, it could not be considered at that stage; it could go on record only when the complainant was, if at all, to be examined; apparently, the prosecution is entitled to test the truthfulness of the affidavit as also of the complainant's evidence; it is only after the prosecution evidence that the Court could assess the evidence and the impact of the affidavit thereon; the totality of all features would ultimately mould the Court's final conclusion: (1985) 1 Bom.C.R. 609.

Application under S. 94, Cr.P.Code for search of house—Magistrate dealing with a serious matter—Evidence required not of a formal character—Special rule of reading affidavit in evidence under S. 296, Cr.P.Code not attracted : 1985 Cr.L.J. 1517: 1985 Ker.L.J. 718.

O. 39, R. 1 permits the Court to decide applications for interim injunction on affidavits. If the Court grants injunction on the basis of affidavit no party can claim the right to cross-examine the deponent: A.I.R. 1968 Guj. 198.

6. Arbitration proceedings.—Strict rules of the Evidence Act and of procedure which is followed in Court are not applicable to arbitration proceedings. Arbitrators are free to decide relevancy of questions and decide the matter on other material. Arbitrator can direct questions which he considers irrelevant to be impugned from record: A.I.R. 1955 N.U.C. 2914 (Cal.); (1993) 1 Cal.L.T. (H.C.) 148.

The Evidence Act does not apply to arbitration proceedings, thus, question of legal or admissible evidence does not arise in arbitration proceedings: (1989) 1 Cal.L.T. (H.C.) 176; (1987) 1 Cal.L.J. 342; A.I.R. 1951 Cal. 220; (1966) 2 An.W.R. 284 (D.B.); I.L.R. (1960) 2 Cal. 538 (D.B.); 1988 All.C.J. 66 (S.C.).

Even though the arbitrators are not bound to meticulously copy the procedure of a Court, yet they are not free to depart from the rule that no enquiry into the case should be undertaken behind the back of a party, and if they do so, the award is vitiated: I.L.R. (1955) Nag. 224: A.I.R. 1955 Nag. 116.

Where an arbitrator has examined witnesses and recorded evidence with due formality, it is open to the parties by consent to treat such statements of evidence and proceed with the case before the Court from the stage it had reached before the arbitrator. The consent in such a case relates to the manner in which the evidence has to be proved and not to the relevancy of the evidence itself: A.I.R. 1934 Mad. 610: 67 M.L.J. 358.

Duties of Arbitrators to conduct arbitration proceedings according to fundamental rules, procedure and canons of justice—Failure of such duties — Award liable to be set aside — Arbitrators guilty of misconduct: (1966) 2 An.W.R. 284 (D.B.).

2. [Repeal of enactments].—*Repealed by the Repealing Act*, 1938 (1 *of* 1938), *S.* 2 *and Sch.*

3. Interpretation clause.—In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—

"**Court**"—"Court" includes all Judges[1] and Magistrates[2], and all persons, except arbitrators, legally authorized to take evidence.

"**Fact**"—"Fact" means and includes—

(1) any thing, state of things, or relation of things, capable of being perceived by the senses;

(2) any mental condition of which any person is conscious.

Illustrations

(*a*) That there are certain objects arranged in a certain order in a certain place, is a fact.

(*b*) That a man heard or saw something, is a fact.

(*c*) That a man said certain words, is a fact.

(*d*) That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(*e*) That a man has a certain reputation, is a fact.

"**Relevant**"—One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

---

1. *Cf.* the Code of Civil Procedure (V of 1908), S. 2, the Indian Penal Code (XLV of 1860), S. 19, General Act, Vol. 1 and for a definition of "District Judge", the General Clauses Act (X of 1897), S. 3 (17).

2. *Cf.* the General Clauses Act (X of 1897), S. 3(32), and Code of Criminal Procedure (V of 1898).

Section 2—Note.

The repeal of S. 2 under Repealing Act does not have the effect of re-enacting the rules which it repealed, such as the rule in *Russel* v. *Russell*, 1924 App. Cas. 687 which was the rule of the English Common law: A.I.R. 1945 All. 190. But *see* A.I.R. 1934 Oudh 41.

Section 3—Synopsis.

1. Court.
2. Fact.
3. Evidence.
4. Oral evidence.
5. Cross-examination of witness—Tests of truth.
6. Cross-examination of one defendant by another.
7. Party's own examination.
8. Examination of party—Defendant as plaintiff's witness.
9. Documentary evidence.
10. Evidence adduced in prior litigation—Use in subsequent proceedings.
11. Relevancy and admissibility of evidence.
12. Objection as to relevancy/admissibility of evidence.
13. Consent/waiver/irregularity—Reception of evidence.
14. Illegally obtained evidence.
15. Written statement.
16. Commissioner's report.
17. Newspaper report.
18. Circumstantial evidence.
19. Evidence in civil and criminal cases—Distinction between.
20. Appreciation of evidence—General.
21. Factors in considering weight of evidence.
22. Appreciation of evidence—Evidence to be weighed and not counted.
23. Corroboration.
24. Examination of only material witness.
25. Failure to examine independent witness.

"**Facts in issue**"—The expression "facts in issue" means and includes—

any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability asserted or denied in any suit or proceeding, necessarily follows.

Explanation—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.

Illustrations

A is accused of the murder of *B*.

At his trial the following facts may be in issue:—

That *A* caused *B*'s death;

That *A* intended to cause *B*'s death;

That *A* had received grave and sudden provocation from *B*;

That *A*, at the time of doing the act which caused *B*'s death, was, by reason of unsoundness of mind, incapable of knowing its nature.

"**Document**"—"Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

---

26. Position of Trial and Appellate Court.
27. Maxim—*'Falsus in uno falsus in omnibus'*.
28. Contradictions and discrepancies in evidence.
29. Improvements/variations in evidence.
30. Admissions—Appreciation of.
31. Suppression of evidence—Inference from.
32. Falsity of defence—Effect of.
33. Absconding—Inference from.
34. Statement of accused.
35. Accomplice.
36. Reputation and hearsay.
37. Pleadings.
38. Medical examination/Blood group test.
39. Expert's evidence.
40. Doctor's evidence.
41. Evidence of tracks.
42. Evidence of age.
43. Contempt cases.
44. Title/possession.
45. Corruption cases.
46. Election matters.
47. Eviction matters.
48. Accident cases.
49. Borrowing by *karta* of HUF for immoral purposes.
50. Credibility of witnesses.
51. Past antecedents of witness.
52. Relations/interested/partisan/inimical witness.
53. Stock/decoy witness.
54. Trap witness.
55. Chance witness.
56. Child witness.
57. Panch witness.
58. Hostile witness.
59. Defence witness.
60. Police officer/Government servant.
61. Private detective agency.
62. Villagers'/labourers' evidence regarding time.
63. 'Proved', 'disproved', 'not proved'.
64. 'Matters before it'.
65. Proof—Generally.
66. Adoption—Proof of.
67. Proof in case of fraud/undue influence.
68. Will—Proof of.
69. Residence—Proof of.
70. Religion—Proof of.
71. Proof in Matrimonial matters.
72. Proof of marriage.
73. Proof of legitimacy of child.
74. Genuineness/proof of sale.
75. Miscellaneous.

---

1. Court.—Broadly speaking, a Court is a place where justice is administered; the term "Court", as defined in the Act, which includes all Judges and Magistrates and all persons, except arbitrators legally authorised

Illustrations

A writing[1] is a document;

Words printed, lithographed or photographed are documents;

A map or plan is a document;

An inscription on a metal plate or stone is a document;

A caricature is a document.

"**Evidence**"—"Evidence" means and includes—

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;

such statements are called oral evidence;

(2) all documents produced for the inspection of the Court;

such documents are called documentary evidence.

"**Proved**"—A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

"**Disproved**"—A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"**Not proved**"—A fact is said not to be proved when it is neither proved nor disproved.

"**India**"—[2]["India" means the territory of India excluding the State of Jammu and Kashmir.]

---

1. *Cf.* Definition of writing in S. 3(65), General Clauses Act (X of 1897).

2. Substituted by Act 3 of 1951, for the definitions of 'State' and 'States'.

---

to take evidence, is by no means exhaustive but inclusive, and the definition is only for the Act's purpose: (1975) 1 An.W.R. 133: 1974 An.L.T. 372: 1975 M.L.J. (Cr.) 155: 1975 Cr.L.J. 144. *See* also A.I.R. 1956 S.C. 66; I.L.R. 4 Cal. 483 (F.B.); I.L.R. 12 Bom. 36 [The definition of 'Court' in this Act is framed only for purposes of this Act and should not be extended beyond its legitimate scope.]

The principles deduced from decided case law about a Court are as follows:—(*1*) where a statute referred a matter to the determination of a Court with no further provision, by necessary implication the Court will determine the matter as a Court; and its jurisdiction stand enlarged with all its incidents; (*2*) where a person is indicated not by name but by his official designation, the question always arises whether such a person is a persona designata or not and its effect depends upon the real intention to be gathered from the words used, nature of the functions to be performed and the object and purpose to be achieved; (*3*) when a reference is made to an officer presiding over a Court and not the Court itself, it does not necessarily follow that he is intended to act as a *persona designata* and not as a Court; it is quite an ordinary practice to refer the matter to the officer presiding over the Court even when the intention is to refer it to the Court; (*4*) when a statute confers authority on a judicial officer, it does not necessarily mean that the Legislature conferred such authority on him as a *persona designata*; (*5*) where a judicial officer who presides over a Court is appointed to perform a function under any statute intending him to act not otherwise than in a judicial capacity, in the absence of any indication to the contrary, he acts not as a *persona designata* but as a Court only; (*6*) when a presiding officer of a Court is appointed to judge and decide in accordance with law and nothing is mentioned about the finality or otherwise of his decisions, it is an indication that he is to act as a Court, and all incidents of exercising jurisdiction as a Court would necessarily follow; and (*7*) whether the authority

functions as a *persona designata* or a Court does not necessarily depend on the question whether it is acting against the decisions of designated person or Tribunals or not; statutes provide for appeals or revisions to Courts even as against the decisions of designated persons and Tribunal: (1975) 1 An.W.R. 133: 1974 An.L.T. 372: 1975 M.L.J. (Cr.) 155: 1975 Cr.L.J. 144.

The Act deals with the law of evidence applicable to both civil and criminal proceedings; it is comprehensive in its nature; the Codes of Civil and Criminal Procedure are separate and distinct by nature; the definition of 'Court' under the Act cannot be invoked in the proceedings under S. 145 of the Code of Criminal Procedure nor can S. 148-A of the Code of Civil Procedure be invoked in criminal proceedings: (1990) 3 An.L.T. 491.

'Court' includes both Judge and jury: I.L.R. 4 Cal. 483 (F.B.). Registrar or Sub-Registrar are not Court under C.P. Code [C.P. Code, S. 105(2)]; so also a Magistrate holding preliminary enquiry in police investigation: I.L.R. 11 Bom. 702. 'Court' includes all Magistrates: 36 I.C. 171: 34 Punj.Re. (Cr.) 1916.

S. 1 and definition of the term 'Court' read together make it amply clear that the Act applies to all judicial proceedings before the authorities legally authorised to take evidence, barring arbitrators and Courts-martial convened under the Acts mentioned in S. 1. Since the Haryana Urban (Control of Rent and Eviction) Act, 1973 as well as the Rules thereunder clearly lay down that the Rent Controller and the appellate authority are under an obligation to record evidence and examine the parties' witnesses, *held*, they are certainly governed by the Act. [(1969) 71 Punj.L.R. 68 and (1981) 83 Punj.L.R. 59, Overruled]: (1986-1) 89 Punj.L.R. 417 (D.B.).

The definition of 'Court' in S. 3 is only inclusive, and is framed only for the purposes of the Act; it should not be extended beyond its legitimate scope; thus, though the Payment of Wages Act, 1936, and the Rules framed thereunder direct the Authority to follow the procedure of a Court of civil jurisdiction as nearly as possible, but that alone is not sufficient to conclude that the Authority has been conferred the status of a Court: 1980 Lab.I.C. 835: A.I.R. 1980 N.O.C. 166 (J.&K.) (F.B.).

Arbitrator is not a Court: 1974 Punj.L.J. (Cr.) 352.

Income-tax Officer is not a Court. *See* (1954) 2 M.L.J. 332: A.I.R. 1954 Mad. 822; A.I.R. 1914 Bom. 138 (F.B.). Income-tax Appellate Tribunal is a Court: (1988) 174 I.T.R. 733 (Andh. Pra.) (D.B.).

Registration Officer in the proceedings for registration of a Will is not a Court: (1912) 13 Cr.L.J. 508 (Mad.) (F.B.); A.I.R. 1969 S.C. 724.

A Revenue Officer is not a Court; it is not necessary for him while conducting mutation proceedings to follow the procedure laid down under the Act: A.I.R. 1988 N.O.C. 9 (Pat.).

Contra.—The Revenue Officer and the appellate and revisional authorities under the Orissa Land Reforms Act, 1965, are Courts in strict sense; the proceedings thereunder are judicial and S. 1 of the Act is applicable to them; all oral evidence adduced therein is subject to cross-examination. The Revenue Officer cannot collect any materials confidentialiy and without disclosing them to the opposite parties, and he cannot use such materials to arrive at his conclusions affecting the *lis*: A.I.R. 1974 Ori. 127: (1973) 1 Cut.W.R. 697 (D.B.).

The authorised officer under the T.N. Land Reforms (Fixation of Ceiling on Land) Act, 1961, is a Court under S. 3; he can require evidence to prove a will before it is acted upon: (1979) 2 M.L.J. 209: (1980) 93 Mad.L.W. 35.

'Court' — Jagir Commissioner under Rajasthan Act (6 of 1952) is not a Court—Provisions of Evidence Act and C.P. Code are not attracted—C.P. Code (1908), S. 141—Tenancy Laws—Rajasthan Land Reforms and Resumption of Jagirs Act (6 of 1952), Ss. 2(*f*), 32: 1964 Raj.L.W. 83: I.L.R. (1964) 14 Raj. 90.

The Assistant Collector acting under S. 134 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 is a Court: 1977 Cr.L.J. 1632 (All.). So also a sub-Divisional Officer deciding an objection under R. 214-I of the U.P. Zamindari Abolition and Land Reforms Rules, 1952: 1981 All.L.J. (N.O.C.) 134.

Applicability—Proceedings under U.P. Consolidation of Holdings Act, 1953—Character of—If 'judicial proceedings'—Consolidation authorities — If 'Courts'. *See* 1971 All.L.J. 843. Assistant Consolidation Officer is a Court: 1983 All.L.J. 921.

The Consolidation Authorities under the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956, are

'deemed Courts'; by a fiction of law, they have to be treated as Courts of law: (1990-1) 38 B.L.J.R. 51 (F.B.); A.I.R. 1989 Pat. 39: 1988 B.L.J.R. 682: 1988 B.L.J. 912: 1989 B.B.C.J. (H.C.) 48; (1994) 1 B.L.J. 326 (D.B.); 1986 Pat.L.J.R. 442.

Commissioner under Public Servants (Inquiries), Act, 1950, is not a 'Court' [A.I.R. 1954 Pat. 289, Reversed]. A.I.R. 1956 S.C. 66. Commissioner appointed merely to record evidence and submit a report—Whether Court for purposes of Oaths Act. *See* A.I.R. 1957 Nag. 47.

The Industrial Disputes Act authorises the Tribunal to take evidence. Under S. 11(3) of the Act every Board, Court and Tribunal has been granted the same powers as are vested in the Civil Courts under the C.P. Code when trying a suit in respect of enforcing the attendance of any person and examining him on oath. Hence, a Tribunal is a Court within the definition of S. 3, Evidence Act, and is bound by its provisions: A.I.R. 1958 Cal. 226. But *see* A.I.R. 1962 Cal. 375.

The Commissioner for Workmen's Compensation is not a Court. The Evidence Act does not apply to the proceedings before the Commissioner: 1979 Lab.I.C. 415: 1979 Ker.L.T. 513 (D.B.).

Accident Claims Tribunal—Claims Tribunal is 'Court' within S. 3, Evidence Act: A.I.R. 1970 Punj. 137; A.I.R. 1975 Cal. 239 (D.B.).

The Railway Claims Tribunal is not a Civil Court: A.I.R. 1995 S.C. 1111.

A Family Court constituted under the Family Courts Act, 1984, is a 'Court': A.I.R. 1991 All. 189.

A Rent Controller, acting under the A.P. Buildings (Lease, Rent and Eviction) Control Act, and authorised to record evidence by virtue of R. 8(2) of the Rules framed under the Act, *held*, is a 'Court' under S. 3. [A.I.R. 1964 Andh. Pra. 132, Disting.; A.I.R. 1975 Andh. Pra. 13, Rel. on]: A.I.R. 1976 Andh. Pra. 270: (1976) 1 An.W.R. 169: 1976 Ren.C.R. 329: 1976 Ren.C.J. 344. The Rent Controller and Eviction Officer under U.P. (Temporary) Control of Rent and Eviction Act, 1947 is not a Court: 1966 All.W.R. 753.

Neither the Collector nor the appellate authority functioning under the Essential Commodities Act, 1955, are Courts under the Evidence Act; the Act therefore, in *stricto sensu*, does not apply to the proceedings conducted by them: (1992) 2 An.L.T. 33.

Magistrate functioning under S. 37 of Rajasthan Co-operative Societies Act (13 of 1965), is not 'Court': 1969 Cr.L.J. 1193 (Raj.).

A Forest Officer under S. 59 of Madras Forest Act, 1882, is a Court: I.L.R. 15 Mad. 138 (F.B.).

A District Judge exercising powers under S. 13 of the A.P. Forest Act, 1967, for disposing of appeals filed against orders passed under Ss. 10 and 11 of the 1967 Act, acts as a Civil Court and not as a *persona designata*: (1980) 1 A.P.L.J. 53.

District Magistrate hearing an appeal under S. 160, U.P. Municipalities Act is not legally authorised to take evidence. The words 'legally authorised' contemplate a positive authorisation. The right to receive evidence is not an incident of an appellate Court; wherever an appellate Court possesses the right to receive evidence it is by virtue of an express enactment such as those contained in S. 428, Cr.P. Code and O. 41, R. 27, C.P. Code: 1956 Cr.L.J. 679: A.I.R. 1956 All. 258. *See* also S. 1, Note 4, *supra*.

2. Fact.—Meaning of 'fact' is not restricted to something which can be exhibited as material object: A.I.R. 1935 Mad. 528 (F.B.). 'Fact' does not mean merely event but also a continuing fact such as possession: A.I.R. 1915 Mad. 249 (D.B.).

Fact in issue cannot be proved by one not called as a witness: 13 I.C. 220: 13 Cr.L.J. 28. Misrepresentation of fact—'fact', meaning of: 36 I.C. 850: 16 Punj. Re. (Cr.) 1916. State of a man's mind as a fact: 29 Ch.D. 483. Possession is a fact: 25 I.C. 510. On this section, *see* also (1936) 38 Bom.L.R. 1122: A.I.R. 1937 Bom. 31; 1946 All.L.J. 441. The evidence of a group of witnesses was of the effect that when they were seated in the common room of the Lewis Jubilee Sanitorium before dinner chatting, a man came with the news that *K* was just dead, and he made a request for men to help to carry the body for cremation. One of such witnesses had a distinct recollection of this request as the news broke in upon the talk they were having and the thing had stuck in his memory. The man who so came into the common room had not been identified and was not a witness. On a question whether the evidence of this group of witnesses was admissible evidence where the crucial question at issue was the time of death of *K*, *held*, that the statement and

request made by the man was a fact within the meaning of Ss. 3 and 59 of the Indian Evidence Act and that it was proved by the direct evidence of witnesses who heard it, within the meaning of S. 60; but it was not a relevant fact unless the learned Judge was entitled to make it a relevant fact by a presumption under the terms of S. 114 of the Act. As regards the statement that *K* had just died, such a statement by itself would not justify any such presumption, as it might rest on mere rumour, but it can be held in relation to the fact of the request for help to carry the body for cremation that it was likely that the request was authorised by those in charge at the residence of *K*, having regard to "the common custom of natural events, human conduct and public and private business" and therefore, to presume the existence of such authority. When such presumption is made, the fact of such an authorised request became a relevant fact, and evidence of that group of witnesses became admissible: (1946) 2 M.L.J. 442 (P.C.): 73 I.A. 246: (1945-46) 51 Cal.W.N. 98: A.I.R. 1947 P.C. 19.

Mental condition is a 'fact'—Inference arrived at by a person by a process of ratiocination is not a mental condition of that person and hence not a fact—Guess or calculation a person may indulge in is not a fact: (1966) 68 Bom.L.R. 187: I.L.R. (1966) Bom. 803: A.I.R. 1967 Bom. 109.

Where assessment of income-tax was made on the basis of valuation report, *held*, subsequent report of official of valuation offices is 'information as to fact' for reopening of assessment under S. 147(*b*) of the Income-tax Act, 1961: 1984 Tax.L.R. 667 (Karn.).

Where a claim based on death and succession is admitted, the date of death cannot become either a distinct or different claim or a new question of fact: 1982 All.W.C. (Rev.) 12.

3. Evidence.—This is only a definition of the word as used in the Act: I.L.R. 4 Cal. 483 (F.B.). The word 'evidence' in the Act signifies only the instruments by means of which relevant facts are brought before the Court, *viz.*, witnesses and documents, and by means of which the Court is convinced of these facts: 26 Nag.L.R. 229: A.I.R. 1930 Nag. 242 (F.B.).

'Evidence' includes statement of witnesses recorded by police under S. 161, Cr.P. Code and evidence recorded by Magistrate under S. 202(2), proviso, of Cr.P. Code: 1978 Raj.L.W. 9.

Statements recorded under S. 161(3), Cr.P. Code — Identical statements — Evidentiary value: (S) A.I.R. 1957 S.C. 623: 1957 Cr.L.J. 1009.

The evidence of complainant already recorded is 'evidence' within the meaning of S. 245(3) of the Cr.P.Code though she has not yet been subjected to cross-examination. [A.I.R. 1992 S.C.W. 1872, Rel. on]: 1995 Cr.L.J. 2640 (S.C.).

The writing obtained by the Court from the accused under S. 73 does not come within the expression evidence as it is not a document produced for the inspection of the Court: 1958 Cr.L.J. 134: A.I.R. 1958 All. 119.

Evidence excluded by statute cannot be admitted merely because it is necessary for ascertainment of truth: (1941) 1 M.L.J. 746: A.I.R. 1941 P.C. 16: I.L.R. (1941) 1 Cal. 468.

Memorandum of identification—Not a record of evidence of a witness—Presumption under S. 80 not available—Statement in identification memo recorded by Magistrate under S. 164, Cr.P. Code — Not evidence within S. 3: 1963 All.L.J. 61: (1963) 2 Cr.L.J.1: A.I.R. 1963 All. 308.

Any evidence of the commission of that 'offence'—Expression refers not to evidence in extensive sense, but to evidence in its primary sense as meaning anything that is likely to make crime evident such as existence of wounded corpse or bloodstains, etc.: I.L.R. (1963) Andh. Pra. 454.

What 'evidence' means and includes has been described in S. 3. An affidavit is not within that description. On the contrary the affidavits have been expressly excluded by S. 1, para. 2 from the applicability of the Evidence Act: I.L.R. (1944) Nag. 436: A.I.R. 1944 Nag. 161. Affidavits do not fall within the term 'evidence' in S. 1 and S. 3; S. 1 rather excludes them expressly from the definition: A.I.R. 1968 Cal. 532. *See* also S. 1, Note 5, *supra*.

Criminal trial — Confession — Voluntary confession by accused and circumstantial evidence proving guilt of accused—Court can reject that part of confession proved to be false by prosecution evidence and accept rest of confession: 31 Cut.L.T. 401: (1965) 2 Cr.L.J. 385: A.I.R. 1965 Ori. 170.

Confession—Recording of: (1965) 2 Cr.L.J. 520: A.I.R. 1965 Ori. 175.

Admissibility—Essentials—Accused kept in Police custody before making his confession—This by itself is no ground to reject the confession: 1967 Cr.L.J. 628: A.I.R. 1967 Del. 14.

Conviction based on admissible portion of confession by accused—Conviction of accused not based merely on his statement under S. 342, Cr.P.Code, but also other evidence including admissible portion of confession, as a whole—Procedure adopted by Court is not open to legal objection: (1963) 76 Mad.L.W. 722.

Confessional statement—Acceptance of inculpatory portion alone—Permissibility—Inculpatory portion can be accepted if the exculpatory portion is found to be inherently improbable—Charge for murder—Confessional statement to Mukhiya of village—Exculpatory portion found to be not only inherently improbable but contradicted by the statement of accused under S. 342, Cr.P. Code—Acceptance of inculpatory portion and conviction based thereon, *held*, was valid: A.I.R. 1969 S.C. 422.

Confession—Extra-judicial confessions—Two accused, husband and wife—Each implicating himself or herself—Husband telling before villagers that he had killed the deceased — Wife also making statement before Police and Magistrate that she shot the deceased when he was trying to abduct her — No corroborating evidence — If statements of accused are not believed they should be rejected as a whole: 1969 Jab.L.J. 525: 1969 M.P.L.J. 524: 1969 Cr.L.J. 1291.

Accused charged under Ss. 302, 364 and 386, Indian Penal Code—Confession not relied in respect of offence under S. 302—Value in regard to other offences: (S) A.I.R. 1957 S.C. 381: 1957 Cr.L.J. 559.

In dealing with a case against an accused person, the Court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. Thus, the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence: 31 Cut.L.T. 401: (1965) 2 Cr.L.J. 385: A.I.R. 1965 Ori. 170.

The confession of co-accused cannot be treated as a substantive evidence as defined in S. 3 and can be pressed into service only when the Court is inclined to accept other evidence and feel the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence. As a result of provisions of S. 30 it has to be treated as amounting to an evidence in a general way: 1970 Cr.L.J. 1206 (Raj.).

Confession of co-accused — Cannot be treated as evidence against another accused: 1967 Cr.L.J. 1179: A.I.R. 1967 Pat. 283.

Judicial confession of co-accused though evidence in generic sense is not evidence as defined in S. 3: (1965) 2 Cr.L.J. 566 (Mad.).

Confession of co-accused—Relevancy of: (1965) 1 Cr.L.J. 458: A.I.R. 1965 Ori. 66.

Confession of co-accused is not evidence in S. 3—Can be considered under S. 30 only after other evidence has been considered and found to be satisfactory—Confessional statement is material of very weak type: (1964) 66 Punj.L.R. 1230: (1965) 2 Cr.L.J. 127: A.I.R. 1965 Punj. 291.

Confession of co-accused—Its probative value—Its use how to be made in joint trial: (1964) 2 Cr.L.J. 344: A.I.R. 1964 S.C. 1184.

Confession by accused implicating co-accused—Maker not implicating himself in offence and also retracting confession—Confession cannot be used as substantive evidence for convicting co-accused: (1964) 66 Punj.L.R. 530: (1964) 2 Cr.L.J. 335: A.I.R. 1964 Punj. 397.

It is well settled that the confession of a co-accused is very weak evidence; it does not fall within the meaning of 'evidence' as defined in S. 3: (1992-2) 40 B.L.J.R. 978: (1993) 1 D.M.C. 200 (D.B.); (1992-1) 40 B.L.J.R. 293 (D.B.).

Confessions of co-accused are not evidence as defined in S. 3 and no conviction can be founded thereon, but if there was other evidence on which a conviction can be based, they can be referred to as lending

assurance to that conclusion and for fortifying it: A.I.R. 1956 S.C. 56: 1956 Cr.L.J. 152 (S.C.); A.I.R. 1955 Trav.-Co. 87: 1955 Ker.L.T. 801. *See* also (1936) 38 Bom.L.R. 1122: A.I.R. 1937 Bom. 31; I.L.R. (1958) Bom. 1092: A.I.R. 1957 Bom. 226: 1957 Cr.L.J. 1107; A.I.R. 1964 S.C. 1184; 1987 Mah.L.J. 683: (1988) 1 Bom.C.R. 428; 1981 Cr.L.J. 1424: 1981 M.L.J. (Cr.) 448 (Ker.); I.L.R. (1977) 1 Cal. 267 (D.B.). *See* also S. 30, Note 6, *infra*.

Where a confessional statement is retracted by the accused, the evidence adduced in the case has to be considered at the first instance before seeking the aid of the confessional statement: 1955 Ker.L.T. 801: A.I.R. 1955 Trav.-Co. 87. *See* also 1977 Cr.L.J. 1309 (Gau.) (D.B.); 1981 Cr.L.J. 430 (Gau.) (D.B.).

Where the confessional statement of a Customs Officer made before three other Customs Officer carrying an endorsement in his own handwriting of having read and understood its contents was later on retracted by him, *held*, in view of the consistent, cogent and convincing evidence of the three Customs Officers that the smuggled goods were found in the accused's possession, it was highly improbable for them to falsely involve a fellow Customs Officer; they were competent, not interested witnesses; conviction under S. 135(1)(*a*)(*ii*) and 135(1)(*b*)(*ii*) upheld: (1991) 53 E.L.T. 178 (Bom.). Non-production of seized gold bars in the Court as evidence—Effect of—*See* 1972 Ker.L.R. 457. *See* also 1980 Cr.L.R. 330 (Guj.).

The evidence of witnesses of extra-judicial confession must not lack plausibility; it must inspire the Court's confidence: 1982 Cr.L.J. 2342 (Ori.). *See* 1988 Cr.L.J. 573 (Gau.) (Extra-judicial confession is a weak piece of evidence). *See* also S. 24, *infra*.

Evidence—Answers given by accused under S. 342, Cr.P. Code. *See* A.I.R. 1958 Cal. 616; 1958 Cr.L.J. 1390. *See* also A.I.R. 1952 Him. Pra. 81. But *see* A.I.R. 1955 N.U.C. 4481 Bom. (D.B.). A statement in an inquest report is not evidence by itself and it certainly cannot be pitted against the evidence of medical witness given in Court A.I.R. 1965 S.C. 425; 1956 Cr.L.J. 815. It is the statement of the Medical Officer on oath which is evidence and not his mere report: 1975 Hindu L.R. 22 (Punj.). Partial evidence is no evidence: A.I.R. 1957 Cal. 360.

The post-mortem report is normally used by the Doctor who had conducted the post-mortem examination to referesh his memory; but in the absence of any evidence to show that the report was being tendered in evidence under any relevant provision of Chapter II of the Act, *held*, the report cannot be treated as substantive evidence: (1982-83) 87 Cal.W.N. 565 (D.B.).

A first information report is not substantive evidence; it can be used to corroborate or contradict its maker only: 1984 Cr.L.J. 1215: 57 Cut.L.T. 505; I.L.R. (1975) 54 Pat. 302 (D.B.). Police report is not evidence within the meaning of S. 3: 1986 All.L.J. 1236 (D.B.).

Presumption under S. 80 arises only in case of evidence; a memorandum of identification is not evidence under S. 3; the identification memo would be inadmissible in evidence unless proved by the Magistrate. [A.I.R. 1961 All. 153, Dissent. from]: A.I.R. 1971 Raj. 184: I.L.R. (1970) 20 Raj. 439: 1971 Cr.L.J. 974.

Statements of witness recorded during investigation cannot be used as substantive evidence: A.I.R. 1980 S.C. 873.

Statement made by accused is not evidence: A.I.R. 1956 All. 341; A.I.R. 1969 Ori. 228.

Self-serving statements filed by a litigant cannot, by itself, be evidence unless it has been proved: (1979) 92 Mad.L.W. 209.

Too much importance need not be attached to statements which might have been made from ulterior motives and were more or less in one's own interest: 1958 M.P.L.J. 198: 1958 Jab.L.J. 289: A.I.R. 1958 Madh. Pra. 246.

The result of an inspection made by the Judge is not 'evidence', under S. 3; only statements permitted or required to be made by witnesses and documents produced in the Court alone are to be treated as evidence. But the terms 'Proved' and 'Disproved' defined in the same section make it clear that in deciding whether a fact in issue has been proved or disproved, the Court is to consider all 'the matters before it'; such matters are not confined to 'evidence' *stricto sensu*; otherwise, a Court would not, for example, take into consideration the witnesses demeanour or compare disputed signatures or writings: (1983) 2 Ren.C.J. 105. *See* also I.L.R. (1974) Him. Pra. 509 (D.B.).

Evidence. *See* I.L.R. (1965) Bom. 648; A.I.R. 1955 Bom. 648.

In a motor accident claim case the rough sketch of the scene, prepared by the Investigating Officer, on the basis of statements recorded by him under S. 161 of the Code of Criminal Procedure, *held*, is admissible in evidence: A.I.R. 1990 Mad. 14. *See* however (1976) 1 Raj.Cr.C. 50.

Deposition of a witness that the accident could have been averted if the drivers had moved the vehicles to left, *held*, is not evidence but just an expression of opinion: (1972) 1 An.L.T. 205.

Recitals in the sale deed about existence of the necessity are admissible in evidence; but they are not evidence by themselves of its existence; there must be some evidence *aliunde*. [(1970) 3 S.C.C. 722: A.I.R. 1971 S.C. 1028, Rel. on]: A.I.R. 1972 Gau. 107 (D.B.).

In proceedings for computation of ceiling area under S. 6 of the Gujarat Agricultural Lands Ceiling Act, 1960, *held*, the statement of accounts, assessment proceeding, the audited accounts, balance-sheet, etc., were not admissible in evidence in establishing the status of HUF unless the status is established in terms from the revenue records; a person cannot succeed in establishing his status *de hors* the said records: (1982-1) 23 Guj.L.R. 317: (1982) 2 Guj.L.H. 77.

Suggestions made but denied in cross-examination whether by prosecution or defence are no evidence. If the accused wishes to establish a fact, he has to lead evidence: 1982 Cr.L.R. 381 (Guj.).

A mere suggestion, made and denied, is no evidence: A.I.R. 1981 Karn. 40: I.L.R. (1981) Karn. 78.

The opinion of the Legal Remembrancer given to the Government would be inadmissible in evidence. Nor can it constitute proof of the facts stated therein: A.I.R. 1958 Manipur 7. Heading of deposition—Entry in—Proof of religion—Not much importance to be attached: 176 I.C. 242: A.I.R. 1938 Rang. 81.

Where one '*P*' was shot dead at the farm of '*A*' by the accused '*D*' in conspiracy with some others and *P*'s dead body was taken in *A*'s car and thrown in a lonely well, but there was no allegation that '*A*' was in any manner concerned as an abettor or accomplice in the murder or participated or abetted the removal and disposal of the dead body, the mere fact that 5 days after *P*'s murder '*A*' got his car washed could not by any stretch of imagination be *prima facie* evidence of the factual ingredients of an offence under S. 201, I.P.Code: A.I.R. 1980 S.C. 1560: 1980 Cr.L.J. 1098.

Prosecution leading two sets of evidence—One set condemning other set—Evidence is unreliable—No conviction can be based upon it: A.I.R. 1974 S.C. 344: 1974 Cr.L.J. 366.

4. Oral evidence.—(*See* also S. 60). A Magistrate has no jurisdiction to refuse to examine a witness who is deaf but who is able to speak and write and such refusal, if materially prejudicial, vitiates the trial: 24 Cr.L.J. 688: A.I.R. 1924 Cal. 541. No statement by any person is evidence unless given on oath in the witness-box: A.I.R. 1935 Nag. 60. *See* also I.L.R. 24 Pat. 379: A.I.R. 1945 Pat. 453.

Appreciation of oral evidence and circumstances inspiring confidence or compelling disbelief. *See* 1957 Cr.L.J. 263 (All.).

Oral evidence—Question is one of fact and not of law—Discretion of Court—Discretion of inferior Courts in the matters cannot be taken away by High Court by laying down rules to be followed by them regardless of circumstances. *See* I.L.R. (1963) 1 All. 585: 1962 All.L.J. 1119: 1963 Cr.L.J. 404: A.I.R. 1963 All. 161 (F.B.).

Civil proceedings — Oral evidence — In assessing the value of the evidence Judges are bound to call in aid their experience of life and test the evidence on basis of probabilities—Evidence of only one party even when no evidence of rebuttal is led by opposite party need not necessarily be accepted: A.I.R. 1969 S.C. 255.

The Court must consider both oral and documentary evidence judicially; it should not summarily brush aside oral evidence: 1977 All.W.C. 23 (Rev.).

The appreciation of oral evidence by a Court cannot conform to certain set formulae or be measured by the yard-stick common to all cases. Ordinarily, a Court should not convict an accused on the basis of evidence not accepted by it in connection with the other accused, unless the evidence is corroborated otherwise; but this is not an inflexible rule of law but a rule of prudence for the appreciation of evidence and is not intended to prevent a Judge of fact from appreciating the evidence that is placed before him, having

regard to the circumstances of each case: 1956 An.L.T. 664: A.I.R. 1956 Andhra 247.

Oral evidence about a happening which occurred some generations ago, has to be assessed with great care: A.I.R. 1975 S.C. 733: (1975) 1 S.C.C. 212.

Testimony of *A* relating to what *M* told *N* and the latter passed on to *A*, is hearsay and is, therefore, inadmissible in evidence: A.I.R. 1956 Raj. 58 (S.B.).

Evidence of person injured in the same occurrence—His ocular version of incident is of great value: A.I.R. 1976 S.C. 2027: 1976 Cr.L.J. 1563.

Statements made at the local inspection are inadmissible and a Judge should not bring such statements into the case as evidence.

Although evidence cannot be given that an accused person has been suspected by persons other than the witness of having committed a certain offence, there is no authority for the proposition that a witness cannot be allowed to state that he personally suspected the accused of having committed a certain offence: I.L.R. 51 All. 275: A.I.R. 1929 All. 650. *See* also 192 I.C. 246: 42 Cr.L.J. 259 (admissibility of evidence of police dog). Conjecture should not be the basis of a judgment: A.I.R. 1924 Nag. 363.

5. Cross-examination of witness—Tests of truth.—(*See* also Ss. 137 to 139). The testimony of a witness is not legal evidence unless it is subjected to cross-examination. Where no opportunity has been given to the counsel for the accused to test the veracity of the principal prosecution witness or where owing to the refractory attitude of the witness the Court is constrained to terminate all of a sudden and prematurely the cross-examination of the witness, the evidence of such a witness is not legal testimony and cannot be the basis of judicial pronouncement: I.L.R. 12 Luck. 553: 37 Cr.L.J. 1144.

Harrington, J.—The evidence of a man who can remember no details and cannot submit to the test of thorough cross-examination is of very little value. The Court should look at the broad outlines of the case and try to visualise what in all probability took place and how far the witnesses support the main story put forward by the prosecution: 32 Cr.L.J. 522: A.I.R. 1931 Lah. 38.

If witnesses are not cross-examined on a point, their evidence thereon has to be accepted unless there are any inherent improbabilities. [A.I.R. 1940 Pat. 683 (D.B.), Foll.]: 1973 Pat.L.J.R. 309 (D.B.).

Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. This is not merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. This much a counsel is bound to do when cross-examining: A.I.R. 1961 Cal. 359; (1984) 1 Cal.L.J. 161: (1983-84) 88 Cal.W.N. 485.

Where a witness is not cross-examined on a particular point deposed in the examination-in-chief, *held*, the other party should be deemed to have accepted it: (1986) 2 Hindu L.R. 75 (P.&H.); 1977 Cur.L.J. 259: (1977) 2 Ren.L.R. 465 (Punj.). This rule applies only where the statement is such that it can be reasonably acted upon by the Court and not where the statement falls short of such probative value: (1979) 2 Ren.L.R. 273 (Punj.).

There is no particular cross-examination to judge the credibility of a witness; it is to be weighed and examined in the light of normal human conduct, the probabilities of the incident deposed to by the witness and, in certain cases, by the witness's subsequent conduct; as a rule, the Court would normally seek corroboration to the testimony of a witness, especially when there is something improbable therein. However, in law, undoubtedly, the testimony of a single witness can be made the sole basis of conviction. However, as a rule of prudence, Courts have always insisted on corroboration, especially in criminal cases: (1988) 1 Bom.C.R. 92 (D.B.).

Cross-examination is not the only method of discrediting a witness; if his oral testimony is contrary to proved facts or on the face of it is unacceptable, it may well be discarded: A.I.R. 1981 S.C. 373: 1980 (Supp.) S.C.C. 417.

Impeaching credit of witness—Omission by opponent to put material and essential

case in cross-examination — Veracity of opponent's version of the case ought to be taken into account—Omission to do so vitiates appreciation of evidence: 1968 Ker.L.J. 123. *See* also S. 155.

The fact that the accused did not cross-examine the witnesses is really of no value in a case where he was unrepresented and was ignorant and could not be expected to know the legal presumption that not cross-examined evidence is probably reliable: 38 Cr.L.J. 889: (1936-37) 41 Cal.W.N. 816.

Permission to cross-examine witness by itself is not enough to discredit him: A.I.R. 1969 Pat. 415.

The trial Court has the discretion to direct that evidence of any witness, who fails to appear in the Court for cross-examination or further examination or cross-examination should be ignored; the discretion is not to be exercised mechanically or without due application of mind. If his absence is for reasons wholly unavoidable or temporary in nature or he is kept back deliberately by one party or the other for different purposes, the Court is to consider various matters like relevance or necessity of his testimony and the cause of his absence; the Court has ample power to procure the presence of witnesses; to get at the truth, the Court should not hesitate to exercise its power; it should not readily expunge the evidence of a witness examined or cross-examined in part: (1985) 60 Cut.L.T. 247.

Suggestion in cross-examination can only be indicative of case put forward or stand taken by party on whose behalf cross-examination is being conducted—But to no extent whatsoever can it be a substitute for evidence if it is repudiated by witness to whom it is made: 1969 All.Cr.R. 240: 1969 All.W.R. (H.C.) 369.

Where in a matrimonial proceeding, the cross-examination of the husband's uncle appearing as the wife's witness was under way when the proceedings were adjourned for reconciliation but on resumption of proceedings, she could not again produce the witness, *held*, the statement of the witness already recorded was admissible: 1984 Hindu L.R. 12 (All.).

Where a witness was examined before the committing Magistrate and was simply tendered for cross-examination in the Sessions Court and the evidence before the committing Magistrate was marked as exhibit in the Sessions Court, such procedure is illegal: 30 I.C. 439: 1915 M.W.N. 544. *See* also 39 Mys.H.C.R. 581: 12 Mys.L.J. 1.

Appreciation—Witness not cross-examined—Court is not precluded from assessing veracity of witness even in absence of his cross-examination: 1960 All.L.J. 782: (1961) 1 Cr.L.J. 15: A.I.R. 1961 All. 38.

6. Cross-examination of one defendant by another.—(*See* also Ss. 137 and 138). Co-defendants—Right of one to cross-examine other defendants—Evidence produced by partner defendant found admissible against other co-defendant partners — Co-defendants have right of cross-examining the deposing defendant: 1965 Raj.L.W. 346: I.L.R. (1965) 15 Raj. 1035: A.I.R. 1966 Raj. 229.

7. Party's own examination.—(*See* also Ss. 135 to 138). No law requires that the petitioner must appear as a witness in a Civil or Revenue Court; where the petitioner, an old lady in her nineties hesitant to appear in public, did not examine herself as a witness, *held*, no adverse inference could be drawn against her: (1985-2) 88 Punj.L.R. 66.

It is true that if a party examines itself as a witness, the other party is entitled to prove its case by cross-examining the party; but that does not mean that the party is bound to examine itself for establishing the opponent's case; it is for the party itself to decide whether to examine itself as a witness; though not examining itself in a given case may lead to adverse inference with regard to certain facts but at the same time, it is permissible for a party to prove its case by examining other witnesses: (1987) 100 Mad.L.W. 612.

Witnesses do not carry conviction with a Court or Tribunal when the party himself is not ready to stand the test of cross-examination and keeps away: A.I.R. 1980 Del. 110: 1980 Rajdhani L.R. 423.

8. Examination of party—Defendant as plaintiff's witness.—(*See* also Ss. 137 and 138). Where the plaintiff refrained from giving evidence on his own behalf and adopted instead the tactics of calling the defendant as a witness for the plaintiff, with the usual result that important features of his case were denied by his own witness their Lordships condemned this practice and approved of

the course taken by the High Court in treating the plaintiff as a person who put the defendant forward as a witness of truth: 172 I.C. 633: 47 Mad.L.W. 124: A.I.R. 1938 P.C. 59 (P.C.).

If a party appears as a witness on behalf of the opposing party, the Court should before proceeding to record his statement question him or his counsel as to whether he does not propose to appear as his own witness. If that party then declares that he does not propose to appear as his own witness, the Court should point out to the party producing him that ordinarily speaking the matter should be left as it is and the Court be left to draw any adverse inference which may justifiably be drawn from the refusal of the party to appear in the witness-box and subject himself to cross-examination. If the party, however, insists on examining the opposite party as his own witness the Court should be careful not to allow him to cross-examine his own witness because unless the evidence is declared hostile, the party producing the witness has no right to cross-examine his own witness: (1933) 35 Punj.L.R. 28: A.I.R. 1934 Lah. 126.

The fact that a witness was cited on behalf of the defendants and his evidence went entirely to support the plaintiff's case does not entitle a Court to reject his evidence as that of a witness who had been 'won over' by the plaintiff: 147 I.C. 591: A.I.R. 1934 All. 226. *See* also 1975 J.&K.L.R. 413.

9. Documentary evidence.—(*See* also S. 61 *et seq*). The definition of the word 'document' in S. 3 of the Evidence Act and S. 29 of the I.P.Code, applies to the word as used in S. 2(6) of the Press (Emergency Powers) Act, 1931: A.I.R. 1934 All. 1031: 153 I.C. 411.

Where a party having once denied on a reconsideration subsequently admits the genuineness of a document, a Court could not be precluded from taking such document into consideration: A.I.R. 1941 Oudh 189: 1940 O.W.N. 1344.

No Court has a right to look at any document or any papers other than those on the record unless the Judge gives to the parties to the suit an opportunity of being heard and making their submission with regard to what is contained in such documents: A.I.R. 1923 Cal. 194.

When there is documentary evidence and also a mass of conflicting oral testimony, it is always desirable and indeed safe to let the documents speak for themselves: (1959) 61 Bom.L.R. 1549: I.L.R. (1960) Bom. 365: A.I.R. 1960 Bom. 418.

The mere summoning of a record does not constitute it a part of the evidence in the case in which it is summoned. The contents in those documents, if sought to be relied upon must be formally proved: 1940 All.W.R. (B.R.) 153: 1940 R.D. 242.

It is only after a document has been proved that its authenticity can be determined: (1980) 6 All.L.R. 595. Mere attestation does not mean that the attesting witness accepts correctness of recitals contained in the document; it only shows that the document was prepared by its author in his presence: 1978 Raj.L.W. 480.

It is an elementary principle that documents inducted by way of proof have to be proved; mere marking of documents by consent does not oblige the Court to look into their contents; the Act contemplates only the enumerated ones and there is no other document of which the Court can take judicial notice; thus, a profession-tax certificate issued by a Panchayat President or an income-tax certificate issued by a Panchayat Union Commissioner, even if exhibited, cannot be taken as proved unless testified by a witness; they are exhibited subject to their admissibility and relevance: (1982) 2 M.L.J. 301: (1982) 95 Mad.L.W. 297.

Unless the documents are proved in accordance with the Act, their contents should not be used as evidence; thus, where neither side had examined any witness to prove documents, the Courts cannot accept their contents as acceptable evidence. [(1982) 2 M.L.J. 301: (1982) 95 Mad.L.W. 297, Foll.]: (1986) 99 Mad.L.W. 73: (1986) 1 M.L.J. 207; A.I.R. 1989 N.O.C. 42 (Mad.).

The principles of law laid down in (1982) 2 M.L.J. 301 are not wholly erroneous but require modification in the light of the earlier Division Bench judgments in (1974) 2 M.L.J. 535 and (1974) 2 M.L.J. 260; the correct position being that "permitting a document to be marked by consent only means that the party consenting is willing to waive his right to have the document in question proved"; the single Judge in (1982) 2 M.L.J. 301, however, took the erroneous view that formal proof is still required even if the document was marked by consent; marking by consent,

however, certainly does not mean that every statement made therein is correct: 1986 T.L.N.J. 1: (1986) 1 M.L.J. 283 (D.B.).

While a document is marked on its formal proof being waived, the party relying upon it need not examine any witness to prove it formally; that, however, does not amount to an admission of the document's contents: (1991) 2 Hindu L.R. 428 (Cal.).

An objection with regard to the mode of proof of a document cannot be raised after it has been exhibited: (1994-1) 106 Punj.L.R. 347.

The proof of the executant's signatures on a sale deed does not by itself prove the truth of its contents. [Similar view was taken in A.I.R. 1954 Bom. 305: (1954) 56 Bom.L.R. 147 and (1966) 68 Bom.L.R. 228 (D.B.); but in (1968) 70 Bom.L.R. 683, the Single Judge disagreed with the Division Bench; his views being personal do not bind the Bombay High Court or any Judge of a subordinate Court]: A.I.R. 1982 Bom. 387: (1982) 1 Bom.C.R. 819: 1982 Mah.L.J. 840.

A mere proof of the handwriting of a document does not tantamount to proof of its contents or facts stated therein; if the truth of the facts is in issue, the proof of its writing and execution would not establish the truth of the facts or contents stated therein; their truth or otherwise has to be proved by evidence of the persons who can vouchsafe for the truth of the facts in issue. [(1965-66) 70 Cal.W.N. 199, Reversed]: A.I.R. 1981 S.C. 2085: (1981) 1 S.C.C. 80: (1981) 1 S.C.R. 899.

No provision of law debars the defendant from examining a Document Writer as his own witness to prove some documents if he has been examined by the plaintiff to prove another document: (1987-1) 91 Punj.L.R. 555.

The principles of natural justice do not imply that what is not justice can be acted upon; it only means that if a document is produced to establish its contents, its author must testify thereabout as a witness or by affidavit and the opportunity should be afforded to the contesting party to challenge him; it is in accord with O. 19 of the Code of Civil Procedure as also of the Act; both of them incorporate the principles: (1971) 2 S.C.C. 617: (1971) 2 S.C.W.R. 733: A.I.R. 1972 S.C. 330.

Only documents produced and proved by a witness in the Court can be regarded as evidence: 1984 Cr.L.J. 733.

A document's admissibility is one thing, its probative value quite another and the two cannot be combined. A document may be admissible and yet, carrying no conviction, its probative value may be nil: A.I.R. 1983 S.C. 684: (1983) 3 S.C.C. 118.

Statements in a document, *held*, cannot bind a person who is not a party to the document: (1990) 1 Bom.C.R. 661: (1991) 1 Hindu L.R. 97.

Where to prove residence at the suit premises, letters addressed at such premises, were produced without examining the senders thereof, *held*, it could not be said that the letters held no evidentiary value; their contents having no bearing upon the question under consideration, their contents need not be proved by producing their writer as a witness: (1984) 2 Bom.C.R. 671.

Proof of execution of a document is no proof of the truth of its contents; the truth of the facts stated in the document, if denied, has to be proved by admissible evidence; under S. 61, the contents of documents are to be proved either by primary or secondary evidence and under S. 62 "primary evidence means the document itself produced for the inspection of the Court". Even on such proof the Court is not bound to accept the contents, unless it is satisfied about their truth: A.I.R. 1983 Ker. 81 (D.B.). *See* also Notes under S: 67.

Where a document was produced after the oral evidence of the witness had concluded and the witness could not be cross-examined with reference to it, *held*, it could not be relied upon: 1979 Bom.C.R. 110: (1980) 2 Mah.L.R. 242.

Proof of document—Document produced from proper custody and drawn upon stamped paper purchased in name of alleged executor—*Held*, document was properly proved: (1967) 69 Punj.L.R. 578.

A Court is not bound to treat the registration endorsement as conclusive proof of the fact of execution; but it can treat it as sufficient proof thereof: 1940 Nag.L.J. 437: A.I.R. 1940 Nag. 382.

Proof — Execution of document: 31 Cut.L.T. 659: (1965) 2 Cr.L.J. 107: A.I.R. 1965 Ori. 126.

Person admitting certain documents as "Bills of lading"—Signature on documents not proved nor new question asked about

signatures—Execution of documents held not proved. Carriage of Goods by Sea Act, 1925, S. 4: (1968-69) 73 Cal.W.N. 279.

An unregistered sale deed can be admitted in evidence and marked in the suit; but the defendant is still entitled to question its genuineness or raise any other objections; he is not precluded from doing so: 1977 An.L.T. 107.

Where title is conveyed together with absolute rights to alienate, etc., under an agreement, unstamped and unregistered, *held*, the document cannot be received in evidence: (1984) 2 An.W.R. 105.

A document, effecting partition of immovable properties worth more than Rs. 100, not registered, *held*, cannot be received as evidence of partition; but if it contains several other matters not requiring registration like the list of the joint family's properties, the document is admissible to prove that they were on the date of its execution such joint family properties: (1988) 2 Hindu L.R. 376 (Karn.) (D.B.). *See* also Notes under S. 65.

S. 12 of the Indian Stamp Act enjoins cancellation at the time the stamp is affixed if the instrument has already been executed or at the time of its execution; if the adhesive stamp is not cancelled, the instrument is deemed to be unstamped; in case a promissory note bears several adhesive stamps, all of them must be cancelled; if any stamp is not cancelled, the instrument is deemed to be not duly stamped; it is inadmissible in evidence: (1979) 92 Mad.L.W. 381.

When no additional stamp duty as required by S. 3-A of the Stamp Act, 1899, is payable on a promissory note, *held*, it is admissible in evidence if it bore proper and requisite stamp duty: A.I.R. 1984 Madh. Pra. 58: 1984 Jab.L.J. 239.

A duly stamped receipt showing payment of advance rent by the tenant need not be registered for being admissible in evidence if it does not purport to create a lease: 1983 All.L.J. 1334.

Document legally admissible cannot be excluded on the ground of public policy: A.I.R. 1940 Mad. 768: I.L.R. (1940) Mad. 969: (1940) 2 M.L.J. 257. Evidence cannot be admitted on the intention of the parties when that intention is clearly expressed in the deed: A.I.R. 1928 Cal. 825.

Whenever objection is raised to a document's admissibility or on any other ground, the Court must decide the same before admitting it in evidence and proceeding further with the trial: (1988) 2 Hindu L.R. 376 (Karn.) (D.B.).

The duly signed statements of parties, recorded by the trial Court and containing the terms of the compromise, *held*, the signed statements are documents under S. 3: A.I.R. 1987 P.&H. 60: (1986) 90 Punj.L.R. 504: 1986 Punj.L.J. 639: I.L.R. (1987) 1 P.&H. 394 (D.B.).

Both prosecution and accused can rely or refer to documents mentioned in S. 174 in support of their contention in exercising right of being heard under S. 251-A (2) and (3): 1968 Cr.L.J. 493: A.I.R. 1968 Mad. 117.

The tape recordings are 'documents', as defined by S. 3; they stand on no different footing than photographs; they are admissible on satisfying the following conditions: (*a*) the voice of the purported speaker must be duly identified by the maker of the record or any others who know it; (*b*) the maker has to prove the accuracy of the recording by satisfactory evidence, direct or circumstantial, so as to rule out possibilities of tampering; (*c*) the contents should be shown to be relevant under the Act. The tape records are the primary evidence of what was recorded. Shorthand transcript of the recording is corroborative as it confirms what the tape records contained; the transcript shows what the transcriber had found recorded therein; it operates as a check against tampering; *held*, the transcripts had been rightly used only as corroborative evidence: A.I.R. 1975 S.C. 1788; 1980 Mad.L.W. (Cr.) 61 (Andh. Pra.).

Merely because the relevant entries in the registers of the stamp vendor and the deed writer were the last on their respective pages, they would not become suspicious and render the documents forged if there was no overwriting or interpolation; non-mention of the details of the document in these entries, *held*, would not render the document doubtful; there is no legal requirement for giving very many details in such entries of the documents intended to be executed: (1994-1) 106 Punj.L.R. 321.

A photostat copy of a document cannot be readily accepted as reliable secondary evidence without the clinching proof that (*i*) the photostat copy truly represented the original

or its counterfoil; (*ii*) the photostat copy was prepared by mechanical process by someone at some particular place on a particular date and time; and (*iii*) the original of the photostat copy was produced at the relevant time by any person in custody thereof: (1986) 1 Hindu L.R. 387 (Madh. Pra.).

The objection that the copy of a mortgage deed is not legal secondary evidence within the meaning of S. 63 is merely to the mode of proof of a document and should be raised at the very time the document is sought to be tendered in evidence and proved: 1958 Raj.L.W. 275: A.I.R. 1958 Raj. 110.

Documents produced in inquiry under S. 207-A, Cr.P. Code: (1961-62) 66 Cal.W.N. 680.

Document includes foreign currency: (1962) 2 Cr.L.J. 794: A.I.R. 1962 Tripura 50.

Where a letter written by the Superintendent of Police to his administrative superior was produced but its writer was not examined as a witness and the defence had no opportunity to cross-examine him, *held*, the letter could not be used to corroborate the oral evidence. [(1983) 1 Crimes 675 (Madh. Pra.), Reversed]: A.I.R. 1984 S.C. 911: 1984 Cr.L.J. 814: (1984) 2 S.C.C. 350.

Where the plaintiffs' only evidence comprised of entries in their account books, *held*, it was not sufficient to charge the defendants with liability. [A.I.R. 1967 S.C. 1058, Foll.]: (1990) 2 Bom.C.R. 692.

Account books which are not maintained in regular course of business, *held*, are not of much evidential value: 1974 W.L.N. (U.C.) 17 (Raj.). Account books not to be rejected for want of counter signatures of tax authority: (1976) 2 U.C.R. 386 (Bom.).

Where during the search of its premises under the Foreign Exchange Regulation Act, account slips carried into the firm's account books were recovered, *held*, they are admissible evidence and can be looked into for convicting the firm under that Act: A.I.R. 1971 S.C. 28: 1971 Cr.L.J. 1: 1971 M.L.J. (Cr.) 387.

As pointed out in A.I.R. 1978 Mad. 56: (1977) 90 Mad.L.W. 686, the account books are not by themselves sufficient to charge any person with liability; the plaintiff has to show by some independent evidence that the entries represented real and honest transactions and that the moneys were paid or the transactions took place in accordance with those entries; the proper person to prove such entries is the accountant who had written the books: (1987) 100 Mad.L.W. 702.

Entries in the seller's books of accounts are perfectly reliable evidence in proving the existence of the contract of sale: A.I.R. 1985 Ker. 262.

Reliance upon an entry in account books—Original account books must be produced before the Court: 1964 All.L.J. 738: A.I.R. 1965 All. 189.

Where in a suit for damages against an insurance company, the firm's account books were produced and one of its partners deposed that they were written in his presence, *held*, the non-examination of the writer of the books was of no consequence: (1994-2) 107 Punj.L.R. 293 (D.B.). *See* also A.I.R. 1979 Cal. 56 (D.B.).

In a suit for recovery of an encroached property, *held*, the report and map submitted by the survey knowing Commissioner appointed by the Court is evidence: (1983) 56 Cut.L.T.152: A.I.R. 1983 Ori. 259.

Where *X* was shown as daughter of *Y* in the school record, more than 30 years old, prepared and maintained when *X* was minor and there was no circumstance to create any doubt about it, *held*, *X* was to be treated as daughter of *Y*: (1988) 1 Bom.C.R. 421.

The respondent, a bill clerk, was acquitted of the charge of having committed criminal breach of trust in respect of a sum entrusted with him by office. The defence of the accused was that he handed over the money to the Drawing Officer of the bill in question. In evidence he produced a receipt for the amount, which was on a torn piece of paper. The contents portion of the receipt was written by the accused and the initial was in brief without showing the year. Further, the accused did not call any witness in support of his story nor did he choose to get himself examined under S. 342-A, Cr.P.Code, to give evidence on oath in disproof of the charges against him which could have been used as a substantive evidence in support of his case. The receipt was also introduced by the accused two months after the F.I.R. in a representation made by the accused.

Held, the order of acquittal passed by the Magistrate was wrong and hence should be set aside. The question whether the circumstances brought out showed that the

defence case was probable was one of intention and not a matter of direct proof but if the accused gave a false account of what he had done with the money received by him, it may be treated a strong circumstance against the accused. The element of criminal offence of misappropriation will be established if the prosecution proves that the accused received the money, that he was under a duty to account and had not done so. It is enough to establish facts which give rise to a suspicion and then to throw the onus on the accused to prove his innocence. In a case like this depending on the conclusions drawn from circumstances, it is well settled that the cumulative effect of the circumstances must be such as to negative the innocence of the accused and to bring the offence home to him beyond any reasonable doubt: (1965) 2 Cr.L.J. 107: 31 Cut.L.T. 659: A.I.R. 1965 Ori. 126.

Appreciation of evidence — Criminal breach of trust — Vital document seized from custody of accused, not produced — Conviction cannot be sustained: A.I.R. 1987 S.C. 856: 1987 Cr.L.J. 773.

Both prosecution and accused can rely or refer to documents mentioned in S. 174 in support of their contention in exercising right of being heard under S. 251-A(2) and (3): A.I.R. 1968 Mad. 117: 1968 Cr.L.J. 493.

Time of occurrence mentioned in injury certificate issued by Assistant Surgeon—Disparity between that time and time in First Information Report and dying declaration—No evidence to show who gave statement to Surgeon—Injury certificate not admissible to prove time of occurrence—By itself, not sufficient to put prosecution out of Court: A.I.R. 1976 S.C. 2588: 1976 Cr.L.J. 1998.

The execution or authorship of a document is a question of fact and can be proved like any other fact by direct as well as circumstantial evidence, although it must be further premised that the circumstantial evidence must be of sufficient strength to carry conviction. S. 67 does not lay down any specific mode of proof, and, therefore, circumstantial evidence as a mode of proof of authorship or execution of documents is not excluded as a legitimate method of proving a document and such evidence may consist of the internal evidence contained in the document itself about the execution of which there is a dispute and the oral evidence of the witnesses to prove other surrounding circumstances.

Held on facts, that the certificate of registration required no further proof. The evidence of Registrar was not necessary. Its genuineness must be presumed under S. 79 of Evidence Act. *Held*, further that the plaintiff had succeeded in proving the sale of the suit house in his favour by G by the sale deed. Thus, the plaintiff had the right to bring the suit: 1963 Raj.L.W. 453: I.L.R. (1963) 13 Raj. 954: A.I.R. 1963 Raj. 234.

S. 139 of the Railways Act, 1890 undoubtedly authorises the Railway authorities to tender certified copies of their records in evidence; but it nowhere provides that their contents would be presumed by the Court to be correct unless there is evidence to the contrary: A.I.R. 1973 Cal. 74.

In a proceedings under S. 145 of Code of Criminal Procedure, the documents filed are not required to be formally or strictly proved: 1975 Ker.L.T. 623.

Where the defendant's declarations in his income-tax returns were sought to be used as evidence about the existence of the joint Hindu family properties but it was contended that the declarations were privileged documents and having been made for gain, they could not prove or disprove the existence of the joint Hindu family or its property, *held*, having been made on behalf of the joint Hindu family, each of the plaintiffs was entitled to rely upon them and as the privilege stood withdrawn with effect from 1-4-1964, they were no longer protected; and though not conclusive of the status of the family and its property, they are certainly good pieces of admission and conduct to support the plaintiff's case: A.I.R. 1982 Del. 520 (D.B.).

The endorsement of the Sub-Registrar on applications made to him, *held*, is admissible without examining him: (1987-2) 92 Punj.L.R. 239.

Service of driver terminated—Employer leading evidence before Labour Court to show that employee was not suitable to perform duties of driver as he mishandled the vehicle—Certificate is relevant—Labour Court rejecting evidence of driver without giving reasons—Award liable to be quashed. *See* U.P. Industrial Disputes Act (28 of 1947), S. 4: 1982 Lab.I.C. (N.O.C.) 131 (All.).

A receipt produced by the plaintiff's witness, a tenant of the defendant, *held*, can be exhibited even though it was not relied upon

by the plaintiff; for the defendant would have a chance to rebut it when he steps into the witness-box or by any other evidence: (1994-2) 107 Punj.L.R. 83. A rent receipt produced but neither admitted by the landlord nor proved, *held*, cannot be treated as legal evidence: 1975 W.L.N. (U.C.) 290 (Raj.).

10. Evidence adduced in prior litigation—Use in subsequent proceedings.—(*See* also S. 33). The original records of a Court proceeding are not required to be independently proved if they are on the Court's record: (1979) 2 Mah.L.R. 132 (Bom.).

An admission made in a prior litigation without its evidence being filed in the subsequent litigation, *held*, is no evidence in the subsequent case: A.I.R. 1983 Andh. Pra. 219: (1983) 1 A.P.L.J. 29: (1983) 1 An.L.T. 47: (1983) 2 An.W.R. 1.

Where in a suit for declaration that the defendant was a benamidar of plaintiff's predecessor and for possession of the house, the defendant's plea that the evidence by the plaintiff's predecessor and the tenant to an earlier title suit by the defendant against the tenant for arrears of rent to the effect that the house belonged to the defendant amounted to an admission on their part binding on the plaintiff in this case, *held*, as the said earlier suit had ended in compromise, admission made therein could only be a piece of evidence which had to be considered along with other evidence in the case: 1979 B.L.J.R. 296.

Paradanashin lady—Proof of—Use of statement by husband in another case—Permissibility: A.I.R. 1958 Madh. Pra. 25.

Where in proceedings under the U.P. Consolidation of Holdings Act, 1954, the objector disputing the claimant's claim of being a co-sharer for the first time in his appeal before the Supreme Court relied on the claimant's statement in another litigation whose genuineness was, because of certain infirmities, doubtful, *held*, the objector could not do so: A.I.R. 1984 S.C. 1413: 1984 U.J. (S.C.) 553: (1984) 3 S.C.C. 568.

Legal practitioners should confine themselves to such documents as were produced by them and exhibited in the case. If the record of another case happens to be in Court for a specific purpose it cannot be treated as evidence in the case for any purpose other than the one for which it was summoned: 131 I.C. 513: A.I.R. 1931 All. 600.

11. Relevancy and admissibility of evidence.—There is a distinction between the relevancy and admissibility of a document. Evidence which is not relevant under provisions of the Act cannot be made relevant because it is let without objection; if a document is inadmissible on account of a defect which could be cured by the person relying on it if an objection had been taken at the proper time no objection as to its admissibility can be allowed at later stage. But the omission to object to the admission of irrelevant evidence cannot possibly make it relevant: A.I.R. 1936 Lah. 114.

When at a trial, admissibility of evidence is objected to, it is the duty of the trial Judge to decide at once whether it is admissible. If he holds it inadmissible the document should not find a place on the record and assessors or jurors should be warned not to rely on it: 50 I.C. 481.

Where the Court passed an interlocutory order that the evidence was admissible, such an order can legally be varied by the Court, though in practice it is not often done. Court, therefore, can hold the evidence as inadmissible which was formerly held admissible: (1937) 39 Punj.L.R. 262: A.I.R. 1937 Lah. 176.

The relevant point of time in the proceedings at which the condition of admissibility must be fulfilled is the time when it has to be admitted by the Court before which the evidence is produced and relied on and not the moment when the case is decided: 1940 Nag.L.J. 459: A.I.R. 1940 Nag. 340.

Use of statement recorded during investigation of crime in civil litigation. *See* 1964 All.L.J. 950: (1965) 2 Cr.L.J. 452: A.I.R. 1965 All. 494.

If the author of the report is found to be false, repetition of that report to others would not add to its weight: 1958 Jab.L.J. 674: 1958 M.P.L.J. 833: A.I.R. 1959 Madh. Pra. 84.

Fresh evidence: 1965 B.L.J.R. 102.

Revision on ground of error in regard to admissibility in evidence of document—Competency—Evidence—Admissibility—Errors—Effect: A.I.R. 1963 Guj. 147.

There is no rule of law which requires the evidence of one party to be accepted unless it is rebutted by evidence led by other parties: (1958) 1 L.L.J. 79: A.I.R. 1958 Mys. 26.

Evidence produced by accused—Admissibility against co-accused — There is no

provision of law which renders the statements of witnesses produced by one accused inadmissible against the co-accused, but there are obvious reasons for receiving such evidence with great caution: 1961 All.L.J. 967: I.L.R. (1962) 1 All. 179: (1962) 2 Cr.L.J. 520. *See* also S. 30.

The Court shall have first to consider the evidence of the approver *de hors* the corroborated pieces of evidence and reject if it comes to the conclusion that his evidence is unreliable; but if it comes to the conclusion that it is reliable then it will have to consider whether that evidence is corroborated by any other evidence: (1962) 1 S.C.J. 231: (1962) 2 S.C.R. 195: A.I.R. 1961 S.C. 1762. *See* also S. 30.

S.P. instructing Investigating Officer to enquire about likelihood of a certain person setting up the complainant and witnesses to create trouble—Investigating Officer gathering information—His report to the S.P. that such person had collected persons to take forcible possession is admissible in evidence: (1963) 3 Orissa J.D. 26: 27 Cut.L.T. 367.

Admissibility—*See* A.I.R. 1966 All. 222.

In a trial for murder, the case against the accused should be determined on evidence which is relevant and admissible under the Act: 62 I.C. 545: (1920) 22 Bom.L.R. 1274.

No statement of Counsel concerning relevant facts in the case can be accepted otherwise than in the witness-box: A.I.R. 1935 Nag. 69: 17 Nag.L.J. 189.

The evidence of statements of a person, who is neither an accused nor a witness is inadmissible: 175 I.C. 523: 39 Cr.L.J. 601: A.I.R. 1938 Cal. 399.

A Court is not bound to accept statements by persons who were not called as witnesses merely because the case is a criminal one and certain facts were admitted: A.I.R. 1941 Sind 33: I.L.R. (1941) Kar. 316.

Effect of signature on statement—Evidence of witnesses who has signed the statement given in open Court at the trial does not on that account only become inadmissible: 1968 Cr.L.J. 493: A.I.R. 1968 Mad. 117.

When considering the question of admissibility, the Court should lean always in favour of the accused, and exclude all evidence tendered by the prosecution which is of doubtful or remote relevancy: 37 Cr.L.J. 394: (1935-36) 40 Cal.W.N. 432: A.I.R. 1936 Cal. 73.

Statements made under S. 108 of the Customs Act, 1962, *held*, are admissible in evidence: (1993) 1 An.L.T. 567 (D.B.).

In a prosecution under S. 135(*i*)(*b*) of the Customs Act, 1962, the statements of accused recorded under its S. 108, *held*, do not constitute corroborative evidence to support the testimony of a co-accused turned prosecution witness: A.I.R. 1992 S.C. 1583.

The records of the German Court authenticated in the manner prescribed by Ss. 14 and 15 of the English Extradition Act are admissible in evidence: I.L.R. 39 Cal. 164: (1910-11) 15 Cal.W.N. 1053: 12 I.C. 273.

Evidence properly admitted for one purpose must be admissible for all purposes in the cause: I.L.R. 37 Bom. 122: 40 I.A. 1: 24 M.L.J. 176 (P.C.) [On appeal from (1910) 12 Bom.L.R. 316: 5 I.C. 457]. *See* also (1909) 11 Bom.L.R. 926: 4 I.C. 652.

Secret reports of the Tahsildar and Naib-Tahsildar under the orders of the Sub-Divisional Officer are not admissible as substantive evidence in a criminal trial: 28 Cr.L.J. 91: A.I.R. 1937 All. 127.

Record requisitioned—When becomes evidence in the case.—A record which has been requisitioned does not become part of the evidence in a pending case merely from the fact that it has been requisitioned. If any document or statement contained in the record are relied upon by a party then they must be duly proved and brought on the record as evidence in the pending case: 1941 R.D. 868: 1941 All.W.R. (Rev.) 914.

Where a witness produces a document which does not tally with its description in the summons but is the document required in the case, *held*, he should be allowed to prove it so that it can be admitted in evidence: 22 Pat.L.T. 656: A.I.R. 1941 Pat. 202.

Reception of inadmissible evidence—Effect of.—Misreception of a piece of evidence which is inadmissible but which has very little weight and admission of which causes no substantial injustice, does not vitiate the trial: I.L.R. 9 Pat. 474: A.I.R. 1930 Pat. 247. *See* S. 167.

Tape recorded statement.—Mechanical process of obtaining statements recorded on tape-recorder is fraught with possibilities of such tampering as to render a statement or conversation something quite contrary to what might have been stated by the speaker

originally or in the first instance. After a statement or a conversation has been recorded, the tape can be replayed and in most tape-recorders by reverse playing the recording is cleaned or wipped off. This means that words or sentences can be tampered with. After tampering, the tampered tape can be replayed on another tape-recorder and the second tape will produce recorded statement or conversation which will appear to be natural in continuity but which has in fact been so tampered with that it has lost its value as a correct representation of statement or conversation. If reliance is placed upon no more than record of a statement or conversation on the tape, it cannot be said to be basically reliable evidence. The only way to ensure the veracity of such statement or conversation is to examine the person whose statement or conversation has been tape-recorded, to put the recording to him, and then to let him say what he has to say about the same. Without this, to proceed or rely upon such piece of evidence is to tread on extremely unreliable ground. The recordings without examination of the person whose statements or conversations have been recorded, cannot be taken as reliable piece of evidence which can be depended upon: I.L.R. (1962) 2 Punj. 642: A.I.R. 1963 Punj. 298.

The conditions for admissibility of a tape recorded statement are as follows: (*1*) the speaker's voice must be duly identified by the person who tape recorded or by others who recognise his voice; if the voice is denied by the purported speaker, very strict proof is required to determine whether or not it was really his voice; (2) the accuracy of the tape recorded statement has to be proved by the maker of the record by satisfactory evidence, direct or circumstantial; (*3*) every possibility of tampering with or erasure must be ruled out; (*4*) the statement must be relevant according to the rules of evidence; (*5*) the recorded cassette must be carefully sealed and kept in safe or official custody; (*6*) the speaker's voice should be clearly audible, and not lost or distorted by other sounds or disturbances: A.I.R. 1986 S.C. 3: 1985 (Supp.) S.C.C. 611; A.I.R. 1974 Raj. 79: 1973 Raj.L.W. 409. *See* also A.I.R. 1965 Bom. 4: I.L.R. (1964) Bom. 240.

Tape-recordings — Not inadmissible merely on ground of possibility of their being tampered with.

Per *Majority*.—If in any particular case there is a well-grounded suspicion, not even say proof, that a tape-recording has been tampered with that would be a good ground for the Court to discount wholly its evidentiary value.

The tape-recordings were referred to by the petitioner in his writ petition as part of the evidence on which he proposed to rely in support of his assertion as regards the substance of what passed between him and the Chief Minister of Punjab and the members of the latter's family the several matters which were the subject of allegations in the petition. The written statement of the respondent—State was filed only after they had their own copies of the tape-records, so that they were in a position to verify (*a*) whether the voice it recorded was that of the person whose voice it professed to be; (*b*) whether there had been any interpolations or omissions; and (*c*) whether there had been any other tampering with the records. In the counter-affidavit filed by the State there was no denial of the genuineness of the tape-records, no assertion that the voices of the persons which were recorded in the tape-records were not those which they purported to be or that any portion of the conversation which would have given a different colour to it had been cut off.

Held, that the evidence afforded by the tape-recorded talk had to be considered in appreciating the genuineness of the talks recorded and in deciding whether the allegations made by the petitioner were substantiated or not.

Per *Raghubar Dayal* and *Mudholkar, JJ.*—Tape-recordings can be legal evidence by way of corroborating the statements of a person who deposes that the other speaker and he carried on that conversation or even of the statement of a person who may depose that he overheard the conversation between the two persons and what they actually stated had been tape-recorded. Weight to be given to such evidence will depend on the other factors which may be established in a particular case. It cannot be held that the record of the conversation on a tape-record is not admissible in evidence for any purpose: (1965) 1 S.C.A. 259: A.I.R. 1964 S.C. 72.

Where (*1*) the voices on the tape at a number of places were not very clear and were intermingled with tremendous noises; (*2*) a good part of the statement on the tape had

been denied and no other witness had identified the voice; (3) there were erasures here and there in the tape; (4) the possibility of tampering with the tape, a fatal defect, could not be ruled out; (5) the transcript was prepared without excluding the possibility of the tape being tampered; (6) the purported speakers had denied the identity of their voices; and (7) the statements had been recorded in a most haphazard and unsystematic manner and without following any logical or scientific method, *held*, the tape-recorded statements were wholly inadmissible; at any rate, they had no probative value; it is extremely unsafe to rely on such tape-recorded statements: A.I.R. 1986 S.C. 3: 1985 (Supp.) S.C.C. 611.

Where the time, place and accuracy of a tape recorded telephonic conversation, was not proved by a competent witness, *held*, the trial Court had rightly concluded that the tape-recording was not proved according to law: A.I.R. 1983 Cal. 343: (1981-82) 86 Cal.W.N. 759: (1982) 2 Cal.L.J. 74: (1982) 2 Ren. C.R. 164 (D.B.).

Where the transcript of conversations recorded on a tape or the tape itself is not produced in the trial Court or before the lower appellate Court, *held*, such conversations cannot be allowed to be adduced as additional evidence in the second appellate Court: A.I.R. 1974 Raj. 79: 1973 Raj.L.W. 409.

A tape-recorded conversion produced in a writ petition pertaining to an election matter, recorded after filing of the petition, *held*, cannot be read in evidence in the absence of any proof that the voices recorded were of the professed persons, particularly when the persons whose voices were recorded were not parties to the petition: (1989) 2 Bom.C.R. 619 (D.B.).

12. Objection as to relevancy/admissibility of evidence.—Statements which are not admissible in evidence cannot be rendered admissible by consent of parties: A.I.R. 1923 Lah. 630. *See* also A.I.R. 1924 Pat. 284: 36 I.C. 96.

Unless a party can be found to have been estopped from objecting to the admissibility of a particular piece of evidence, it cannot be said that evidence otherwise inadmissible may be perfectly good evidence if admitted by the consent of parties: A.I.R. 1942 Mad. 528: (1942) 1 M.L.J. 485.

Omission to object to the reception of evidence does not make irrelevant evidence relevant and the objection can be taken on second appeal: I.L.R. 44 Bom. 192: (1920) 22 Bom.L.R. 57. *See* also 47 M.L.J. 640; A.I.R. 1924 Nag. 358: 79 I.C. 1029; A.I.R. 1924 All. 918: 40 I.C. 553; 135 I.C. 572: A.I.R. 1931 Mad. 601.

No doubt the proper time to take an objection as to the admissibility of a document is when the document is tendered in evidence, but the omission to object to a document which is not in itself admissible will not constitute such document evidence. It is the duty of the Court to exclude all irrelevant evidence, even if no objection is taken, to its admissibility by the parties. The question of relevancy of a document is a question of law and can be raised at any stage: (1944-45) 49 Cal.W.N. 791: A.I.R. 1945 Cal. 492: I.L.R. (1946) 1 Cal. 149; 1952 Nag.L.J. 49: I.L.R. (1950) Nag. 834. The mode of proof, however, is a different matter: A.I.R. 1959 Pat. 515.

Where a piece of evidence not proved in the proper manner has been admitted without objections, the opposite party cannot challenge it at a later stage. But this principle, does not apply where evidence has been received without objection in direct contravention of an imperative provision of law: (1922-23) 27 Cal.W.N. 134: A.I.R. 1922 Cal. 160. *See* also A.I.R. 1939 All. 61: 1939 All.L.J. 128.

A party who did not object to the admissibility of secondary evidence of a registered will even in his appeal memo cannot be allowed to urge it: 31 I.C. 600.

There can be no conditional admissibility of a document. There cannot be an order that while a document is inadmissible as lease, it is admissible as a receipt: 1941 All.W.R. (Rev.) 979: 1941 R.D. 932.

An objection as to the mode of proof not taken in the Courts below cannot be taken for the first time in second appeal: 64 I.C. 266: 36 Cal.L.J. 186.

The objection that the copy of a mortgage deed is not legal secondary evidence within the meaning of S. 63 is merely to the mode of proof of a document and should be raised at the very time the document is sought to be tendered in evidence and proved. [A.I.R. 1943 P.C. 83; (1943) 2 M.L.J. 51, Foll.]: A.I.R. 1958 Raj. 110.

An erroneous omission to object to evidence being irrelevant and consequently inadmissible under any circumstances, does not make it admissible. But the Court will not entertain for first time in appeal an objection that a document not admissible has been improperly admitted in evidence: I.L.R. 45 Cal. 159: (1916-17) 21 Cal.W.N. 996; I.L.R. 3 Lah. 59: A.I.R. 1922 Lah. 281; I.L.R. (1937) Nag. 68: A.I.R. 1937 Nag. 13.

Where no objection was taken to the admissibility of a document either before the arbitrator or before the High Court in the proceedings taken to set aside the award, *held*, no objection to the admissibility could be allowed to be raised in the appeal before the Supreme Court: A.I.R. 1959 S.C. 488: 1959 S.C.J. 443.

If a party to a suit consents to the recitals in prior judgement being taken as proof of a will, he cannot object in appeal: 43 M.L.J. 448.

A Court refusing to admit a piece of evidence in the first instance has no jurisdiction to take the same into consideration at a subsequent stage, unless some good explanation or reason is shown by the party producing the same. Once a document is admitted at a late stage by a dodge or trick, there is an end of the matter: 182 I.C. 407: A.I.R. 1939 Pat. 530.

Documentary evidence relevant to the case and admitted without objection in the first Court cannot be objected to in appeal on the ground that it is not admissible for the purposes for which it has been used: 40 I.C. 553; (1930) 32 Punj.L.R. 470: 134 I.C. 700. *See* also 167 I.C. 190: I.L.R. (1937) Nag. 68: A.I.R. 1937 Nag. 13; (1943) 45 Punj.L.R. 325: A.I.R. 1944 Lah. 1.

C.P. Code (1908), S. 107, O. 13, R. 3 and O. 18, R. 11—No opportunity in lower Courts for taking objection to admissibility of evidence—Objection can be raised in appeal: (1966-67) 30 F.J.R. 134: A.I.R. 1966 Cal. 504.

Evidence which is relevant under any circumstance whatsoever must be distinguished from evidence which is admissible if certain conditions were fulfilled. In the latter case objection should be taken at the earliest possible stage and if such objection is not taken the appellate Court will not entertain it: 9 I.C. 211: 13 Cal.L.J. 18.

An objection relating to the mode of proof of a document must be raised when the document is sought to be put in evidence and not at a later stage: I.L.R. 63 Cal. 1053: A.I.R. 1936 Cal. 316.

13. Consent/waiver/irregularity—Reception of evidence.—Parties, if so minded, may ordinarily agree that evidence shall be taken in a particular way. That is not a matter which can be said to affect the jurisdiction of the Court. It is merely that parties allow certain materials to be used as evidence which apart from their consent cannot be so used. [I.L.R. 43 Mad. 609; I.L.R. 38 Mad. 160, Foll.]: 43 M.L.J. 448: A.I.R. 1922 Mad. 394.

The omission by a party to prevent irrelevant evidence from being admitted will not, in the absence of a deliberate consent to waive objections, cure the defect: 36 I.C. 906.

When the lower Court has given a finding that the document is legally proved, the appellate Court should sparingly interfere with the findings when no objection was taken at the hearing: 32 I.C. 760; I.L.R. 8 Luck. 315: A.I.R. 1933 Oudh 128. *See* also 62 Mad.L.W. 256: (1949) 1 M.L.J. 434.

Where a document is admitted without proof but without objection in the trial Court, no objection to its admissibility on the ground of want of formal proof can be taken in appeal: 44 I.C. 422: 3 Pat.L.J. 306.

If a document is once admitted in the lower Court without objection, no party can take objection to its being referred to by the Court: 36 I.C. 96: 10 Sind L.R. 4. *See* also Note 9, *supra*.

Where the only reason given for admitting a document in appeal is that it is a public document but it relates to facts which the defendant is entitled to meet, the admission is illegal: 150 I.C. 306: A.I.R. 1934 Nag. 124.

Certificates or Report of Expert—If party does not object to its admission, party must be said to have waived proof of it and not its relevance: A.I.R. 1967 Andh. Pra. 338.

14. Illegally obtained evidence.—The fact that a document was procured by improper or even illegal means is not a bar to its admissibility if it is relevant and its genuineness is proved; but while examining its genuineness, the Court has to consider the circumstances under which it came to be produced in the Court: A.I.R. 1971 S.C. 1295: (1971) 2 S.C.R. 118.

Illegally obtained evidence is admissible; but the Court has to satisfy that (*1*) such

evidence is genuine and untampered and unmutilated; (2) the Police Officer in obtaining the evidence had observed scrupulous conduct and behaviour: A.I.R. 1973 S.C. 157: (1972) 2 S.C.W.R. 776: (1973) 1 S.C.C. 471.

It is well settled that evidence illegally procured by threat, inducement and promises is not *per se* inadmissible; admissibility or otherwise of evidence is regulated by the Act; but there is a difference between admissibility which depends upon relevancy and acceptability which depends upon credibility: (1988) 3 Bom.C.R. 462.

Even in a criminal trial, if relevant evidence procured otherwise than by proper means is tendered, *held*, it is open to the Court to consider such evidence; it cannot be said that the Court could not look into it: (1991) 4 Bom.C.R. 156.

The only test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. The Court is not concerned with where and how evidence was gathered. Evidence adduced cannot be rejected on the ground merely that it is the outcome of an unauthorised investigation: (1969) 2 An.W.R. 449.

If evidence is relevant, the Court is not concerned with the method by which it was obtained: (1988) 1 Bom.C.R. 480 (S.C.).

The detaining authority under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, is entitled to rely upon the statements recorded by an officer of the Enforcement Directorate under S. 40(1) of the Foreign Exchange Regulation Act, 1973, even if that officer was not competent to record such statements under S. 40(1) of the Foreign Exchange Regulation Act, 1973: (1988) 1 Bom.C.R. 480 (S.C.). Statement recorded in breach of S. 275 of Criminal Procedure Code, 1973 does not constitute evidence: 1977 J.&K.L.R. 346.

Assessment based on documents or accounts seized illegally—Such documents can legally be used as evidence: (1965) 16 S.T.C. 687: (1965) 2 M.L.J. 406: (1965) 78 Mad.L.W. 702: 1966 Mad.W.N. 46.

Non-recording of reasons makes search illegal—But evidence of such search is not inadmissible: 31 Cut.L.T. 172: (1965) 2 Cr.L.J. 112: A.I.R. 1965 Ori. 136.

15. Written statement.—Averments in a written statement do not by themselves take the place of proof unless the same is adduced by the defendant: A.I.R. 1982 All. 385 (D.B.).

One of the defendants filing written statement in support of case of plaintiff—Defendant not examined in Court—*Held*, that such statement, in the absence of the statement of the defendant on oath, is of no use to the plaintiff: A.I.R. 1962 Pat. 168.

Where the defendant in the original written statement had averred that the property was entrusted to him by his father to effect improvement and later on the father, considering his affection towards his daughter in law and in consideration of the debt he owed to her, had orally gifted the properties to her for her livelihood which was accepted by her but neither the date nor the names of the witnesses to the gift were given which particulars were given only in the additional written statement thereafter without any explanation therefor, *held*, the particulars were undoubtedly an afterthought; oral gift not believed: A.I.R. 1989 Ker. 148.

It would no doubt add more credibility and acceptance of evidence if apart from bald allegation of cruelty and misbehaviour, the written statement also gives specific instances of misbehaviour and cruelty; but a mere absence of such details does not mean that evidence relating to cruelty and misbehaviour is to be shut out. As to what value such evidence should have is a different matter, and is certainly for the Court to examine: 1980 Hindu L.R. 70 (Del.).

Where in a suit for declaration of title and injunction, the defendants' oral testimony was at variance with their written statement and there was also no independent corroboration, *held*, their evidence was unacceptable and could not be relied on: A.I.R. 1976 Cal. 238.

16. Commissioner's report.—(*See* also O. 26, R. 10, C.P.Code). The report of survey made by the Local Commissioner deputed by the Court becomes a part of the Court's record as well as evidence as soon as it is submitted by the Commissioner: A.I.R. 1983 Ori. 259: (1983) 56 Cut.L.T. 152.

The Commissioner's report, even though not challenged by any of the parties, is not binding on the Court. When parties file no objection to the Commissioner's report, the Court rightly accepts the report; but such acceptance by itself does not preclude the

parties from challenging the report by cross-examining the Commissioner at the trial or by examining witnesses and proving documents to nullify the report's effect or to place materials from the report itself to prove that it cannot be relied upon: A.I.R. 1983 Ori. 259: (1983) 56 Cut.L.T. 152.

It is possible that scandalous, and indecent matter might be expunged by the trial Court from the evidence recorded on commission. If it proves to be irrelevant then the matter should be noted in the judgment in the case. But once evidence has been recorded on commission it must remain as such on the record. If it is irrelevant or inadmissible, it will not aid in the determination of the case and should be neglected: 1940 A.M.L.J. 4.

17. Newspaper report.—News items published in newspapers have not yet been accepted as proof of their contents: (1990) 2 Bom.C.R. 702.

A mere publication of a report in a local newspaper is not sufficient to corroborate the testimony of the witnesses deposing that the impugned statement was made at the meeting: (1974) 3 S.C.C. 719: A.I.R. 1974 S.C. 405.

Evidence—News item by itself does not constitute evidence: I.L.R. (1964) 16 Assam 395: A.I.R. 1967 Assam 74.

Newspaper report—Value of—It cannot be treated as substantive evidence—It is no evidence of facts stated therein unless the correspondent who made the report is examined: I.L.R. (1960) Mys. 1307: A.I.R. 1961 Mys. 106.

Where in an election petition, the returned candidate also admitted that the newspaper reporter's version of his speech did more or less tally with the view expressed by him in the meeting, *held*, the report of the speech, though not a full text, could be relied on: A.I.R. 1980 S.C. 354: 1980 U.J. (S.C.) 1: (1980) 1 S.C.C. 398: (1980) 1 S.C.R. 1148.

18. Circumstantial evidence.—Rule that facts are provable by circumstances as well as by direct testimony has a considerable effect in preventing guilty or dishonest parties from tampering or making away with witnesses, and other instruments of evidence; such parties would be more prone to so act if they knew that law would receive only such evidence which is contained in a few easily ascertainable depositories: A.I.R. 1955 All. 638: 1955 Cr.L.J. 1451.

There is no rule of evidence that if direct evidence on a fact is rejected, then the circumstantial evidence bearing upon that fact must be ignored; and indeed there could not be if one remembers that the circumstantial evidence is merely a direct evidence indirectly applied, and direct evidence when closely analysed is found to possess inferential quality. A fact has to be determined on the basis of such direct and circumstantial evidence as may be on record. When the direct evidence led by a party to prove a fact is found to be unreliable, the circumstantial evidence bearing upon that fact may be looked into: 1959 M.P.C. 143: A.I.R. 1959 Madh. Pra. 151 (F.B.).

Circumstantial evidence in order to justify a conviction must be exhaustive and must exclude the possibility of guilt of any other person or must point conclusively to the complicity of the accused: 38 I.C. 759: 32 Punj. Re. (Cr.) 1916.

In the case of direct evidence, where the prosecution depends on the testimony of a single witness, he should be above board. In the case of circumstantial evidence, there must be witnesses reliable to prove particular circumstances: 1968 Jab.L.J. 737: 1968 M.P.L.J. 745.

'Circumstantial evidence' ordinarily means a fact from which some other fact is inferred while 'direct evidence' means testimony of a person about what he had himself perceived by his own senses. Circumstantial evidence is the testimony of a witness to other relevant facts from which the fact in issue may be inferred, admissibility of the two forms of evidence stand on the same footing; the testimony whether about the *'factum probandum'* or the *'facta probantia'* is original and direct: 1981 Cr.L.J. 1661 (Gau.) (D.B.); 10 I.C. 929: 12 Cr.L.J. 329.

Circumstantial evidence is the testimony of a witness to other relevant facts but other than those in issue, from which the fact in issue may be inferred; the facts constituting the circumstantial evidence themselves must be clearly knitted with each other and form a strong body which must carry conviction to the Court's mind; the circumstantial evidence is that which proves or tends to prove the *'factum probandum'* indirectly, by means

of certain inferences or deductions to be drawn from its existence and their connection with *'facta probantia'*: 1982 Cr.L.J. 572 (Gau.).

Circumstantial evidence must like any other evidence be tested and weighed and must prevail or not by its own inherent proving force: 1 Mad.L.W. 1007: 16 Cr.L.J. 38. To justify an inference of guilt from circumstantial evidence the inculpatory facts must be incompatible with the innocence of the accused and must be incapable of explanation upon any reasonable hypothesis other than that of his guilt: 59 I.C. 858: 22 Cr.L.J. 154. *See* also (1963) 65 Punj.L.R. 1917: 42 I.C. 129; 8 Cal.W.N. 278: 39 I.C. 322; I.L.R. (1954) Patiala 316: A.I.R. 1955 Pepsu 33; I.L.R. (1953) Mys. 152: A.I.R. 1953 Mys. 22; 1941 All.L.J. 416, followed in A.I.R. 1949 All. 222; A.I.R. 1952 All. 776: 1952 Cr.L.J. 1585; 1953 All.L.J. 166: A.I.R. 1953 All. 211; 1953 Raj.L.W. 338: 1956 Cr.L.J. 1240; A.I.R. 1956 Sau. 83; I.L.R. 36 Pat. 141; 1957 S.C.J. 359: 1957 M.L.J. (Cr.) 254: A.I.R. 1957 S.C. 425; (1957) 2 An.W.R. 156: 1957 M.L.J. (Cr.) 421: A.I.R. 1957 Andh. Pra. 758; A.I.R. 1966 Raj. 83; A.I.R. 1966 All. 142; 1967 Cr.L.J. 125: A.I.R. 1967 Tripura 1; 1969 Pat.L.J.R. 532; 1972 Cr.L.J. 177 (Pat.) (D.B.).

Circumstantial evidence in order to furnish a basis for conviction in a criminal case, requires a high degree of probability, that is, so sufficiently high that a prudent man, considering all the facts and realizing that the life and liberty of the accused depends upon the decision, feels justified in holding that the accused committed the crime. It must be consistent, and, consistent only, with the guilt of the accused. If any rational explanation is possible, then there is an element of doubt of which the accused must be given the benefit: 1957 M.P.C. 668: 1957 M.P.L.J. 885; 1974 Chand.L.R. (Cr.) 26 (Punj.).

The Court has to consider whether the circumstantial evidence is proximate to the principal fact, *viz.*, the factum of the guilt of the accused persons. The circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established. All the facts so established should be consistent only with the hypothesis of the guilt of the accused. Incriminating facts must necessarily be incompatible with the innocence of the accused. Furthermore, there must be a chain of evidence so far complete as not to leave any ground for a conclusion therefrom consistent with the innocence of the accused: 1966 Cr.L.J. 323 (2) (Cal.); 1970 Cr.L.J. 403 (Cal.); 1955 An.W.R. 426; 1958 An. L.T. 633; 1969 Cr.L.J. 471: A.I.R. 1969 Guj. 100; A.I.R. 1955 Him. Pra. 15: 1955 Cr.L.J. 679; 1956 An.W.R. 788: 1956 An.L.T. 833; A.I.R. 1957 All. 459: 1957 Cr.L.J. 803; (1957) 2 An.W.R. 63: 1957 M.L.J. (Cr.) 368; A.I.R. 1958 Andh. Pra. 37: I.L.R. (1956) Andh. Pra. 173; A.I.R. 1957 Andh. Pra. 611: 1957 M.L.J. (Cr.) 496: (1957) 2 An.W.R. 222; 1959 Ker.L.T. 167: I.L.R. (1959) Ker. 319: 1959 Ker.L.T. 920: A.I.R. 1960 Ker. 115; I.L.R. (1969) 2 Punj. 173: 1969 Cr.L.J. 932: A.I.R. 1969 Punj. 225; 1995 Cr.L.J. 248 (P.&H.) (D.B.); 1995 Cr.L.J. 792 (Bom.) (D.B.); A.I.R. 1995 S.C. 1387: 1995 Cr.L.J. 2692; (1995) 1 S.C.J. 525.

The principle that the inculpatory fact must be inconsistent with the innocence of the accused and incapable of explanation on any other hypothesis than that of guilt does not mean that any extravagant hypothesis would be sufficient to sustain the principle, but that the hypothesis suggested must be reasonable: 1960 Cr.L.J. 137: A.I.R. 1960 S.C. 29; (1969) 17 Law Rep. 486 (Mys.). Per *Agarwala, J.*—The rule as to circumstantial evidence is that it must be consistent, and consistent only with the guilt of the accused, and if the evidence is consistent with any other rational explanation, then there is an element of doubt of which the accused must be given the benefit. Any hypothesis or explanation tending to show his innocence must be rational because an irrational or unnatural or a highly improbable explanation would not suffice. The test is of probabilities upon which a prudent man may base his opinion: A.I.R. 1955 All. 443: 1955 All.L.J. 468: I.L.R. (1956) All. 538.

A reasonable hypothesis clearly includes an explanation suggested by the counsel or one which occurs to Court. It will not be wrong or opposed to any rule of law to find the accused guilty of the offence charged against him merely on the strength of the circumstantial evidence provided that such evidence is so conclusive as to lead only to one conclusion, *viz.*, that it establishes beyond doubt the guilt of the accused when the circumstantial evidence is so thorough and convincing, it can be accepted and acted upon as good as direct evidence: 1952 Ker.L.T. 728: A.I.R. 1952 Trav.-Co. 305.

Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved and not by themselves presumed. No single item of evidence can be singled out and given prominence nor accused's theory of the case be withdrawn from consideration: I.L.R. (1952) Cut. 364: A.I.R. 1952 Ori. 267. The credibility of circumstantial evidence depends to a large extent upon the impression created in the mind of a Court by the methods adopted by the investigating agency, where these methods are fair and much criticism cannot be levelled against them, the investigation inspires confidence, but where there is a total disregard and a flagrant breach of the rule of the law, very little value can be attached to such evidence. Such an investigation is not only capable but likely to fabricate links and build up its chain of evidence: 1958 Cr.L.J. 462: A.I.R. 1958 All. 293. Per *Raman Nayar, J.* in considering a case of circumstantial evidence based on the conduct of the accused, it is very important to remember that different people react differently to the same circumstances and that often an innocent person does behave in a strange manner. Particularly so, when he is charged with the crime or knows that he is suspected of it. In such circumstances he often falsely denies circumstances which he regards as suspicious, and false alibis by innocent persons are within the experience of every criminal Judge: 1959 Ker.L.T. 167: I.L.R. (1959) Ker. 319.

In a case depending on the conclusion drawn from circumstances, it is well settled that the cumulative effect of the circumstances must be such as to negative the innocence of the accused and to bring the offences home to him beyond any reasonable doubt. Suspicion, however strong, cannot take the place of proof: (1965) 1 Cr.L.J. 565: A.I.R. 1965 Mys. 128; 1971 Raj.L.W. 311 (D.B.); I.L.R. (1958) Punj. 775: A.I.R. 1958 Punj. 356. *See* also 1957 M.L.J. (Cr.) 672: 1957 S.C.J. 699: A.I.R. 1957 S.C. 637; A.I.R. 1960 Mad. 370: 1960 Cr.L.J. 1102; A.I.R. 1956 Andhra 65: 1955 An.W.R. 933.

The mind is apt to take a pleasure in adapting circumstances to one another, and even in straining them a little if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely is it, considering such matters, to over-reach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete. What has to be seen is not the effect of each isolated item of circumstantial evidence separately but their cumulative effect: 1970 Cr.L.J. 603 (All.).

Circumstantial evidence in its very context means a combination of facts creating a network from which there is no escape for the accused, because the facts taken as a whole do not admit of any inference but the guilt of the accused. In other words, the circumstances as a whole must be thoroughly inconsistent with the hypothesis of the innocence of the accused: 29 Cut.L.T. 557.

In a case of circumstantial evidence the chain must be so complete to rule out any reasonable likelihood of innocence, if there be a reasonable hypothesis consistent with the innocence of the accused then the accused is entitled to an acquittal even if his own explanation be something else; and it is only when there is apparently no hypothesis reasonably consistent with his innocence that the question of the acceptability or otherwise of the particular explanation he might give arises. The accepted principle is that the circumstances must be consistent only with the guilt of the accused and must be inconsistent with any reasonable hypothesis consistent with innocence: 1960 Ker.L.T. 1276: I.L.R. (1961) 1 Ker. 107: A.I.R. 1961 Ker. 250. *See* also 1988 Cr.L.J. 1275 (Cal.).

In assessing evidence, imaginary possibilities have no role to play; ordinary human probabilities have. It is necessary to distinguish between primary or basic facts on one hand and inferences of facts to be drawn from them, on the other. For the proof of basic or primary facts, the Court has to judge evidence in the ordinary way; there is no scope for applying the doctrine of benefit of doubt; the Court has to decide whether the evidence proves a particular fact or not. Whether that fact leads to the inference of the accused's guilt or not is another aspect and the doctrine of benefit would apply; an inference of guilt can be drawn only if the proved facts are inconsistent with the innocence of the accused and are consistent only with his guilt: A.I.R. 1990 S.C. 2140: (1991) 1 S.C.C. 286. *See* also A.I.R. 1981 S.C. 34; A.I.R. 1977 S.C. 1063: 1977 Cr.L.J. 639.

There is a long distance between what may be true and must be true; the prosecution

has to travel all the way to fully establish the entire chain of events which should be consistent only with the hypothesis of the accused's guilt; the circumstances should be of conclusive nature and tendency and should exclude all other hypothesis but the one to be proved by the prosecution; the chain of evidence must be so consistent and complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused; it must be such as to show that within all probability the act must have been done by the accused and the accused alone: A.I.R. 1990 S.C. 2140: (1991) 1 S.C.C. 286. *See* also A.I.R. 1981 S.C. 34; A.I.R. 1977 S.C. 1063: 1977 Cr.L.J. 639; 1976 Cr.L.J. 1471 (Punj.) (D.B.); (1965) 1 Cr.L.J. 194: A.I.R. 1965 Pat. 76; I.L.R. (1960) Cut. 659; 1979 All.Cr.R. 166; (1995-2) 43 B.L.J.R. 463 (D.B.).

While appreciating circumstantial evidence, the Court must adopt a very cautious approach; it should record conviction only if all the links in the chain are complete and point to the accused's guilt; and negative every hypothesis of his innocence. But this is not to say that the prosecution must meet any and every hypothesis put forward by the accused, however far-fetched and fanciful; nor does it mean that prosecution evidence must be rejected on the slightest doubt creeping in; the law permits rejection only if the doubt is reasonable, not otherwise: A.I.R. 1992 S.C. 840. *See* also A.I.R. 1994 S.C. 468: 1994 Cr.L.J. 140.

In case of circumstantial evidence, all circumstances leading to the conclusion of guilt should be fully and cogently established; all the facts so established should be consistent only with the hypothesis of the accused's guilt; they should be of a conclusive nature and definite tendency, unerringly pointing towards the accused's guilt and should exclude every other hypothesis. Satisfactorily established, the circumstances must bring home the offences to the accused beyond all reasonable doubt. Each circumstance by itself may not be conclusive but cumulatively they must form an unbroken chain of events leading to the proof of guilt; if such or some circumstances can be explained by a reasonable hypothesis, the accused must have the benefit of that hypothesis and of doubt: A.I.R. 1990 S.C. 2140: (1991) 1 S.C.C. 286. *See* also A.I.R. 1981 S.C. 34; A.I.R. 1977 S.C. 1063: 1977 Cr.L.J. 639.

It is well settled that the circumstantial evidence to sustain conviction must satisfy three conditions: (*i*) the circumstances indicating guilt must be cogently and firmly established; (*ii*) such circumstances must be of a definite tendency unerringly pointing towards the accused's guilt; and (*iii*) taken cumulatively, the circumstances should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; in cases depending largely upon circumstantial evidence there is always a danger that conjecture or suspicion may take the place of proof; the Court has to be watchful and ensure that it does not happen, and the completed chain of circumstances must rule out a reasonable likelihood of the accused's innocence: A.I.R. 1991 S.C. 1388. *See* also 1988 Cr.L.J. 1783: A.I.R. 1988 S.C. 1274.

Before the absence or falsity of the accused's explanation for the circumstances is used as additional link against him, the Court should first satisfy itself that (*1*) various links in the chain of prosecution evidence have been satisfactorily proved; (2) the circumstances point to his guilt with reasonable definiteness; and (*3*) the circumstances are in proximity to the time and situation. It is only on all these conditions being fulfilled that a Court can use the falsity of his explanation or defence as an additional link to lend assurance to the Court. [A.I.R. 1984 S.C. 1622, Rel. on]: A.I.R. 1991 S.C. 1842.

Circumstantial evidence has peculiar excellencies and defects; some of the golden principles governing admissibility and use of circumstantial evidence are: (*1*) the facts alleged as the basis of any legal inference must be clearly proved and connected with the *'factum probandum'*; (2) the burden of proof is always on the party who asserts the existence of any fact which infers legal accountability; (*3*) in all cases, whether direct or circumstantial, the best evidence must be adduced which the nature of the case admits; (*4*) to justify the inference of guilt, the inculpatory facts must be incompatible with the accused's innocence and incapable of explanation upon any reasonable hypothesis other than that of his guilt; and (*5*) in case of a reasonable doubt about the accused's guilt, he is, as of right, to be acquitted: 1982 Cr.L.J. 572 (Gau.); 1981 Cr.L.J. 1661 (Gau.).

The conditions to be fulfilled in a case based on circumstantial evidence are: (*1*) the circumstances proving guilt should be fully established; (*2*) the facts so established should be consistent only with the hypothesis of the accused's guilt and should not be explainable on any other hypothesis except that of the accused's guilt; (3) the circumstances should be of a conclusive nature and tendency; (*4*) they should exclude every possible hypothesis except the one to be proved; and (*5*) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused; a case is proved only when there is certain and explicit evidence; no person can be convicted on pure moral conviction: A.I.R. 1984 S.C. 1622: (1984) 4 S.C.C. 116: 1984 Cr.L.J. 1738. *See* also A.I.R. 1994 S.C. 468; (1994) 1 S.C.J. 256; (1993) 1 D.M.C. 215 (Cal.) (D.B.); (1993) 2 Hindu L.R. 244 (S.C.); A.I.R. 1992 S.C. 2045; (1992) 1 Hindu L.R. 118 (S.C.); 1992 All.L.J. 898 (S.C.); A.I.R. 1962 Mys. 124: (1962) 1 Cr.L.J. 733; 1965 Ker.L.T. 292: 1964 M.L.J. (Cr.) 347; A.I.R. 1963 S.C. 200: (1963) 1 Cr.L.J. 235; (1991-1) 39 B.L.J.R. 1193 (S.C.); (1991) 3 S.C.C. 27; (1991) 1 S.C.C. 286; A.I.R. 1989 S.C. 1890; A.I.R. 1988 S.C. 1274; A.I.R. 1987 S.C. 350: (1987) 1 S.C.C. 1; (1986) 1 An.W.R. 53 (D.B.); A.I.R. 1985 S.C. 1224: 1985 Cr.L.J. 479; A.I.R. 1985 S.C. 1692; (1985) 2 Bom.C.R. 518 (D.B.); 1985 Cr.L.J. 52 (Ori.); 1985 Cr.L.J. 1416 (Raj.); 1984 Ker.L.T. 774; 1983 Cr.L.J. 1854 (Cal.) (D.B.); (1983) 55 Cut.L.T. 531; A.I.R. 1983 S.C. 446; A.I.R. 1983 S.C. 61; 1983 Cr.L.J. (N.O.C.) 212: 56 Cut.L.T. 339; 1983 Cr.L.J. 1482: 1983 Kash.L.J. 166; 1983 Cr.L.J. (N.O.C.) 227 (Ori.); (1983) 24 Guj.L.R. 215; 1982 Cr.L.J. (N.O.C.) 4 (Del.) (D.B.); A.I.R. 1982 S.C. 1157; A.I.R. 1982 S.C. 1227; 1982 Cr.L.J. 1110: (1982) 23 Guj.L.R. 464: 1982 Guj.L.H. 240; 1982 Cr.L.J. 938: 53 Cut.L.T. 130; 1982 Cr.L.J. 1804 (Gau.); 1982 Cr.L.J. 1243: (1982) 2 S.C.C. 351: 1982 M.L.J. (Cr.) 396: (1982) 1 S.C.J. 307; 1982 Ker.L.T. 692 (D.B.); 1982 Cr.L.J. 2214; 1981 Cr.L.J. 1661 (Gau.); 1981 Raj.L.W. 370; A.I.R. 1981 S.C. 738: (1981) 1 S.C.C. 511: 1981 M.L.J. (Cr.) 241; 1981 All.L.J. 991 (D.B.); 1981 Cr.L.J. (N.O.C.) 26 (Cal.) (D.B.); 1981 Cr.L.J. (N.O.C.) 73 (Gau.); 1981 Cr.L.J. (N.O.C.) 100 (Del.) (D.B.); A.I.R. 1980 S.C. 436; 1980 Cr.L.J. (N.O.C.) 41 (Punj.) (D.B.); 1980 Raj.Cr.C. 355; 1979 Raj.Cr.C. 308; A.I.R. 1979 S.C. 190; 1979 Raj.L.W. 515 (D.B.); 1979 Cr.L.J. (N.O.C.) 209 (Guj.) (D.B.); A.I.R. 1980 S.C. 1382: (1980) 2 S.C.C. 665; A.I.R. 1979 S.C. 1382: (1979) 3 S.C.C. 318: 1979 Cr.L.J. 1057: 1980 M.L.J. (Cr.) 71; A.I.R. 1979 S.C. 1410; I.L.R. (1979) 2 Del. 110: 1979 Cr.L.J. 1290 (D.B.); 1979 Cr.L.J. (N.O.C.) 102 (Punj.) (D.B.); 1979 Cr.L.J. (N.O.C.) 34 (Punj.) (D.B.); A.I.R. 1979 S.C. 1949: 1979 Cr.L.J. 1310; 1979 All.Cr.R. 273 (D.B.); (1978) 2 An.L.T. 275 (D.B.); A.I.R. 1979 S.C. 826: 1979 Cr.L.J. 566: (1979) 1 S.C.C. 535: (1979) 2 S.C.R. 875; A.I.R. 1978 S.C. 424: (1978) 1 S.C.C. 228: (1978) 2 S.C.R. 471; 1978 All.Cr.R. 444 (D.B.); I.L.R. (1977) Bom. 2425 (D.B); 1978 Cr.L.J. (N.O.C.) 80 (Raj.); 81 Cal.W.N. 724 (D.B.); 1977 Raj.L.W. 241 (D.B.); 1976 Raj.Cr.C. 182; A.I.R. 1976 S.C. 69: (1976) 1 S.C.C. 542; A.I.R. 1976 S.C. 917; 1976 Cr.L.J. 1416 (Assam) (D.B.); (1976) 42 Cut.L.T. 453 (D.B.); A.I.R. 1975 S.C. 241; 1975 Chand. L.R. (Cr.) 435 (H.P.); 1975 Cut.L.R. (Cr.) 404 (D.B.); 1975 Cr.L.J. 509 (Mad.); (1975) 2 Cr.L.T. 119 (Him. Pra.); A.I.R. 1974 S.C. 1144; A.I.R. 1974 S.C. 1545; A.I.R. 1973 S.C. 2474; A.I.R. 1973 S.C. 264; 1973 Chand. L.R. (Cr.) 529 (Punj.); (1972) 1 Cut.L.R. (Cr.) 73; A.I.R. 1973 All. 513; 1973 Cr.L.J. 723 (Raj.); 1974 Cr.L.J. 556 (Him. Pra.); A.I.R. 1972 S.C. 54; A.I.R. 1972 S.C. 110; A.I.R. 1971 S.C. 2016; 1971 Cr.L.J. 1620 (Del.); 1971 Pat.L.J.R. 414 (D.B.); A.I.R. 1971 S.C. 69; 1970 Cr.L.J. 403 (Cal.); 1970 Mad.L.W. (Cr.) 262; I.L.R. (1970) 2 Del. 854 (D.B.); (1962) 2 Cr.L.J. 81: A.I.R. 1962 Mys. 138: 1962 M.L.J. (Cr.) 41; 1960 Cr.L.J. 1360: A.I.R. 1960 Pat. 459; A.I.R. 1968 Bom. 127; 1967 Cr.L.J. 1023: A.I.R. 1967 Manipur 11; A.I.R. 1967 Goa 21: 1967 Cr.L.J. 357; A.I.R. 1967 Assam 26; 1967 Cr.L.J. 714; A.I.R. 1967 S.C. 52; A.I.R. 1963 S.C. 74; 1967 All.Cr.R. 252; A.I.R. 1995 S.C. 2585: 1995 Cr.L.J. 470.

Circumstantial evidence, therefore, must be a combination of facts creating a network through which there is no escape for the accused, or, in other words, the facts taken as a whole do not admit, to the extent of mor certainty, of any inference but of his The chain of facts constituting the must be so complete as not to le sonable ground for a concl consistent with the innoce *Held*, on facts, that it the circumstantial only with the had abducte abductio

S. 364, Penal Code: 1969 Cr.L.J. 1549: A.I.R. 1969 Tripura 57.

The doubt must be real and reasonable which the Court after full and fair consideration of the evidence, really entertains; if the evidence leaves the Court's mind in ill equilibrium, the decision must go against the party on which the burden of proof lay; if the Court's mind is evenly balanced about the accused being guilty or not, it should acquit him; and if the prosecution evidence is discredited or manifestly unreliable, the prosecution must fail: 1982 Cr.L.J. 2123 (Del.).

"A reasonable doubt ... is that quality or kind of doubt which when you are dealing with matters of importance in your own affairs you allow to influence you one way or the other". The Court cannot be satisfied beyond reasonable doubt if there be still open some reasonable hypothesis compatible with the accused's innocence. It must be remembered that, in the heat and hurry of a trial, witnesses can make mistakes; their capacities and stimuli for accurately observing and remembering vary from witness to witness; the ability and desire to narrate truly may be slight or great; a prosecution case perfect in every way can be so only by tailored evidence; there must be recognition at the outset that nicely accurate results cannot be expected in human affairs; rather a rough approximation to truth alone is attainable; the Courts of fact should remember this: 1982 Cr.L.J. 2123 (Del.).

Witnesses may lie but the circumstances do not. Thus, broad probabilities emerging from circumstantial evidence should be given proper weight: (1973) 1 Cut.W.R. 392.

Every evidentiary circumstance is a probative link, strong or weak, and must be made out with certainty. Link after link forged firmly by credible testimony may form a strong chain of sure guilt binding the accused. Each link taken separately may just suggest but when hooked on to the next and on again may *manacle* the accused inescapably. Only then can a *concatenation* of incriminating facts suffice to convict a man. Short of that is insufficient: A.I.R. 1975 S.C. 241: (1974) 4 S.C.C. 267.

Cumulative effect of circumstances may irresistibly prove guilt; circumstantial evidence of conclusive character unerringly pointing to guilt at times may be more reliable than direct evidence; but the absence of motive would be a strong circumstance favouring the accused: 1973 Cr.L.J. 723.

In case of circumstantial evidence, the Court has not to consider whether the cumulative effect of the circumstances establishes the accused's guilt beyond a 'shadow of doubt'. The 'shadow of doubt', even in cases depending on direct evidence is shadow of 'reasonable' doubt; in its practical application, the test which requires the exclusion of other alternative hypothesis is far more rigorous than the test of proof beyond reasonable doubt: A.I.R. 1981 S.C. 765: (1981) 2 S.C.C. 35: (1981) 2 S.C.R. 384.

In every case depending on circumstantial evidence, the whole of the law governing such cases need not be set out in the judgment. Legal principles are not magic incantations; their importance lies more in their application to the facts of the case than in their recital in the judgment. The only thing is that the judgment must show that the finding of guilt, if any, has been reached after a proper and careful evaluation of the circumstances and that they are not compatible with any other reasonable hypothesis: A.I.R. 1981 S.C. 765: (1981) 2 S.C.C. 35: (1981) 2 S.C.R. 384.

Rule of benefit of reasonable doubt does not imply a frail willow bending to every whiff of hesitancy. Judges are made of sterner stuff and must take a practical view of legitimate inferences flowing from evidence, circumstantial or direct: A.I.R. 1975 S.C. 241. If a reasonable doubt arises regarding the guilt of the accused, the benefit of that cannot be withheld from him: A.I.R. 1973 S.C. 2773. *See* also 1976 Cr.L.J. 1342 (Ori.) (D.B.); 1979 Raj.L.W. 103; 1976 Raj.L.W. 345 (D.B.); 1973 W.L.N. 330 (Raj.); (1974) 1 An.W.R. 407; (1972) 1 Cut.L.R. (Cr.) 245; (1971) 2 Cut.W.R. 797; A.I.R. 1979 S.C. 1410; 1977 Raj.Cr.C. 195 (D.B.); (1974) 78 Cal.W.N. 334; 1980 Raj.Cr.C. 219 (D.B.); A.I.R. 1979 S.C. 1382; A.I.R. 1977 S.C. 315; 1980 Raj.Cr.C. 355; A.I.R. 1974 S.C. 1740.

Even a conjecture or assumption capable to explain otherwise inexplicable facts is not without some basis in direct evidence; even unsatisfactory evidence can be made use of as indicated in A.I.R. 1967 All. 64: 1967 Cr.L.J. 134. Circumstantial evidence, not infrequently, indicates the truth more unerringly than direct testimony: A.I.R. 1971 All. 304.

Though, circumstantial evidence must be of a conclusive nature and circumstances must not be capable of a duality of explanation, it does not mean that the Court is bound to accept any exaggerated, capricious or ridiculous explanation which may suggest itself to a highly imaginative mind: A.I.R. 1981 S.C. 1675: (1981) 3 S.C.C. 610: 1981 Cr.L.J. 1273.

The basic rule of criminal jurisprudence is that if two views are possible in case of circumstantial evidence, one pointing to the accused's guilt and the other to his innocence, the Court should adopt the latter view: A.I.R. 1991 S.C. 1842; 1980 Raj.L.W. 208 (D.B.); 1978 Cr.L.J. 830 (Bom.); 1972 M.L.J. (Cr.) 177 (Mys.).

Where circumstances are susceptible of two equally possible inferences, the Courts should accept that inference which favours the accused rather than an inference which goes in favour of the prosecution: A.I.R. 1977 S.C. 1164; 1995 Cr.L.J. 3002 (Him. Pra.) (D.B.).

While appreciating the circumstantial evidence, the mere fact that there is only a remote possibility in favour of the accused, it would not be legally justified to allow the accused to escape punishment. It is true that the principle of innocence of an accused must be kept in view while appreciating the circumstantial evidence but simultaneously, it must also be kept in view that guilty person should not be allowed to escape punishment only on a remote possibility of innocence in his favour. In such case, the judicial conscience of the Court must be tested on the anvil of rational thinking man, who could reasonably, honestly and conscientiously arrive on the same conclusion. The Court cannot afford to give a long rope to the subordinate Courts to entertain untenable doubts about innocence of an accused on fanciful conjectures in a brutal crime committed in broad day-light. If this is permitted the law and the law Courts will not be able to protect the society from antisocial elements for whom society has developed the concept of law and law Courts from time immemorable: 1995 Cr.L.J. 1004 (Raj.) (D.B.).

Circumstantial evidence in order to furnish a basis for conviction in a criminal case requires a high degree of probability. It must be consistent and consistent only with the guilt of the accused. Suspicion is not sufficient to fasten the guilt on accused.

Where the explanation offered by an accused person is plausible, although a Court or a jury may not be convinced of its truth, the prisoner is entitled to an acquittal. The prosecution must show the explanation to be false: 1961 Ker.L.T. 1023: I.L.R. (1962) 1 Ker. 215: 1962 M.L.J. (Cr.) 640.

Suspicion is not a substitute for proof. In Criminal law the prosecution has to prove the guilt beyond reasonable doubt: A.I.R. 1995 S.C. 135.

Evidence adduced on both sides—Appraisal of: 1964 B.L.J.R. 701.

In a case where an accused pleads not guilty and does not plead any definite or specific case and leaves the proof of the charge entirely to the prosecution, the question whether the charge has been established beyond reasonable doubt or not must necessarily be based on the prosecution evidence. But in a case, where a specific defence is taken by the accused and evidence is adduced in support of his defence, the defence evidence also forms part of the record of the case as much as the prosecution evidence does. In such a case, it would be the duty of the Court to consider the entire evidence as a whole and then arrive at a decision. Under such circumstances, there is no bar to find corroboration even in the defence evidence: 1969 All.Cr.R. 565: 1969 All.W.R. (H.C.) 875.

Before conviction based solely on circumstantial evidence can be sustained, it must be such as to be conclusive of the guilt of the accused and must be incapable of explanation of any hypothesis consistent with the innocence of the accused. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must meet any and every hypothesis suggested by the accused, however, extravagant and fanciful it might be. Before an accused can contend that a particular hypothesis pointing to his innocence has remained unexcluded by the facts proved against him, the Court must be satisfied that the suggested hypothesis is reasonable and not far-fetched. Further, it is not necessary that every one of the proved facts must in itself be decisive of the complicity of the accused or point conclusively to his guilt. It may be that a particular fact relied upon by the prosecution may not be decisive in itself, and yet if that fact along with other facts which have been proved, tends to strengthen

the conclusion of his guilt, it is relevant and has to be considered. In other words when deciding the question of sufficiency, what the Court has to consider is the total cumulative effect of all the proved facts each one of which reinforces the conclusion of guilt and if the combined effect of all those facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that any one or more of those facts by itself is not decisive.

Held, on facts and circumstances of the case, that the guilt of the accused persons has been established beyond all reasonable doubt and the facts proved against them were of such a nature that the only conclusion which any Court would legitimately reach was that the offences under Ss. 120-B and 420, I.P. Code had been committed by each one of the four accused persons and under S. 419, I.P. Code by accused No. 3: (1969) 2 S.C.W.R. 807: A.I.R. 1970 S.C. 648.

Nature of proof required—Some links missing in prosecution evidence—Circumstances *held* not sufficient to warrant conviction: 1961 Ker.L.T. 546.

Though it cannot be laid down, as a law of general application, that, in no case, a Judge can accept a part of the prosecution story when he has disbelieved its other part, as a rule of prudence, it will not be safe to rely on the evidence of witnesses on one part of the prosecution story when it has been disbelieved as to its material part. It is elementary that where the prosecution has a definite or positive case it must prove the whole of the case: 1969 Pat.L.J.R. 306: 1970 Cr.L.J. 64: A.I.R. 1970 Pat. 20.

A conviction cannot be sustained even if the Court is satisfied that the prosecution story 'may be true' unless and until it is found that the prosecution story 'must be true': A.I.R. 1957 S.C. 637: 1957 M.L.J. (Cr.) 672.

Criminal Procedure Code (1898), S. 367—Onus of proving everything essential to establishment of charge against accused lies on prosecution—Evidence must be such as to exclude to a moral certainty even reasonable doubt of guilt of accused—In the matter of doubt it is safer to acquit than to condemn—Hypothesis of delinquency should be consistent with all facts proved: 1967 Cr.L.J. 52: A.I.R. 1967 Goa 4 (F.B.).

Criminal trial—Onus of proof in a criminal case is on the prosecution—Proof, need not, however, be a mathematically accurate proof—Standard of proof required is indicated in S. 3 of the Evidence Act, which is applicable to the former Portuguese territory from 1st June, 1964—Being adjective law, law of evidence has retrospective effect—Supreme Court of justice — Vol. 60, page 536—*Boletim ministerio de justica*: 1967 Cr.L.J. 473: A.I.R. 1967 Goa 51 (F.B.).

The duty that is cast on the prosecution in a criminal case is to prove their case beyond reasonable doubt against the accused. If the evidence produced in the case falls short of the quantum and the quality required by the Court trying the case, then the prosecution takes the consequences thereof. If the prosecution keeps back any evidence from some oblique motive, then obviously a Court is entitled to use that circumstance against the prosecution and in favour of the accused while judging the evidence which the prosecution chose to produce in the case. Where, however, the prosecution offers adequate explanation for the non-production of all the eye-witnesses named in the first information report and if that explanation is found satisfactory by the Court, then obviously the prosecution cannot, because of that circumstance alone, incur any disability: 1957 All.L.J. 857: 1958 Cr.L.J. 324: A.I.R. 1958 All. 214.

Where the Court accepts the story of the prosecution in respect of the crime in essential particulars, that is to say, the manner in, and the circumstances under which, it was committed, and also that some of the persons, alleged to have taken part in it, had actually been participants in the crime, the Court should endeavour to find out which of them were the actual participants, and should not throw out the case, merely because the prosecution partly had embellished the actual occurrence by making false embroideries to it, and there were discrepancies in the evidence of the prosecution witnesses. The doctrine of separating the grain from the chaff applies to such a situation. It is not intended to apply to the following cases: (*1*) Where the prosecution account of the occurrence is not acceptable in material particulars forming the core of the happenings, the Court will not ordinarily be justified to act upon any rival theory of the defence,

attempted to be proved or suggested during the trial in such a way as to take out one part of it to supplement the prosecution evidence and reject the other part of it, and then come to the conclusion that the prosecution had proved its case. (2) Where the case of the prosecution regarding the occurrence is sought to be proved by evidence which is wholly unacceptable, *e.g.*, witnesses are unreliable, by reason of enmity, by telling an extravagant story, by reason of inconsistencies in their evidence, want of corroboration in suitable cases on material parts of the story and other like infirmities, the case of the prosecution must be rejected outright. (3) Where the facts proved beyond doubt, or admitted, indicate that some sort of occurrence must have taken place, there is no rule of law preventing a Judge from arriving at in theory of actual happenings, if this can be fairly done on all the evidence. But this is not permissible, when the prosecution story about the occurrence is found to be false in its fundamental aspects: 1959 B.L.J.R. 416: 1959 Cr.L.J. 1009: A.I.R. 1958 Pat. 362.

Offence under S. 218, I.P. Code—Burden to prove fact of dishonesty lies heavily on the prosecution: 1968 Cr.L.J. 721: A.I.R. 1968 All. 207.

Notification under R. 44-A prohibiting sale of Kesari Dal for human consumption—*Held*, onus was on prosecution to prove beyond reasonable doubt that Kesari Dal kept in the shop of the accused was for sale for human consumption—Unless onus was discharged offence was not brought home and accused must be given benefit of doubt: (1967) 33 Cut.L.T. 830.

Onus of proving case on prosecution—No question of presumption arises in respect of facts which prosecution has to prove—Existence of facts cannot be presumed unless case comes under S. 114, Evidence Act: 1965 Kash.L.J. 125: (1965) 2 Cr.L.J. 640: A.I.R. 1965 J.&K. 105.

Recovery of property from accused inside harbour under alleged Mahazar—Mahazar though prefaced as such, appearing like statement of attestor—Recovery in presence of attestor, *held*, could not be believed as attestor, lorry cleaner, was unable to state lorry number or its driver's name coupled with the fact that special report made by Police Constable after recovery made no mention of attestor's name: 1969 Mad.L.W. (Cr.) 245.

Discrepancies and caution—Accused being previous convict—Prosecution still is not relieved of its duty to prove its cases beyond reasonable doubt—Conviction cannot be sustained on basis of conjectures and surmises: 1969 Cr.L.J. 739: A.I.R. 1969 Goa 68.

Credibility of circumstantial evidence largely depends upon the impression created in the Court's mind: (1975) 1 An.W.R. 304 (D.B.).

The plea of improbability can be pressed into service in many criminal cases. The veracity of the prosecution case is to be judged by the reliability of the witnesses who have deposed about the occurrence. If the witnesses are natural and have given a consistent, straight forward and unbiased account, their evidence is not to be discredited on the ground that a rational-minded accused would not behave or act in the manner stated by these witnesses. There are various ways in which a Court can assure itself that the case presented by the prosecution is concocted or substantially embellished. The prosecution story is not to be subjected to the critical and meticulous test of rationalism. It is the experience of Criminal Courts that criminals who are brought to trial seldom act rationally and the motive in most cases is such that it would not impel an ordinary thinking individual to commit the crime: (1969) 71 Punj.L.R. 33: 1969 Cr.L.J. 848.

The accused's motive need not be established in every criminal case; however, if sought to be established but found to be false, it may have some effect on the prosecution case, though absence of motive would not: 1975 Cr.L.J. 354.

Appreciation of evidence—Circumstantial evidence — Murder — Motive — Importance of—Absence of motive if necessarily vitiates conviction: (1962) 2 Cr.L.J. 354: A.I.R. 1962 Cal. 504.

Intention or object of accused—Has to be judged from facts and circumstances of the case: 1968 Cr.L.J. 584: A.I.R. 1968 All. 170.

Intention is not capable of direct proof as fact—Intention is to be gathered from surrounding circumstances and conduct of accused.

Per *V.S. Jetley, J.C.*—In criminal cases, intention, motive or knowledge under which a person acts, is an important consideration. Intention being a state of mind can never be directly proved as a fact. Further, a man is presumed to intend the natural consequences of his acts. This is a subjective investigation and intention is to be gathered from the surrounding circumstances and also the conduct of the accused: 1967 Cr.L.J. 184: A.I.R. 1967 Goa 11 (F.B.).

The motive that led to the commission of the offence is always there though often it remains undiscovered; its non-proof in cases of direct evidence is of no consequence; however in cases resting on circumstantial evidence, proof of its presence or absence is of greater weight: 1983 Cr.L.J. 1854 (Cal.); 1980 Cr.L.J. 71 (Punj.) (D.B.).

In circumstantial evidence facts in issue are indirectly inferred, not directly perceived; motive is no doubt of importance in circumstantial evidence but instances are not lacking where atrocious crimes were committed for very slight motives: 1982 Cr.L.J. 2123 (Del.).

Where accused was alleged to have robbed deceased after killing her and there was direct evidence of the witnesses that the accused was sleeping in deceased's room on the night of incident and tried to run away in the night and chain belonging to deceased was recovered at accused's instance and medical evidence showed that deceased died a homicidal death and further plea of false implication of the accused was not substantiated, *held*, omission on the part of the prosecution to discover motive was of no consequence; conviction of the accused was proper: 1994 Cr.L.J. 3656 (Him. Pra.) (D.B.).

Where prosecution case rested on ocular testimony of son and wife of deceased but the motive for alleged offence could not be said to be entirely on the side of the accused and it was found that prosecution changed its version after obtaining a copy of post-mortem report and the testimony of alleged eye-witnesses concerning the manner in which the occurrence took place did not sound natural, probable and convincing, *held*, accused could not be convicted for offence of murder: 1995 Cr.L.J. 1059 (P.&H.) (D.B.).

Where the motive for crime is totally absent and testimony of the eye-witnesses is not reliable and entire prosecution story is cooked up and not worthy of credence, accused deserves the benefit of doubt and consequent acquittal. Where deceased died as a result of strangulation but the motive for crime was absent and the manner of strangulation as stated by alleged eye-witnesses was falsified by the medical evidence and further there was delay in filing of F.I.R., *held*, prosecution failed to bring home guilt of the accused. Hence, accused was entitled to benefit of doubt: 1994 Cr.L.J. (N.O.C.) 364 (Raj.) (D.B.).

Where accused who was last seen with the deceased was alleged to have committed murder of the deceased and it was found that there was absence of motive for murder and further accused alongwith others carried dead body of deceased publicly to the hospital for treatment and also prosecution failed to establish continuous chain of circumstances, *held*, accused could not be convicted for offence of murder: 1994 Cr.L.J. (N.O.C.) 343 (Ori.) (D.B.).

Foreign markings on goods can be taken as a circumstance to infer that they were of foreign origin: (1988) 34 E.L.T. 571 (Ker.) (D.B.).

Where a car was brought at the spot at an odd morning hour, with the convict sitting at its back seat and was taken to and parked on the *kutcha* track, with its engine kept running, and when intercepted and interrogated by the Customs Officials, he did not express lack of knowledge about the presence of gold in the car dicky, and which on search yeilded gunny bags containing gold and wet mud thereon indicating that they had been placed in the dicky only a little ago, *held*, these incriminating circumstances clearly pointed to the convict's guilt. [A.I.R. 1970 Bom. 79, Affirmed]: A.I.R. 1972 S.C. 1224: (1971) 2 S.C.R. 583.

Where the proof of guilt of an accused person rests only upon circumstantial evidence the several pieces of testimony which have to be regarded as links in the chain of this evidence, have to be considered in their cumulative effect. S. 106 of the Evidence Act cannot apply to shift the burden of proof in a criminal case where the onus lies upon the prosecution throughout to establish the guilt of the accused beyond reasonable doubt. Even where there are facts specially within the knowledge of the accused which could throw a light upon his guilt or innocence, as

the case may be, the accused is not bound to allege them or to prove them. But it is not as if the section is automatically inapplicable to criminal trials. The true rule is that S. 106 does not cast any burden upon an accused in a criminal trial, but where the accused throws no light at all upon facts which ought to be especially within his knowledge and which could support any theory or hypothesis compatible with his innocence, the Court can also consider his failure to adduce any explanation as an additional link which completes the chain: I.L.R. (1960) Mad. 157: (1960) 1 M.L.J. 118: A.I.R. 1960 Mad. 218.

Where accused was alleged to have killed his wife and children and he was found lying injured in his house alongwith corpses of his wife and children and a sickle and knife having blood-stains were also found in the same house and doctor opined that injuries found on deceased persons could be caused by a sickle and further report of the Chemical Analyst stated that there was human blood on sickle and knife and blood group also fitted in with the prosecution case, *held*, the aforesaid circumstances unmistakenly completed the entire chain of circumstantial evidence against the accused which could only be consistent with his guilt wholly inconsistent with his innocence and incapable of being explained on any other reasonable hypothesis: 1994 Cr.L.J. 3493 (Bom.) (D.B.).

Where accused was alleged to have killed deceased and though he was seen by good number of people in the vicinity and he was taken into custody at a place some distance away from the spot, still he pleaded that he was not at all present at the spot and subsequently he stated that some persons murdered the deceased but the accused neither filed a complaint in police station nor took any steps to unfold his own version of the incident, which did not even remotely fit into the circumstances, *held*, the only possible conclusion would be that it was the accused and accused alone who committed the murder of the deceased. [1992 Cr.L.J. 1529 (S.C.); 1983 Cr.L.J. 1457 (S.C.), Rel. on]: 1994 Cr.L.J. 2798 (Karn.) (D.B.).

Sufficiency of circumstantial evidence. *See* A.I.R. 1958 Andh. Pra. 273; 1957 M.L.J. (Cr.) 496: 1956 An.L.T. 833: 1956 An.W.R. 788; A.I.R. 1956 Sau. 83; 1956 Cr.L.J. 1240; A.I.R. 1961 Assam 81. Suspicion — Proof: I.L.R. (1957) 7 Raj. 944: A.I.R. 1958 Raj. 338.

Circumstantial evidence in criminal trial—Reliance on: I.L.R. (1965) 15 Raj. 174: (1965) 1 Cr.L.J. 478: A.I.R. 1965 Raj. 74.

Where there is no eye-witness to the murder and the case against the accused depends entirely on circumstantial evidence, the standard of proof required to convict the accused on such evidence is that the circumstances relied upon must be fully established and the chain of evidence furnished by these circumstances should be so far complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused. In the case of circumstantial evidence, not only should the various links in the chain of evidence be clearly established, but the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. But in a case where the various links have been satisfactorily made out and the circumstances point to the accused as the probable assistant, with reasonable definiteness and in proximity to the deceased as regards time and situation and he offers no explanation, which, if accepted though not proved, would afford a reasonable basis for conclusion on the entire case consistent with his innocence, such absence of explanation or false explanation would itself be an additional link which completes the chain.

Therefore, in a murder case, where the accused who were inimically disposed towards the deceased were, a few hours prior to the incident, seen assembled at the house of accused No. 1 and preparing to use their fire arms and after the shooting incident, they were found absconding for several days without any proper explanation for their disappearance and the evidence also disclosed that the fatal shots came from within the house of accused No. 1, which fact also stood confirmed by recognised medico-legal principles, it was *held* that the complicity of the accused persons in the commission of the offence under S. 302 read with S. 34 of the Penal Code must be considered proved beyond doubt: 1967 Cr.L.J. 1155: A.I.R. 1967 Ori. 118.

Where in a criminal prosecution under Ss. 300 and 376 of the Indian Penal Code, neither the accused and the deceased being last seen together, nor the recovery of dead body at his instance, were proved beyond reasonable doubt, and there was no mention of such recovery in the inquest report or the

panchnama and medical evidence did not find any recent sign of sexual intercourse, *held*, the accused was entitled to the benefit of doubt: A.I.R. 1991 S.C. 1388: 1991 Cr.L.J. 1809.

Where offence of rape was alleged against the accused and minor prosecutrix recognised accused from his voice and stature in dark night and prosecution witness saw accused running after occurrence in moon light but his distance from accused was not mentioned, *held*, accused was entitled to benefit of doubt: 1994 Cr.L.J. (N.O.C.) 326: (1994) 1 Gau.L.R. 197.

Where offence of rape was alleged against the accused and it was found that the prosecutrix who was unknown to the accused accompanied him to a movie and also stayed in a hotel and neither any injury was present on her private parts nor was there any semen discharge on pubic hair and prosecutrix neither shouted nor asked for any help when alleged rape was being committed, *held*, offence of rape was not proved against the accused. [1977 Cr.L.J. 817 (S.C.), Rel. on]: 1994 Cr.L.J. (N.O.C.) 327 (J.&K.).

Where none of the prosecution witnesses had seen the accused stabbing the deceased with a knife but they did depose having seen the accused quarrelling with the deceased and immediately thereafter they also saw the accused running with a blood-stained knife in his hand, apprehended him with the aid of several others , and handed him over to a Police Sub-Inspector, but they were declared hostile; the Sub-Inspector, however, proved that the witnesses had indeed apprehended the accused and made him over to the Sub-Inspector; the medical evidence conclusively established that the deceased had died of injuries inflicted by a sharp-edged weapon; the accused's clothes soaked with blood belonged to the same group as that of the deceased; the prosecution witnesses were independent and had no reason to make false statements; the accused's motive for the assault was also established by oral evidence; *held*, taken cumulatively, all these facts form a chain so complete that there is no escape from the conclusion that within all human probability the murder was committed by the accused and none else; the facts proved admit of no explanation on any other hypothesis than that of the accused's guilt; conviction maintained: A.I.R. 1988 S.C. 615.

Where the appellant and her paramour prosecuted for the murder of her husband and though they were found to be in complicity but the paramour was acquitted on benefit of doubt, and the nature of injuries on the deceased being such as could not have ordinarily been inflicted by a woman's frail hands, *held*, there was no justification to maintain the conviction and sentence of the appellant: A.I.R. 1991 S.C. 342.

The accused, a male and a female, were charged with murdering the deceased by making him unconscious at her house by making him drink excessively, then strangulating him by pulling apart a rope tied on his neck and dragging his dead body and dumping it in a *nallah* half a kilometer behind her house, which was recovered four days thereafter. The dragging marks on the ground as well as the trail of the tracking dog led to the house. The death by strangulation and consumption of liquor by the deceased was established by medical evidence. The liquor bottle and steel container wherein the liquor was served were recovered from her house at her instance. The rope and the deceased's slippers were recovered at the instance of the male accused. *Held*, in the absence of direct evidence of murder, the above complete chain of circumstances, duly established by witnesses, is sufficient to prove the guilt of the accused, both under S. 302 as well as S. 201 of the Indian Penal Code: 1995 Cr.L.J. 943 (Bom.) (D.B.).

Where no one had seen the husband being attacked at night by a sharp edged weapon and it had been stated in the F.I.R. that some culprits had attacked him and the attempt to murder was sought to be proved against his eighteen year old wife who had been slapped by him a little earlier for her refusal to bed with him and the recovery of stolen ornaments at her instance allegedly concealed by her on that night in a rat-hole outside the house, *held*, the concealment and recovery being a concoction and contrary to the ordinary course of human nature, her conviction on circumstantial evidence could not be sustained: 1995 Cr.L.J. 169 (Madh. Pra.).

To attempt to isolate a particular fact from the surrounding circumstances and to discuss the logical inference may be useful mental exercise. But it is wholly out of place in any judicial decision. Judge's experience of

life is undoubtedly an important factor in evaluating the evidence placed before him. But he must judge the action and reactions of the accused and witnesses before him from their standard: (1969) 18 Law Rep. 412 (Mys.). *See* also (1962) 1 Cr.L.J. 733: A.I.R. 1962 Mys. 124: 1963 M.L.J. (Cr.) 5.

Proof for conviction in a criminal trial. *See* 1958 Ker.L.J. 273: A.I.R. 1958 Mys. 150: 1958 M.L.J. (Cr.) 341; (1958) 60 Punj.L.R. 557; 1958 M.L.J. (Cr.) 163: A.I.R. 1958 Andh. Pra. 235. Murder—Evidence: 25 Cut.L.T. 216; Value of circumstantial evidence: A.I.R. 1958 Andh. Pra. 37: 1957 M.L.J. (Cr.) 368.

The finding as to free fight can be arrived at not only on the basis of direct evidence but also on the basis of circumstantial evidence: (1965) 1 Cr.L.J. 478: I.L.R. (1965) 15 Raj. 174: A.I.R. 1965 Raj. 74.

Murder—Circumstantial evidence. *See* (1964) 1 Cr.L.J. 596 (Madh. Pra.).

Trial for murder — Circumstantial evidence—Appreciation of—Opinion of doctor not conclusive: 29 Cut.L.T. 557.

Criminal trial — Prosecution must dislodge presumption of innocence available to accused by leading evidence to prove guilt—Mere suspicion, however, strong, not sufficient for conviction: 1966 Ker.L.J. 868.

Circumstantial evidence raising mere suspicion but not proving complicity of accused in crime — Mere suspicion is not enough proof to convict: 31 Cut.L.T. 401: (1965) 2 Cr.L.J. 385: A.I.R. 1965 Ori. 170.

Murder case—Eye-witnesses independent and natural—Corroborating evidence of complainant—Medical evidence also consistent with their version—Conviction of accused proper: 1989 Cr.L.J. (N.O.C.) 78 (D.B.) (All.).

Charge of dacoity—Occurrence taking place on a dark and cloudy midnight—Culprits taking precautions to conceal their identity by painting themselves, wearing masks and using turbans to cover their faces—Sole witness failing to explain how he identified culprits—Absence of corroboration direct or circumstantial—Accused could not be convicted: 1982 Cr.L.J. 500: (1981) 52 Cut.L.T. 512.

Murder of Guru during night—Guru living with chela—Disappearance of chela next morning—This is a circumstance which stands against the chela and it has to be considered alongwith the other circumstances and the direct evidence forthcoming in the case: I.L.R. 32 Pat. 243: A.I.R. 1954 Pat. 109.

The mere possession of the bill-hooks by the accused cannot be relied upon as a circumstantial evidence to support the case that those bill-hooks must have been used for committing murder where the bill-hooks do not contain blood-stains. There must be further evidence to connect bill-hooks found with the accused with bill-hooks alleged to have been used for committing the murder: 1955 An.W.R. 220: A.I.R. 1955 Andhra 161.

Where the witnesses had seen only the causing of stab injuries and the assailant is only one, it is an inference that the other injuries were caused by the same assailant. There could be no complication in the case of a single assailant. It could be different in the case of more than one assailant and where there is no common intention. An inference might be legitimately drawn that the accused had caused all the injuries, in the circumstances and in the situation in which he was seen: (1966) 2 An.W.R. 338: 1966 M.L.J. (Cr.) 726.

Murder and robbery taking place—Accused the only companion of deceased, found within 24 hours of the incident, in unexplained possession of goods stolen in robbery—Circumstance held incompatible with innocence of the accused and incapable of explanation upon any other hypothesis than his guilt: I.L.R. 32 Pat. 243: A.I.R. 1954 Pat. 109. *See* also 1957 M.L.J. (Cr.) 120: A.I.R. 1957 Ker. 65.

Where the facts indubitably established were (*i*) that the jewels belonged to the deceased; (*ii*) that she had them with her on the night when the murder took place; (*iii*) that the accused were found to be in possession of the same the next morning after murder; and (*iv*) that they were unable to explain how they came by them, the hypothesis most favourable to the accused in the circumstances, is that, under *Illus.* (*a*) to S. 114 of the Evidence Act, they either stole them or received them knowing them to be stolen: I.L.R. (1956) Andhra 538.

Presumption—Possession of stolen property: A.I.R. 1965 S.C. 1179.

Where accused purchased 9 kg. of silver for a paltry sum deliberately knowing it to be

stolen silver and on his information several recoveries were made by the Investigating Officer of the silver ingots during the course of investigation, *held*, conviction of accused for receiving stolen property was proper: 1995 Cr.L.J. 625 (Raj.).

Mere fact of knowledge of accused of existence of stolen articles in place accessible to all is not conclusive proof of possession of those articles by accused: 31 Cut.L.T. 396.

Where three inmates, the man and his mother and wife, of a house were found to have been killed by cutting and stabbing with a chopper/knife and the ornaments worn by them were removed and taken around ten at night, and the accused, a petty money lender desperately in need of funds had been seen near the house shortly before the murder time, was seen afterwards near a culvert wearing only a *chuddy* and washing his clothes, his blood-stained thumb and foot impressions were found in the house, the bedsheet of one of the deceased, recently torn, was stained with O group blood and the torn piece was found, with same blood, from the spot where he was seen washing his clothes, and some of the removed ornaments were also recovered at the accused's instance; his *alibi* not having been proved, *held*, the chain of circumstances proving his guilt was complete; merely because, as contended by the defence, some other person might have also been involved in the murder, is no ground to set aside his conviction: 1995 Cr.L.J. 55 (Ker.) (D.B.).

The fact that the accused was arrested with blood-stained clothes when he was running away from his house after the occurrence points amply to the guilt of the accused: 1958 B.L.J.R. 60: A.I.R. 1958 Pat. 190.

Discoveries of incriminating articles containing human blood given by accused—They are very strong incriminating circumstances to arouse suspicion that accused might have been author of murder but suspicion, however grave, cannot take place of legal proof: (1969) 35 Cut.L.T. 301. See also S. 3, Note 65.

Accused charged with offence of murder—Accused and deceased last seen together at place wherefrom dead body of deceased recovered—Accused failing to give satisfactory explanation as to what happened to deceased and how deceased got fatal injuries—Accused producing knife stained with blood to police—Pant of accused found containing blood mark—On serological test both articles found containing human blood—Doctor opining that injuries on deceased could have been caused by knife produced by accused; circumstantial chain of evidence *held* was complete and accused convicted: (1969) 35 Cut.L.T. 258.

Recovery of weapon on statement of accused—Reliability of evidence relating to recovery—Depends on a large measure on whether the investigation was honest and straightforward—Where evidence of fact of most damaging character has been manufactured and produced in Court and F.I.R. was got prepared in an improper manner, evidence relating to discovery of alleged murder weapon cannot be accepted unless the same is above board and free from doubt: 1966 Cr.L.J. 369: A.I.R. 1966 All. 142; 1986 Cr.L.J. 2077.

Investigating Officer deposing to statements made by accused indicating places where incriminating articles were concealed, prior to recovery of those articles—Statements not corroborated by search witnesses—*Held*, corroboration by contemporaneous entries in search list was sufficient: (1964) 30 Cut.L.T. 544.

Where in a murder charge, soon after the deceased was found to be missing, the appellant (accused), who had earlier held out a threat that he would take revenge on the father of the deceased, made a statement to the father of the deceased that he had a hand in the disappearance of the deceased by throwing him in a furnace. *Held*, that the statement was an incriminating circumstance against the accused even if the statement was made in anger. The fact that the deceased's body was not found in a furnace but in a well was of little consequence in the circumstances of the case: 1957 Cr.L.J. 328: A.I.R. 1957 S.C. 211.

Murder of wife—Appreciation of evidence—Accused addicted to heavy drinking—At time of death of deceased, there was no one in house except accused—Trustworthy medical opinion that death was due to asphyxia—*Held*, it was accused who murdered his wife: A.I.R. 1982 S.C. 1217: 1982 Cr.L.J. 1572.

Where accused made a confessional statement (though subsequently retracted) about

his having murdered his mother-in-law by strangulation and accused was last seen with the deceased and further the medical evidence proved that deceased died as a result of asphyxia by throttling, *held*, accused could be convicted for offence of murder: 1994 Cr.L.J. (N.O.C.) 320 (Andh. Pra.) (D.B.).

Murder by poisoning—Medical evidence unable to determine the poison—Contention that medical evidence alone should be considered in deciding whether the death is violent or unnatural, not accepted—Conduct of accused and other circumstantial evidence were also held relevant in proving the guilt of the accused—Indian Penal Code, 1860, S. 302: (1966) 68 Bom.L.R. 941: 1967 Mah.L.J. 25: 1968 Cr.L.J. 453: A.I.R. 1968 Bom. 127.

Where there are strong circumstances against the accused who was alleged to have killed her brother-in-law by poisoning him by putting poison in his food, the fact that no explanation is offered by her for those circumstances completes the chain of evidence against her. [A.I.R. 1955 S.C. 801, Rel. on]: A.I.R. 1959 Him. Pra. 3.

No direct evidence as to which of the two persons including the accused, murdered the deceased. Facts established showed that accused had opportunity and also strong motive to do away with the deceased that he was insistent on cremating the corpse as early as possible when he was being prevented from doing so. *Held*, that the conduct of the accused far from establishing his innocence certainly showed that he was aware of the manner in which the old woman had met with her death and was most anxious to dispose of the body so as to avert any suspicion or proof of her having met with an unnatural death as it was finally found by the Civil Surgeon on a post-mortem examination of the dead body and that the prosecution succeeded in establishing the guilt of the accused: A.I.R. 1954 S.C. 720: 1954 Cr.L.J. 1802.

Confessional statement of accused, believed and forming main evidence against accused—Rest of evidence not sufficient in itself to convict accused, treated as corroborating confession—This is the correct estimate of probative force of other evidence: 1970 Cr.L.J. 603 (All.).

Sufficiency of evidence—Uncorroborated testimony of a single eye-witness—Dark night—Absence of source of any light—Witness a pregnant woman who suffered from night blindness—Her testimony also not corroborated by other witnesses—Conviction set aside as single eye-witness did not inspire sufficient evidence: 1980 Cr.L.J. (N.O.C.) 112: 1981 Raj. Cr.C. 199 (D.B.).

Where apart from other circumstances which could not be said to have reasonably been established on record, the prosecution alleged that the murder, committed on 16th, was discovered on the 18th when the dead body was recovered from a room not proved to be in the accused's exclusive possession and that the accused had been coming all this while to the spot to get a pit dug in the courtyard to bury the deceased even after foul smell had started emanating from the room, *held*, such version being highly unbelievable, no credence could be given to it: 1995 Cr.L.J. 470: A.I.R. 1994 S.C. 2585.

Murder—Proof of—Recovery of body is not essential—It can be proved by circumstantial evidence provided that jury is warned that evidence must irresistibly lead to that conclusion: I.L.R. (1967) 1 Mad. 226.

Murder—Proof—*Corpus delicti* not traceable—Proof of murder solely dependant on retracted confession—Improbability of murder—Duty of Court: A.I.R. 1957 S.C. 381: 1957 Cr.L.J. 559. Proof of *mens rea*: A.I.R. 1957 Mad. 675: 1957 Cr.L.J. 1279; Effect of prosecution not examining any witness: 1957 B.L.J.R. 338; Proof—Adultery—A.I.R. 1957 Mad. 766; Proof—Evidence of single witness: I.L.R. (1957) Cut. 642; Proof—Conspiracy: A.I.R. 1958 Mys. 150: 1958 M.L.J. (Cr.) 341; Proof—Criminal conspiracy: A.I.R. 1957 Bom. 226: 1957 Cr.L.J. 1107; Proof—*Benami*: A.I.R. 1957 Ker. 121; Election: A.I.R. 1960 Punj. 45; Company whether bogus or real; A.I.R. 1956 Bom. 749: (1956) 58 Bom.L.R. 20; Motor Vehicle—Cancellation of permit on refusal to review it on grounds of conviction: A.I.R. 1958 All. 30.

The circumstances, namely, that the accused on the date of occurrence about an hour before sunset was seen proceeding with the deceased in the direction of the scene of the occurrence, that the accused came home without the deceased the same evening in hurried steps and with her cloth lifted up, that the cloth was stained with human blood and that the two Naulis of the deceased which were seen on her person up to her going towards the scene of the murder had

been discovered at her instance from the thatch of her hut were only consistent with the guilt of the accused: A.I.R. 1954 S.C. 279: 1954 Cr.L.J. 743.

The mere fact that the accused and the deceased, both real brothers, were last seen together in the field, *held*, did not lead to the conclusion that the accused must have murdered him: A.I.R. 1979 S.C. 1620.

Accused charged with offence of murder—Accused and deceased last seen together at place where from dead body of deceased recovered—Accused failing to give satisfactory explanation as to what happened to deceased and how deceased got fatal injuries — Accused producing knife stained with blood to Police—Pant of accused found containing blood mark—On serological test both articles found containing man blood—Doctor opining that injuries on deceased could have been caused by knife produced by accused—Circumstantial chain of evidence, *held*, was complete and accused convicted. Penal Code (1860), S. 302: (1969) 35 Cut.L.T. 258. *See* also 1980 Srinagar L.J. 614 (D.B.).

Deceased and accused seen together on day of occurrence—Injuries on person of deceased caused by sharp cutting instrument like sickle — Sickle recovered — Clothes of accused found blood-stained at the time of arrest — Blood-stains not satisfactorily explained by accused—Ring which deceased was wearing produced by accused—Evidence *held* sufficient to prove that accused was guilty of murder: (1962) 1 Cr.L.J. 733: A.I.R. 1962 Mys. 124: 1963 M.L.J. (Cr.) 5.

Where two accused were last seen with the deceased and though both should explain the disappearance of the deceased, one of them is acquitted of the charge of murder and no appeal is filed against the acquittal, the very circumstance that the deceased was last seen with them ceases to be of an incriminating character and the other accused cannot also be convicted solely on that basis: A.I.R. 1979 S.C. 1949: 1979 Cr.L.J. 1310.

Omission of the prosecution to send the blood-stained earth found at the place of occurrence for chemical examination, *held*, throws a reasonable doubt on the prosecution's case: A.I.R. 1976 S.C. 2263.

Prosecution for possession of opium—Analytical examination of article seized not necessary in every case: (1964) 1 Cr.L.J. 453 (Madh. Pra.).

Criminal trial—Material on record justifying finding in favour of accused—Court, *held*, could act on it though accused had not taken it as a specific ground of defence—[Cr.P.Code (1898), S. 367]—[Prevention of Food Adulteration Act, 1954, S. 16 (1) and (7)—Matterdal—Analyst testing it only for pulse—Court also treating it as food-grain—Absence of additional tests could result in acquittal—Fact that accused had not pleaded it in defence, *held*, immaterial]: 1970 Cr.L.J. 340: A.I.R. 1970 Cal. 120.

Material objects—Weapons recovered not sent to ballistic expert—Recovery does not link accused with crime: 1969 Cr.L.J. 1002: A.I.R. 1969 Mad. 219.

Murder case—Overwhelming direct and circumstantial evidence for prosecution—Knife and clothes recovered from accused not got examined by Chemical Examiner—Lacuna, *held*, of no consequence: (1965) 2 Cr.L.J. 771: A.I.R. 1965 J. & K. 126.

In a case in which any general exception in the Penal Code is pleaded by the accused and evidence is adduced to support such a plea, but such evidence fails to satisfy the Court affirmatively of the existence of circumstances bringing the case within the general exception pleaded, the accused is entitled to be acquitted if upon a consideration of the evidence as a whole a reasonable doubt is created in the mind of the Court whether the accused is or is not entitled to the benefit of the said exception: 1958 All.W.R. (H.C.) 622: 1958 All.L.J. 511: 1958 All.Cr.R. 415: 1959 Cr.L.J. 413: A.I.R. 1959 All. 233.

Sufficiency for conviction—Validity. *See* Penal Code (1860), S. 148: 1969 Cr.L.J. 301: A.I.R. 1969 Ori. 23; 1969 B.L.J.R. 569.

Murder—Deceased was under medical treatment—Nature of her illness not clear—F.I.R. recorded much after incident—Alleged demand for dowry by accused, as mentioned in F.I.R. not supported by evidence—No evidence to prove ill-treatment or torture of deceased before her death—Her cremation, not objected—No adverse inference of guilt can be drawn for not having informed her father about death—Failure of prosecution to establish her own case—Accused entitled to acquittal: 1992 Cr.L.J. 1930 (S.C.).

Standard of proof in regard to the plea of *alibi* as well as in regard to prosecution evidence should be a reasonable standard: 1958 All.W.R. (H.C.) 48.

Good faith—Standard of proof: A.I.R. 1957 Madh. Pra. 95.

Appreciation of evidence—Eye-witnesses normally do not observe infliction of every injury caused to the victim; causing of injuries is inferred from circumstantial evidence. Thus, where witnesses had seen only causing of injuries and there was only one assailant, inference is that other injuries were caused by same assailant: 1966 M.L.J. (Cr.) 726: (1966) 2 An.W.R. 338.

The mere fact that the accused was seen running away from the place of occurrence, *held*, is not enough to convict him: 1981 Cr.L.J. 1110 (Gau.) (D.B.).

In a case of murder of five persons inside their family house, when prosecution evidence itself is not acceptable, mere gravity of offence cannot be made basis for conviction: A.I.R. 1992 S.C. 1131: 1992 Cr.L.J. 1426: 1992 All.L.J. 395.

The circumstances that an accused person may have taken fright and remained traceless until the time when he presented himself in the Court of the District Magistrate cannot be used against him. The fact that a man, after finding out that he is wanted by the police, takes fright and absconds is certainly suspicious but explicable on grounds other than guilt also: 1966 Cr.L.J. 1369: A.I.R. 1966 All. 607; (1975) 1 An.W.R. 304 (D.B.); 1973 Raj.L.W. 58; 1979 All.Cr.R. 273 (D.B.); A.I.R. 1971 S.C. 2156. Accused absenting from his house throughout the night of occurrence, *held*, his conduct was not consistent with his innocence: (1973) 39 Cut.L.T. 1156 (D.B.). *See* also I.L.R. (1974) Him. Pra. 509 (D.B.).

Absence of accused from his house for couple of days—Not sufficient to prove abscondence: 1969 Cr.L.J. 1393: A.I.R. 1969 Goa 116. *See* also S. 8, Note 3, *infra*.

Discovery of dead body and silver buttons stained with human blood at instance of accused—Value of: 1963 M.L.J. (Cr.) 465: (1963) 2 S.C.J. 364: 1966 Cr.L.J. 605: A.I.R. 1966 S.C. 821.

Cases where circumstantial evidence was found to be not enough to convict the accused: A.I.R. 1994 S.C. 468; A.I.R. 1994 S.C. 470: 1994 Cr.L.J. 142; A.I.R. 1994 S.C. 1511; (1994) 1 S.C.J. 6; A.I.R. 1993 S.C. 1723; 1992 All.L.J. 1182: 1992 Cr.L.J. 3972 (D.B.); (1990-2) 38 B.L.J.R. 967 (D.B.); (1990-2) 38 B.L.J.R. 1242 (D.B.); (1989-2) 37 B.L.J.R. 8 (D.B.); A.I.R. 1988 S.C. 1766; (1986) 1 Bom.C.R. 343 (D.B.); A.I.R. 1985 S.C. 1224: 1985 Cr.L.J. 479; (1985) 2 Bom.C.R. 518 (D.B.); A.I.R. 1983 S.C. 61: (1982) 3 S.C.C. 462: (1983) 1 S.C.R. 822; (1983) 24 Guj.L.R. 215; 1983 Cr.L.J. 1854 (Cal.); A.I.R. 1982 S.C. 1157; A.I.R. 1982 S.C. 1227; 1982 Cr.L.J. 572 (Gau.); 1982 Cr.L.J. 27: (1981) 83 Punj.L.R. 412; (1981) 51 Cut.L.T. 343 (D.B.); (1981) 19 Del.L.T. 38 (D.B.); 1981 Cr.L.J. (N.O.C.) 43 (Punj.); 1981 Cr.L.J. 1763: 52 Cut.L.T. 543; A.I.R. 1980 S.C. 1168; A.I.R. 1980 S.C. 1534; 1980 All.L.J. 236 (D.B.); A.I.R. 1979 S.C. 1410; A.I.R. 1979 S.C. 1949: 1979 Cr.L.J. 1310; A.I.R. 1977 S.C. 135: (1977) 1 S.C.C. 707; A.I.R. 1977 S.C. 1164; A.I.R. 1976 S.C. 951; A.I.R. 1976 S.C. 69: (1976) 1 S.C.C. 542; A.I.R. 1975 S.C. 258: (1975) 4 S.C.C. 475: (1975) 1 S.C.R. 747; A.I.R. 1974 S.C. 1545; 1974 Punj.L.J. (Cr.) 145; A.I.R. 1974 S.C. 1740; A.I.R. 1973 All. 513; A.I.R. 1972 S.C. 2077; (1972) 1 Cut.L.R. (Cr.) 227 (D.B.); 1995 Cr.L.J. 1991 (Mad.) (D.B.).

Where case based on circumstantial evidence was found to have been proved: A.I.R. 1994 S.C. 1597; A.I.R. 1994 S.C. 458; (1993) 1 Hindu L.R. 511 (S.C.); (1992) 1 Hindu L.R. 118 (S.C.); (1992-2) 40 B.L.J.R. 908 (D.B.); (1990-1) 10 Guj.L.H. 105 (S.C.); (1990-2) 38 B.L.J.R. 967 (D.B.); A.I.R. 1989 S.C. 1890; A.I.R. 1987 S.C. 350: (1987) 1 S.C.C. 1; 1985 Cr.L.J. 1651 (Andh. Pra.); 1984 Cr.L.J. 694 (P.&H.); 1982 Cr.L.J. (N.O.C.) 39 (Gau.); 1982 Cr.L.J. 938: 53 Cut.L.T. 130; (1982) 23 Guj.L.R. 464; A.I.R. 1981 S.C. 1388; 52 Cut.L.T. 507 (D.B.); A.I.R. 1981 S.C. 738: 1981 Cr.L.J. 298; (1981) 52 Cut.L.T. 126: 1981 Cr.L.J. 1452; 1981 Chand. Cr.C. 226; 1979 Chand. L.R. (Cr.) 8 (Him. Pra.); (1978) 5 Cr.L.T 347 (Punj.); 1978 M.P.L.J. 706 (D.B.); A.I.R. 1978 S.C. 1511; 1978 Raj. Cr.C. 63 (D.B.); 1976 Cr.L.J. 1342 (Ori.) (D.B.); (1976) 42 Cut.L.T. 419 (D.B.); (1975) 41 Cut.L.T. 1283 (D.B.); A.I.R. 1974 S.C. 1144; A.I.R. 1974 S.C. 1723; 1974 Mad.L.W. (Cr.) 43 (D.B.); A.I.R. 1972 S.C. 2077; 1972 Cr.L.J. 1226 (Mad.) (D.B.); 1971 Cr.L.J. 1764 (Punj.) (D.B.); (1971) 2 Cut.W.R. 373; I.L.R. (1973) Karn. 1163 (D.B.); (1971) 1 Cut.W.R. 770 (D.B.); 1995 Cr.L.J. 2692: A.I.R. 1995 S.C. 1387.

Offences under Ss. 120-B, 171, 365, 398 of Penal Code—Threatening letter by accused

two years prior to alleged commission of offences—Offences committed at night—Accused proving to be on duty on date of offence up to 7.30 p.m. and claiming to have gone for picture thereafter—Identification parade not held—Accused identified by voice only—Prosecution witnesses turning hostile—No cogent and convincing direct evidence to prove that arrested persons were same as travelled in the car used for committing alleged offences—*Held*, a threatening letter, taken in itself, cannot be an evidence for the commission of the offence unless it is proved. The prosecution could not prove by cogent, convincing and unimpeachable evidence the guilt of the accused: 1980 Raj. Cr.C. 1 (D.B.).

Intention to cause death—Injury caused with sharp edged instrument resulting in fracture of skull and making victim unconscious for number of days—Inference as to intention of accused not to cause death not to be drawn without examining doctors under whose treatment victim was kept: 1961 Jab.L.J. 1282: (1962) 2 Cr.L.J. 190: A.I.R. 1962 Madh. Pra. 239.

Where five members of a family and servant in the family died of injuries caused to them and the five members included a six months old child and the injuries inflicted upon these persons number 67, some of them being either upon the abdomen or upon the chest, this is shocking crime but the Court's approach to the evidence in the case must be dispassionate and free from prejudice and the examination of the evidence must be fair and just in fixing the guilt upon the accused persons. It would not be right to inflict death penalties upon a number of persons merely because six persons have been killed. It certainly, is not a case of mathematical equation. Nobody would suggest that for one murder there ought to be a penalty of a sentence of death passed on one person. It must, depend upon the facts of each case, and if, evidence was forthcoming to show who were the persons who actually assaulted the six persons, it would be possible to consider the case upon a different footing. In proper cases the Court should discriminate and that is probably for the reason that although a sentence may be logical, it may not be proper: (1957) 59 Bom.L.R. 244: A.I.R. 1957 Bom. 226: 1957 Cr.L.J. 1107: I.L.R. (1958) Bom. 1092.

Clandestine carrying of a liquid in tough rubber tubes—Circumstance not sufficient to conclude that the liquid contains alcohol—Grave suspicion cannot take the place of proof: 1967 Cr.L.J. 167: A.I.R. 1967 Bom. 61.

Evidence taken together establishing allegation of the prosecution that the accused murdered the deceased at a certain place with the spade, took his cash in the bag, disposed of the corpse in the channel, buried the clothes of the deceased, washed his own clothes at the culvert, paid certain amount to his mother and concealed remaining amount in the cloth bag in the hayrick behind his house—*Held*, criterion of the circumstantial evidence was satisfied and the accused was guilty of murder under S. 302, I.P.Code: 1974 Mad.L.W. (Cr.) 43 (D.B.).

Where the circumstances sought to be proved were that (*i*) the accused was much perturbed when the deceased lady attributed paternity of her new born child to the accused's son (*ii*) the deceased and her new born baby were murdered and (*iii*) the accused walked to the police station holding a blood-stained chopper in his hand on the same forenoon and handed over the chopper to the police and requested them to do whatever was necessary in the matter, *held*, the circumstances when put together could not form a chain much less a completed chain for drawing the irresistible inference that the deceased were murdered by the accused and none else. Therefore, the accused could not be convicted for the offence of murder: 1995 Cr.L.J. 61: (1994) 1 Ker.L.J. 696 (D.B.).

Where couple of hours before the incident there was a furious quarrel between the accused and the deceased in which the former asked the latter as to why he had cut the grass in his field and went away threatening that he would see him that very day, and a couple of hours after the said quarrel the informant found, while he was returning from the house of Sarpanch, that his father was dead, *held*, the aforesaid circumstantial evidence was not sufficient to warrant an inference that it was the accused alone who had murdered the deceased. [1957 Cr.L.J. 1014 (S.C.), Rel. on]: 1995 Cr.L.J. 1432 (Bom.) (D.B.).

Where accused husband caused death of his pregnant wife by kicking and beating and evidence of eye-witnesses was fully corroborated by medical evidence, *held*, conviction of accused was sustainable: 1994 Cr.L.J. (N.O.C.) 413 (Raj.).

1852

Where in a case of murder by gun-shot injuries, the testimony of the eye-witnesses, notwithstanding lengthy cross-examination, remained unshaken and their presence at the spot was also established, and further said testimony was corroborated by medical evidence as well as by the ballistic expert and no material inconsistent about the injuries sustained by the deceased was shown, the motive for murder being that the deceased and some others had assaulted and threatened him with death sometime earlier for which the accused had lodged a Police report, *held*, the accused had rightly been convicted for murder: 1995 Cr.L.J. 2038 (Raj.) (D.B.).

Where medical evidence amply supported the evidence of the eye-witnesses with regard to the manner and the nature of injuries inflicted which were responsible for death of deceased and the fact that the accused appeared before the police and produced the weapon of offence and gave a report and that from him the blood-stained clothes were recovered, *held*, all these are admissible and could be used against the accused for convicting him. [1991 Cr.L.J. 458 (Karn.), Foll.; 1954 Cr.L.J. 230 (S.C.); A.I.R. 1937 Mad. 209, Expl. and disting.]: 1994 Cr.L.J. 2584 (Mad.) (D.B.).

Delay in post-mortem examination of dead bodies is not material factor which should seriously tell against authenticity of prosecution story—Recovery of weapons of offence from odd places as result of statements made by accused to police—Circumstances go against theory of fabrication and establish correctness rather than falsity of evidence with respect to recoveries: (1961) 63 Punj.L.R. 742.

No explanation offered by accused-appellants in respect of facts completely proved by prosecution and some of them not even contested by appellants—*Held*, absence of explanation would itself be additional link which would complete chain even in case of circumstantial evidence: (1967) 69 Punj.L.R. (Del.) 168.

Where an accused was charged under Ss. 366 and 376 of Penal Code, the circumstance that the accused induced the victim girl aged 15 years to go away with him to Bombay would prove case of prosecution under S. 366: 1993 Cr.L.J. 907 (Karn.).

The fact that the deceased was stabbed in the heart and might have, bleeded internally is sufficient to explain the circumstance that no blood mark was found on the scene of occurrence: A.I.R. 1971 S.C. 1656.

Prosecution deliberately producing false witness for procuring conviction—Credibility of rest of evidence affected—It is unsafe to act upon any evidence in such a case: (1961) 63 Punj.L.R. 908.

Murder by poisoning—Circumstantial evidence—Nature of: (1965) 1 Cr.L.J. 321: A.I.R. 1965 Ori. 38.

Appreciation of evidence—Delay in lodging F.I.R.—Kidnapping of minor girl—Delay of three days in lodging F.I.R., *held*, did not justify rejection of prosecution case: 1969 Cr.L.J. 1282 (Del.).

The statement made in the F.I.R. that a certain person was an assailant is not substantive evidence and can be used only for the purpose of corroboration under S. 157 or contradiction under S. 145, Evidence Act against the maker thereof alone. The fact that a complaint was made against that person implicating him as an assailant is admissible for the limited purpose to show that such a complaint whether true or unfounded, was made: (1965) 1 Cr.L.J. 744: A.I.R. 1965 Ori. 99.

The first information report is the basis of the case although it is not the last word on the prosecution case. The fact that no eye-witness is mentioned by name therein, is a circumstance against the prosecution, particularly when the complainant was aware or could reasonably be aware of his presence. This omission has to be satisfactorily explained: 1969 Cr.L.J. 1393: A.I.R. 1969 Goa 116.

It is not necessary to give the names of eye-witnesses in the F.I.R. According to S. 154 of the Cr.P.Code, under which an F.I.R. is made, what is required, is that information relating to the commission of a cognizable offence should be given. The words 'relating to the commission of a cognizable offence' do not and cannot mean that the information must give details of all the elements of the offence or give the names of the witnesses. The fact therefore, that the name of the witness is not mentioned in F.I.R. does not affect the evidence: 1957 Jab.L.J. 321: 1957 Cr.L.J. 1138: 1957 M.P.C. 461: A.I.R. 1957 Madh. Pra. 153.

Scope—Negotiable instrument—Defendant failing to prove absence of consideration — Plaintiff also failing to prove

consideration — Duty of Court in such cases—Presumption: A.I.R. 1959 Raj. 1 (F.B.).

Disciplinary action against public servant—Finding of guilt when can be based on circumstantial evidence—Evidence not justifying such finding—Error can be corrected under Art. 226: (1963-64) 68 Cal.W.N. 215: A.I.R. 1964 Cal. 503.

Suit to recover loan—Plaintiff, a respectable Advocate—His evidence as against that of defendant would be case of oath against oath—Plaintiff's interested testimony would therefore require corroboration. *Held*, that the sole testimony of the plaintiff was not only not corroborated but on the contrary there were telling circumstances to show that he was not the real creditor so far as the suit transaction was concerned. His suit must, therefore, fail: (1964) 6 Ori.J.D. 235: 31 Cut.L.T. 6: I.L.R. (1964) Cut. 640.

Where the links completed the chain of circumstantial evidence against the accused, *held*, it would be substantial and sufficient corroboration of the approver's statement in material particulars: A.I.R. 1975 S.C. 1320: (1975) 4 S.C.C. 234.

Circumstantial evidence in the nature of recoveries and chemical evidence is of no avail in the absence of evidence to show non-tampering of sealed packets after their seizure till their delivery to the laboratory: 1980 Raj.Cr.C. 355.

Roof of a godown belonging to the accused was requisitioned by the Government for the use of the military. During the occupation by the military, the accused had repeatedly complained to the authorities that the roof was being damaged by the military authorities by the way in which it was being used, that as a consequence of it the roof had begun to leak and that the jute belonging to the accused which was stored underneath the roof in the godown was being spoiled. After the premises were de-requisitioned and handed over to the accused, the accused laid claim to compensation and damages. The claim was scrutinized by the Government Officer and the claim for the reduced amount was sanctioned and paid to the accused. The gravamen of the prosecution case was that the allegations of damages to the roof by misuse of the military as well as the allegation of collapse thereof were absolutely false, fraudulent and collusive and that there had been deliberate misrepresentation in this behalf, while it was the defence case that these allegations were substantially true and that there was no question of any misrepresentations, fraud or collusion. In the view of the High Court, the evidence did not disclose that any damage on the roof worth the name was caused by the occupying military and the subsequent conduct of the accused was such as to lead to a reasonable and necessary inference that the claim in this respect was fraudulent and the result of a conspiracy. There was no specific evidence, in the nature of contemporaneous reports or the like as to the condition of the roof (*1*) when it was taken over by the military authorities from the accused and (2) when it was handed back by them to the accused nor was there any direct evidence about the actual kind of use to which it was being put by the Government during this period. *Held*, (*i*) that in the absence of direct evidence, the conclusion had to be necessarily formed with reference to the assertion and counter-assertion in the correspondence between the accused and the Government and the subsequent conduct of the parties. The offences charged had, therefore, to be brought home to the accused in the light of the principles laid down by A.I.R. 1952 S.C. 343: 1952 S.C.J. 509: (1952) 2 M.L.J. 631 as applicable to such cases. Before a person could be found guilty with reference to mere circumstantial evidence, each of the circumstances relied upon must be clearly established and the proved circumstances taken together must be such as reasonably to exclude the probability of innocence; (*ii*) that taking all the features together, the circumstances actually made out fell far short of establishing any dishonesty, or fraud in respect of the claim for compensation due in respect of damage to the roof. There must be room for suspicion that the claim was rather overrated and that one of the accused who recommended the claim and on whose recommendation it was sanctioned, was accommodating. But this was no substitute for proof of dishonesty and fraud; (*iii*) that as regards the claim for compensation in respect of the alleged damages to the stock of jute stored within the godown, there was reason to think, on the evidence in the case (apart from any subsequent circumstances) that the claim had been very much inflated without any basis or foundation, though the occurrence of some damage might be true and that

the question then was whether the circumstances brought forward relating to this portion of the case were such as to lead to a clear inference that this claim was fraudulent and the result of a conspiracy; (*iv*) that there were definite and clinching circumstances against the accused which lead to a reasonable and necessary conclusion that the claim put forward by them for compensation in respect of the alleged damage to the jute had been deliberately and fraudulently bolstered up and was the result of a mutual arrangement: 1954 Cr.L.J. 1679: A.I.R. 1954 S.C. 660.

Apart from the fact that depending upon or drawing any inference on the basis of rejected suggestions is an impossible thing for a Court to do, suggestions of complicity in fraudulently filling up a form signed in blank has to be proved by positive and acceptable evidence. It is not possible upon mere suggestions and suspicions to ask a Court to hold a state of affairs to be true suggesting the commission of more than one offence punishable under law: 13 Law Rep. 153: A.I.R. 1968 Mys. 18.

A and *B*, two brothers entered into partnership and started business of commission agents. Accounts were maintained by *B* who was in charge of account books. On death of *B* on 3rd November, 1957, his heirs including his eldest son *H* continued the business with surviving partner *A* till it was dissolved by mutual consent on 5th February, 1958. *A* instituted suit on 4th February, 1961, against *H* and other heirs of *B* for rendition of accounts of dissolved firm. *A* found two entries dated 5th February, 1958, in account books evidencing division of partnership and closing of business that day. It was nobody's case that the entries were deeds of dissolution of partnership. The suit as well as the first appeal was dismissed on ground of suit being time-barred. On second appeal the question was whether there was any agreement between the partners *A* and *B* that in case of death of either of them, the heirs of deceased would become partners in place of deceased, *held*, (*i*) that the entries of 5th February, 1958, showed that even after the death of *B* the business of the firm under the same style and name was continued by his heirs, particularly his eldest son and the surviving partner *A*; (*ii*) that from such conduct and circumstances, the existence of an agreement of the kind in question between the original partners could be inferred. There is nothing in S. 42 to indicate that the contract to which the operation of Cls. (*a*), (*b*), (*c*) and (*d*) of that section is subject, or that it should be a contract between more than two partners. A contract to continue the partnership after the death of a partner may be implied from the conduct of the parties. Though the contract must be one between the original partners, the conduct of the surviving partner and the heirs of the deceased partner after the death of partner may evidence an original contract that the partnership should not be dissolved on the death of a partner; (*iii*) that the suit was within time: (1969) 71 Punj.L.R. 152: A.I.R. 1969 Punj. 244.

Benefit of doubt.—To convict accused it must be such that no other conclusion excepting the guilt of accused is possible — Facts proved in case not incompatible with innocence of accused—Accused is entitled to benefit of doubt: 30 Cut.L.T. 478: (1964) 6 Ori.J.D. 231.

If there is any doubt in the evidence, the benefit of that doubt must go in favour of the accused: 1956 Pat.L.R. 434. *See* also A.I.R. 1965 Andh. Pra. 361; (1965) 1 Mys.L.J. 476: A.I.R. 1966 Mys. 142; 1966 Cr.L.J. 361; A.I.R. 1967 All. 204.

Prosecution evidence raising suspicion against accused — Suspicion, howsoever strong, cannot take the place of proof—Benefit of doubt should go to the accused: (1964) 2 Cr.L.J. 497: A.I.R. 1964 All. 481; A.I.R. 1965 Ori. 170: (1963) 2 Cr.L.J. 385.

Evidence and proof—Evidence of witnesses not named in complaint—Testimony of—Possession of complainant not proved—Benefit of doubt, *held*, could be given: 1963 B.L.J.R. 251.

Opposite party violating Court's order to hand over papers and documents to petitioner—Existence of papers and documents doubtful—Benefit of doubt must go to opposite party and he cannot be found guilty of contempt: (1963-64) 68 Cal.W.N. 330.

Dying declaration not satisfactory—Police investigation inadequate and defective—Evidence not conclusive—Benefit of doubt given to accused: A.I.R. 1970 Assam 137.

Prosecution for offences under Ss. 395 and 412, Penal Code—Suspicious circumstances —Delay in filing F.I.R. not explained—No mention of accused persons in F.I.R.—

Confession made by accused, not true—Identification by prosecution witnesses of accused persons doubtful—Benefit of doubt *held* rightly given: 29 Cut.L.T. 455.

Prosecution for selling adulterated milk—Delay not explained—Benefit of doubt given on that ground: 1969 Cr.L.J. 1278 (Andh. Pra.).

Trial for offence under Prevention of Food Adulteration Act—Contravention of provisions of Act and Rules alleged—Witness not examined by food inspectors—Benefit of doubt to accused: 1969 Cr.L.J. 1344: A.I.R. 1969 Bom. 353.

Prosecution under S. 9(*a*) — Reports of Public Analyst, conflicting—Benefit of divergence must go to accused: 1967 Cur.L.J. 411.

Accused is entitled to benefit of doubt if his version may reasonably be true though he might have failed to establish its truth—Onus on accused is not as heavy as it is on prosecution: (1967) 33 Cut.L.T. 1088.

Defective investigation by itself is not ground for throwing out prosecution case and giving benefit of doubt to accused: (1966) 32 Cut.L.T. 494.

The prosecution story was that in a quarrel that arose over putting up of a fence, the accused fired a gun at a particular person. The shot, however, missed him and struck another person who was coming from the opposite direction. The defence-story was that while the accused was sleeping in his house, some 40-50 persons belonging to the opposite party in the village tried to forcibly enter into his house and, finding no other way of rescue, the accused fired one round in self-defence. In the trial the Sessions Judge found that the deceased was shot at from a distance of about 60 feet and the question of right of private defence did not arise. In view of the fact that there was party faction in the village, and enmity between the complainant and the prosecution witnesses and the accused, and in view of the medical evidence supported by Ballistic Expert's opinion it was, however, extremely doubtful if the firing was made at a distance of 60 feets as has been tried to be proved. *Held*, that in the circumstance, it was not safe to rely on the evidence of the eye-witnesses and benefit of doubt could be given to the accused: I.L.R. (1959) Cut. 654.

A obtaining decree and permanent injunction against *B* in respect of possession of land—Sudden fight between party *A* and party *B*—Party *B* found to be aggressors—Larger number of injuries on party *B* cannot wipe out criminal liability of that party—Minor discrepancies in statements of prosecution witness—Benefit of doubt—Benefit of doubt cannot be given where totality of evidence is in favour of conviction: (1965) 2 Cr.L.J. 331: A.I.R. 1965 All. 417.

Non-production of documents—Effect—Benefit of doubt—In view of confession and admission by accused there was held no question of raising any reasonable doubt on non-production of documents called for by him: 1967 Cr.L.J. 1401: A.I.R. 1967 S.C. 1590.

Appreciation of evidence—Statement of one witness being only evidence to connect accused with offence—Witnesses giving different version before committing Court from that given before Sessions Court—Nothing further to connect accused with offence—*Held*, good ground for acquitting accused: 1967 Cr.L.J. 975: A.I.R. 1967 S.C. 1027.

In a criminal trial, benefit of doubt often plays an important part. If some of the evidence leads to a conclusion that a man is guilty and if another part of the evidence in the same case indicates that the man may not be guilty, or if two possible views of a conflicting nature can be spelt out from the entire facts of the case, the accused gets benefit of doubt: A.I.R. 1966 Cal. 388.

Accused *B*, approaching *K*, a minor married girl and suggesting her to meet him at particular place if she wants to go to her parents—Same day on receiving information from *G* that *B* is waiting for her, *K* leaving her parents-in-law's house to meet *B* at pointed place from where she was taken from place to place—*Held*, it cannot be said that *K* was not under lawful guardianship of her parents-in-law on the day of occurrence—There being no evidence that *G* ever met *K* or *B* thereafter or he took away *K* or enticed her, benefit of doubt should be given to him: (1965) 67 Punj. L.R. 628.

Prosecution of husband and wife under Ss. 302 and 201, I.P.Code, respectively—Each of them taking blame at some stages on himself or herself—Each indicating that they were justified in shooting deceased—Wife stating that she shot him when he tried to

abduct her—Circumstance showing that a muzzle loading gun was used—But no evidence to show that accused was the only owner of muzzle loading gun in that village—No other evidence to pin responsibility on one of the two definitely or even to make out common intention—Assuming accused's gun was used and then put on dung heap, that by itself while creating suspicion may not point to one or the other definitely as offender—In view of wife's statement it would be a case of justification in self-defence—If her statement is rejected, nothing is left—Therefore, *held*, in circumstances that it was a fit case for benefit of doubt: 1969 Jab.L.J. 525: 1969 M.P.L.J. 524: 1969 Cr.L.J. 1291.

Offence under Ss. 302 and 324, Penal Code—Omission in F.I.R. as to all the weapons used and individual acts of accused—Absence of any reference to any specific overt Act, committed by accused even in inquest report—Version of witnesses in Sessions Court attributing specific acts to three accused and altogether exonerating fourth accused from attack upon accused: *Held*, it was a subsequent development in prosecution case—It would be improper to implicitly rely upon such version and to hold accused guilty—Accused given benefit of doubt: (1969) 2 An.L.T. 200.

Charge under S. 379, I.P. Code for committing theft of a silver waist cord from possession of a child—Accused caught hold of the child and after dashing the child against stone ran away—Subsequent missing of waist cord—Accused immediately went to police station and surrendered there—No recovery of waist cord—Accused *held* entitled to benefit of doubt: 1969 Mad.L.W. (Cr.) 29: (1969) 1 M.L.J. 511.

Seven accused persons—Three accused given benefit of doubt by reason of their names being not mentioned in F.I.R.—Other accused also need not be acquitted on that ground: A.I.R. 1970 Bom. 166.

Witness naming five assailants—Fact that Court gives benefit of doubt to two of them and acquits them is no reason for disbelieving testimony of witness: (1962) 1 Cr.L.J. 473: A.I.R. 1962 S.C. 424.

Accused person is entitled to benefit of reasonable doubt in matter of sentence as in matter of conviction: 1970 Cr.L.J. 91 (Goa).

19. Evidence in civil and criminal cases—Distinctin between.—"There is no difference between civil and criminal cases as to evidence; whatever is proper evidence in one case is in the other. With respect to criminal cases, if there is any doubt, one would lean in favour of a defendant, for this reason, that is not to be set right afterwards". Lawrence, J., Stone's case, (1796) 25 How. St. Tr. 1314. "There is no difference, in point of evidence, whether the case be a criminal or civil case, the same rules must apply to both." Hothem B., *King* v. *Cator*, (1802) 14 Esp. 143. "It has been solemnly decided that there is no difference between the rules of evidence in civil and criminal cases. If the rules of evidence prescribe the best course to get at truth, they must be and are the same in all cases and in all civilised countries." Best J., *R.* v. *Burdett*, (1820) 4 B. & Ald. 95. *See* also A.I.R. 1943 Mad. 38. The standard of proof required in criminal cases is not different from the standard of proof required in civil matters: 1957 All.L.J. 857: 1958 Cr.L.J. 324.

In a criminal case when the Court is called upon to convict a person having committed any offence, it has to satisfy itself that possibility of innocence is ruled out, but in a civil case all that is necessary to insist upon is that the proof adduced in support of a fact is such that should make a prudent man to act upon the supposition that it exists: I.L.R. (1953) Patiala 187: A.I.R. 1954 Pepsu 14.

It is well-established that in criminal proceedings facts are to be proved beyond reasonable doubt to result into a conviction; in civil proceedings, the Court is to determine the existence of facts on probability and preponderance of evidence; burden to prove shifts in civil cases but not in criminal cases: (1989) 1 Hindu L.R. 125 (P.&H.).

Civil proceedings—Finding can be rested on probabilities of the case: 1959 Ker.L.T. 1302: I.L.R. (1960) Ker. 106: A.I.R. 1960 Ker. 195.

Unlike in criminal cases, the balance of probabilities is the governing standard of proof in civil litigation. The petitioner's case for enhanced compensation based on findings in settlement report cannot be accepted just because there is no evidence on the part of the State to challenge it.

The petitioner's case for compensation will have to be judged on merits.

Held, in the instant case that petitioners are entitled to compensation for lands at 16 times the net annual yield on the basis of Verma Settlement Report, 1938: I.L.R. (1964) Cut. 785: A.I.R. 1965 Ori. 49.

Where in a suit for specific performance of an agreement to sell a share in managing agency, it is alleged that the agreement was void on the ground of its being against public policy, because the share was offered as a bribe, the burden is on them who allege, to establish the plea. They are not required to prove that fact beyond reasonable doubt as in a criminal case. The probative effects of evidence in civil and criminal cases are not always the same. In civil cases the preponderance of probability constitutes a sufficient ground for a decision but in criminal cases the prosecution has to prove the charge beyond reasonable doubt. Of course, if the facts and circumstances are such that no reasonable man would draw a particular inference from them or if the degree of probability in the case is such as to include any other hypothesis besides the one proposed to be proved, then the party who relies on a particular theory cannot be said to have discharged the onus of proof of establishing that theory. But if there is evidence strongly preponderating in favour of anyone of the theories set up, the Court is entitled to act upon it: A.I.R. 1959 Madh. Pra. 151: 1960 M.P.L.J. 334 (F.B.).

Standard of proof—Civil case involving allegation of charges of criminal or fraudulent character — Insistence on proving charges beyond reasonable doubt is wrong: A.I.R. 1966 S.C. 1734.

Evidence in civil cases is to be recorded in the mode laid down in O. 18 of the Code of Civil Procedure: (1972) 1 Cut.W.R. 318.

A fact may be taken as proved in a civil suit, though the evidence thereof may not be considered sufficient for conviction in a criminal case; in a civil suit, mere preponderance of evidence is sufficient but not in a criminal case where the prosecution must prove the charge beyond reasonable doubt. No conviction can be recorded where the prosecution story considered as a whole 'may be true' and not 'must be true': 1979 All.Cr.R. 185 (D.B.).

It is well established that the burden of proving that a member of a joint Hindu family had thrown his self-acquired property into the common stock lies on the person asserting it; this burden can only be discharged by proof that the owner had clearly expressed his intention to abandon his separate and exclusive right in favour of the members of the joint family; such intention may be expressed by words or inferred from the parties' conduct: (1974) 87 Mad.L.W. 817 (D.B.).

Income-tax Act, 1922, S. 10(2)—Burden of proving that expenditure is allowable deduction is on assessee—Burden, however, is different from proof itself: (1966) 61 I.T.R. 480 (Mad.).

20. Appreciation of evidence—General. —(*See* also S. 5). In the matter of appreciation of evidence, no hard and fast rule can be laid down; yet, in most cases, it is useful as a first step to find out whether the presence of the witness at the scene at the material time was probable; whether the substratum of the story narrated by the witness is consistent with the other evidence on record or the natural course of human events or the surrounding circumstances and inherent probabilities of the case or whether it will carry conviction with a prudent person. If the answers are in the affirmative, and the evidence of the witness appears to the Court to be almost flawless and free from suspicion, it may accept it without seeking corroboration from any other source. These are only broad guidelines which may often be useful and not iron-cased rules uniformly applicable in all situations: A.I.R. 1981 S.C. 82: (1981) 3 S.C.C. 675. *See* also I.L.R. (1967) 1 Ker. 640; 1969 Cr.L.J. 467: A.I.R. 1969 Goa 40.

No hard and fast rule can be laid down about appreciation of evidence; after all, it is a question of fact; each case has to be decided on its own facts: A.I.R. 1987 S.C. 1328: (1987) 2 U.J. (S.C.) 116: (1987) 3 S.C.C. 360: 1987 Cr.L.J. 1065.

Criminal case ought to be decided on broad view of evidence and by considering salient features of the case: (1964) 2 Cr.L.J. 711: A.I.R. 1964 Pat. 561.

How the evidence adduced on both sides is to be dealt with, is a matter which rests with the Court and no fault can be found unless the appraisal of the evidence appears to be vitiated on account of wrong placing of the onus on one or the other party: 1964 B.L.J.R. 701.

Witnesses are expected to depose to what they have seen and heard and not to draw inferences from what they see; the privilege of drawing inferences is given to Courts and not to witnesses: A.I.R. 1974 S.C. 775.

Evidence—Appreciation of—Duty of Judge: A.I.R. 1958 All. 293: 1958 Cr.L.J. 462.

If a witness is withheld by the prosecution, the complainant as well can bring to the notice of the Court for summoning such witness; but ordering re-trial on such a ground will seriously prejudice the defence as during the re-trial, the prosecution will get ample opportunity to fill up the *lacuna*. Thus, where though the prosecution had failed to produce the medical officer who conducted post-mortem examination, *held*, as charge against the accused could not be established beyond reasonable doubt otherwise also, no purpose will be served if there would be further direction for re-trial: 1995 Cr.L.J. 930 (Cal.).

Where the accused and the deceased in the murder case were closely related and the eye-witnesses examined-in-chief supported the prosecution version but could not be cross-examined because the defence Counsel was — as found by the Court — absent on design and the cross-examination could be effected rather late when the eye-witnesses turned hostile in their cross-examination, *held*, the Sessions Court rightly convicted the accused on the basis of their evidence as given in the examination-in-chief, the Court was justified in proceeding against them for perjury; such a course should be followed in similar situations to curb some manipulations: 1995 Cr.L.J. 1738 (Andh. Pra.) (D.B.).

Any information which is based on an information given by someone else has no value unless the informer who gathered the information is produced and opposite party is given an opportunity to cross-examine him. Where a question arose regarding genuineness of a report by defence witness regarding the incident which was in turn based upon information given by another person, *held*, since informer was neither examined nor his report in original was produced, no reliance could be placed on report of defence witness, it being based on hearsay: A.I.R. 1995 Del. 164.

Where the testimony of the first informant, on whose statement the formal F.I.R. was registered was cogent and consistent and was corroborated by other materials on the record, *held*, mere acquittal of some of the accused nominated by him as being present alongwith the accused persons at the time of occurrence is not enough to discredit his evidence: 1995 Cr.L.J. 2682 (S.C.).

Witnesses can and may easily perjure, but circumstances properly established rarely mislead. Witnesses are not averse to bury grains of truth in high heaps of chaff of untruth. The paramount duty of every Court is to separate the grain from the chaff on a careful and scrupulous analysis and if that is not possible give the benefit of it to the accused lest the innocent be convicted: (1965) 2 Cr.L.J. 215: A.I.R. 1965 Ker. 196: I.L.R. (1964) 2 Ker. 654.

Criminal trial—Duty of Court. *See* I.L.R. (1964) 2 Ker. 654: (1965) 2 Cr.L.J. 215: A.I.R. 1965 Ker. 196.

A Judge must assess the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses; he must not mechanically compute the evidence on record: 1974 Cr.L.J. 1120 (Ori.).

Where the parties' subsequent conduct shows that the partition effected under the *Pancha's* guidance was mutually accepted and acquiesced in, *held*, mere absence of the defendant's signature on the memorandum of partition will not invalidate the partition: A.I.R. 1975 S.C. 1119: (1975) 1 S.C.C. 556: (1975) 1 S.C.W.R. 691.

Though it is laid down in A.I.R. 1971 S.C. 804 that the evidence recorded at a late stage must be received with a pinch of salt, nevertheless each case has to be considered on its own facts: (1993) 1 D.M.C. 326 (S.C.).

Where in a case under the Narcotic Drugs and Psychotropic Substance Act, 1985 for possessing drugs without valid documents, the prosecution had alleged that the accused was apprehended when he fell down while trying to escape on his motor-cycle, but the defence countered that in absence of any injury on his person, the case of the prosecution story of the accused having fallen down from his vehicle was hardly acceptable, *held*, the prosecution did not claim that the accused had sped away to some distance and had fallen down from the speeding vehicle; its case was that the accused, on seeing the Police party, tried to accelerate the speed and in the attempt fell down and then

immediately stood up; the defence had no force: A.I.R. 1989 S.C. 1966.

Complainant stating that accused had inflicted injuries with sword on him—Other prosecution witnesses stating that they did not see any sword at the place of incident.

Held, that evidence of the latter being of negative character could not be taken to counteract and rebut the complainant's evidence that sword was used by the accused—The recovery of a sword containing human blood is a circumstance corroborating the statement of the complainant that he was injured by the accused with the sword: 1961 Raj.L.W. 55: (1961) 2 Cr.L.J. 430.

Appreciation of—Criminal trial—Finding in one case, how far binding in another case. *See* (1965) 2 Cr.L.J. 142: (1965) 2 S.C.J. 181: 1965 M.L.J. (Cr.) 513: A.I.R. 1965 S.C. 1037.

Unlawful assembly assaulting with weapons including guns—Death of some victims—Duty of Court in appreciating evidence: 1965 M.L.J. (Cr.) 312: A.I.R. 1965 S.C. 202.

Appreciation of — Criminal trial: 1963 All.L.J. 977.

Criminal trial—Mob attack—Evidence of eye-witness regarding persons taking part: I.L.R. 42 Pat. 293.

Where the accused, a member of the Armed Forces, had taken a leading and prominent part in spearheading and committing the murder and his plea of *alibi* had also failed, *held*, a mis-description or omission in the promptly recorded F.I.R. about the number of shots fired, injuries on the injured witness or the accused being a military man, would not tell on the prosecution case or the statements of the eye-witnesses with regard to his participation in the crime: A.I.R. 1992 S.C. 1389: 1992 Cr.L.J. 1952.

Right of private defence—If there is a great disproportion between number of injuries inflicted on two sides, it certainly indicates that those who inflicted larger number of injuries were likely to be aggressors: 1967 Cr.L.J. 598: A.I.R. 1967 All. 204.

To bring home the offence of the criminal breach of trust, the prosecution must establish the entrustment of the property to the accused and its mis-appropriation by him: 1983 Cr.L.J. (N.O.C.) 127 (Ori.).

Damaging statements cannot be got rid of merely by dismissing them as slips of tongue: A.I.R. 1982 Cal. 488: (1981-82) 86 Cal.W.N. 673: (1982) 1 Cal.L.J. 493.

For establishing that a school is established by a minority community, *held*, it is not necessary to prove that it was constructed by the community; even if a school, previously run by another organisation, is taken over by or is transferred to the Church which reorganised and managed it in conformity with Roman Catholics' ideals, it can be safely accepted as a school established by the Roman Catholics: A.I.R. 1974 Ker. 197: 1974 Ker.L.T. 78: I.L.R. (1974) 1 Ker. 137: 1974 Ker.L.J. 1.

Merely because the school was successively having a non-Christian as its Headmaster, *held*, that would not make it a school not established or administered by the Christian community: A.I.R. 1974 Ker. 197: 1974 Ker.L.T. 78: I.L.R. (1974) 1 Ker. 137: 1974 Ker.L.J. 1.

Where four receptacles containing about 100 packets of opium were, as per the seizure list, produced by three accused, *held*, it must further mention as to which receptacle was produced by which accused; if the attesting witnesses in their deposition implicate only one accused and say that he had produced all the four receptacles from inside the haystack, the story becomes absolutely unreliable; it is contradicted by the earlier documentary record to which both witnesses are parties: A.I.R. 1972 Gau. 7: 1972 Cr.L.J. 779.

Appreciation — Suit regarding land — Identification of land—Survey Plot number is important—No mention or wrong mention of Khata number makes difference: A.I.R. 1965 Pat. 279.

21. Factors in considering weight of evidence.—It cannot be said to be an axiom of law that every Court must reject examination-in-chief whenever cross-examination does not confirm it. A Court may believe any witness or any part of any witness's evidence and disbelieve any other part and it is entitled to come to the conclusion that the examination-in-chief is true and that statements in cross-examination are false: 1937 M.W.N. 986.

Low status of witness is not sufficient to discredit him: 1924 M.W.N. 445: A.I.R. 1924 P.C. 106 (P.C.).

The mere fact that a witness is a man of no means is no ground to discredit his evidence: A.I.R. 1935 Rang. 297: 36 Cr.L.J. 1307.

Where the parties to a suit are at issue on a vital question, such as the genuineness of defendant's signature to the document sued on, the safe principle is to consider which story fits in with the admitted circumstances and resulting probabilities. The Privy Council upheld the finding of the Chief Court as to the genuineness of the signature, in reversal of the decision of the first Court: I.L.R. 38 Cal. 805: 21 M.L.J. 1127: 38 I.A. 155 (P.C.).

In a dispute as to facts, great weight naturally attaches to the finding of the trial Judge: 15 Cal.W.N. 717: 10 I.C. 903 (P.C.).

The fact that a witness makes mistakes in identification is no reason for discrediting his evidence in other matters: I.L.R. 45 All. 300: A.I.R. 1923 All. 342.

In India where references to time are generally mere approximations there is large margin of honest error: 15 Bom.L.R. 297: 19 I.C. 328. *See* also 1994 Cr.L.J. 1206 (S.C.) (Minor inconsistency as to time).

A theory of improbability in order to prevail against positive evidence must be clear and cogent; it must be such as to justify the rejection of the positive evidence as concocted and unreliable: (1919-20) 24 Cal.W.N. 860: A.I.R. 1921 Cal. 677.

Presumption against misconduct is among the probabilities to be taken into account in estimating the value of evidence and where the character and position of the person is above reproach this probability becomes stronger. The mere fact that this or that thing in a complete transaction is improbable does not count for much as against clear and distinct evidence of reliable witnesses: I.L.R. 39 Cal. 245: 16 Cal.W.N. 266.

Illustrative cases.—The mere fact that the promissory note is stamped with a King Edward stamp does not prove that the note was executed in 1911 and not in 1915, in the absence of any evidence that there were no King Edward stamps in existence in 1915: A.I.R. 1923 Lah. 607.

Where a witness keeps quiet for many days after the occurrence and comes forward after the police had made a discovery, he is not reliable: A.I.R. 1923 Lah. 438 (2).

Without deliberately intending to tell a lie human beings are prone to believe what they wish, to confound what they believe with what they heard and to ascribe to memory what is merely the result of imagination: A.I.R. 1922 Oudh 178.

The evidence of respectable persons with special means of knowledge, owing to relationship to the parties, on the matters they depose to, should not be viewed with suspicion especially in cases where only oral evidence will ordinarily be available: 25 I.C. 660: 1 O.L.J. 383.

It is a good working rule not to act upon the evidence of persons who are vitally interested in the result of the case, unless that evidence receives corroboration. *See* A.I.R. 1922 Pat. 111.

Interested evidence is not necessarily false evidence: A.I.R. 1938 Sind 202: 178 I.C. 520. *See* also A.I.R. 1940 Pat. 629: 189 I.C. 232 (Witnesses being employee of party producing him). Where a party comes into a Court with a story, which cannot be believed in its essential details, it is impossible to rely on a part of the story for the purpose of convicting the accused: 19 Cr.L.J. 877: 47 I.C. 73.

The fact that the prosecution produces a false witness for the purpose of procuring a conviction must affect the mind of the Court as to the rest of the evidence, and when the other witnesses are easily amenable to police influence, the effect will be greater. It would be extremely unsafe for the Court to act upon any of the evidence in the case: 37 Cr.L.J. 493: A.I.R. 1936 Lah. 278.

Evidence of a person who is capable of being easily won over by either side is not entitled to any respect: A.I.R. 1936 Pesh. 12: 160 I.C. 452.

As to evidence of witnesses recorded by Commissioner, *see* A.I.R. 1938 Rang. 81: 176 I.C. 242.

It is not necessary to tender the evidence taken on commission formally at a trial to make it evidence in the case: (1932-33) 37 Cal.W.N. 666: A.I.R. 1933 Cal. 412.

22. Appreciation of evidence—Evidence to be weighed and not counted.—(*See* also Notes given under S. 134). It is the function of a Judge to arrive at a decision in civil or criminal cases, by weighing evidence and not by counting the number of witnesses examined by a party. It is the quality and not the quantity of the evidence that ought to influence the decision of a case and it is upon

this fundamental maxim that S. 134 of the Evidence Act is based: 11 Mys.L.J. 468: 39 Mys.H.C.R. 141.

The conviction depends upon the veracity and the reliability of the evidence of the witnesses already examined. The evidence is not to be counted but has to be tested and weighed. It is the quality which is material. If the evidence of the witnesses examined by the prosecution is reliable, then it is not a tenable ground that the prosecution should have examined some more witnesses, encumbering the records with oral evidence: 1968 Cr.L.J. 1630: A.I.R. 1968 Tripura 57.

Mere numbers cannot be taken into account for determining the value of the evidence: 1938 All.W.R. (H.C.) 656: 1938 All.Cr.C. 122.

Appreciation — Evidence has to be weighed and not counted: 1959 An.L.T. 884: (1961) 1 Cr.L.J. 218: A.I.R. 1961 Andh. Pra. 70.

It is not enough to prove a fact that number of witnesses should assert it. Proof of a fact would depend upon the character of the witnesses, their competency to speak to the fact. It is the assurance or persuasiveness of the evidence which alone would incline a judicial mind to put any reliance on the testimony: 19 Cut.L.T. 316: A.I.R. 1954 Ori. 40.

It is elementary that the evidence of an infirm witness does not become reliable merely because it has been corroborated by a number of witnesses of the same brand; for evidence is to be weighed, not counted: A.I.R. 1976 S.C. 989: 1975 U.J. (S.C.) 692: (1976) 1 S.C.C. 37.

Neither the number of witnesses examined nor the quantity of evidence adduced but it is the quality of the evidence that counts: (1982) 1 S.C.C. 218: 1983 M.L.J. (Cr.) 405: A.I.R. 1983 S.C. 126; 1986 M.P.L.J. 652 (D.B.); testimony of a single witness may be sufficient if his evidence is found to be honest and trustworthy and suffers from no infirmities: 1980 Rajdhani L.R. 126: I.L.R. (1979) 2 Del. 302 (D.B.).

Witnesses have to be weighed, not counted; in human affairs, quality matters more than the quantity; an accused may justly be convicted even on the evidence of a single eye-witness provided it is convincing and appears to be truthful: 1976 Kash.L.J. 253: 1976 Cr.L.J. 1310; 1982 Cr.L.J. 1702 (Ker.); 1995 Cr.L.J. 1160 (Raj.).

The evidence of an otherwise infirm witness does not become reliable merely because it is corroborated by a number of witnesses; evidence is weighed, not counted: 1978 Raj.L.W. 298 (D.B.).

The evidence of a single eye-witness, especially when corroborated by medical evidence of autopsy and other witnesses who had actually come to the spot soon after the deceased was stabbed cannot be rejected as unreliable; his evidence can neither be considered wholly unacceptable nor wholly impeachable; it has to be considered in the light of the features of the case which should put the Court on its guard; though it is not the principle of law that a conviction cannot be based on the testimony of a single witness, yet it is a well known principle of criminal jurisprudence that, before convicting the accused on the testimony of a single witness, the Court must have implicit faith and reliance on his testimony; but where a single witness, not an eye-witness, was interested, hostile, unreliable, infirm and discrepant, the accused is entitled to the benefit of doubt and acquittal: 1981 Mad.L.W. (Cr.) 237.

It is open to a Judge to rest his finding on the solitary testimony of a single witness whom he found to be credible even if he had a personal interest in the litigation: (1958) 60 Punj.L.R. 49: A.I.R. 1958 Punj. 164.

It is not the law that a fact cannot be proved by the evidence of a single witness. If there is nothing intrinsically unbelievable in the evidence of a particular witness, the Court can well rely upon his testimony and find the facts deposed to by him as proved: (1967) 33 Cut.L.T. 640: I.L.R. (1967) Cut. 616.

The law is well settled that the evidence of a single witness, if believed, would be sufficient to prove a fact. This is because the evidence has to be weighed and not counted. The qualitative and not quantitative character of the evidence is what the Act stresses. The law is also well settled that the evidence of a witness need not be necessarily true in all respects. It may be partly true and partly untrue. It is for the Courts to separate truth from untruth. The maxim *'falsus in uno falsus in omnibus'* has not received general acceptance by the Courts in our country. Untruth on a major point would doubtless shake the

credit of a witness but not necessarily on a minor point: 1969 Cr.L.J. 1393: A.I.R. 1969 Goa 116.

Evidence of single eye-witness—Sufficiency: I.L.R. (1957) Cut. 642.

Legally there can be no objection in basing the conviction of the accused on the sole testimony of a witness provided he is above reproach and entitled to full credit. But where there was bad blood between the parties from before the occurrence and litigation both civil and criminal was going on between them, complainant's failure to promptly lodge a report at the police station, omission of the names of the accused from the report, omission to mention his wife's presence at the place of occurrence in the report and the allegation of his being relieved of a wrist watch and ring all cast serious doubt on his veracity. *Held*, on facts that the convictions were based on evidence which was not on record and hence the convictions were set aside: 1968 Cr.L.J. 378: 1968 Raj.L.W. 35: A.I.R. 1968 Raj. 63.

Where, in a criminal trial, there was only one prosecution witness who stated about the recovery of non-duty paid ganja from the possession of the accused but his evidence was corroborated by the confessional statement made by the accused and recorded by another prosecution-witness, the contention that conviction ought not to have been based upon the testimony of one witness alone was not upheld: 1957 B.L.J.R. 149.

In criminal cases, it is the weight of the evidence and not the number of the witnesses, which the Court has and ought to consider: 63 I.C. 407: 24 O.C. 225. Per *Rowland, J.*—Evidence needs to be not merely enumerated but weighed; the safe principle is to consider which story fits in with the admitted circumstances and resulting probabilities. The real test for either accepting or rejecting evidence is how consistent the story is with itself, how it stands the test of cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case. If witnesses are *prima facie* interested or dis-interested, or if they have changed or developed their story from time to time, these are also matters that ought to be regarded: I.L.R. 21 Pat. 854.

It is improper for Judge to tell the jury in his charge that "the law is, the more heinous is the offence the more rigid or stricter the proof shall be." That is not a correct view of the law. The law is the same whether the offence is heinous or not; the standard of proof is exactly the same, namely, that the evidence should be such as to lead a reasonable mind to a satisfactory conclusion that the offence has been brought to the accused: I.L.R. 21 Pat. 865.

There is no provision in the Indian law requiring more than one witness to prove any fact: 1937 A.M.L.J. 134.

A test to assess the credibility of evidence is whether the evidence is inherently probable and whether the conduct of the prosecution witnesses is such as would invest them with any measure of veracity. A witness who has something in his knowledge vitally concerning the matter of enquiry cannot be believed if he does not mention it at the time when he is expected to do so: 41 P.L.R. J. & K. 11.

Even an unreliable witness may not be false; and if the Police have trumped up one witness or two or has embroidered the story to give it a credible look, that by itself cannot defeat justice if there is clear and unimpeachable evidence of the accused being guilty; even if the case against the accused hangs on the evidence of a single eye-witness, it may be enough to sustain conviction based on sterling testimony of a competent, honest man although as a rule of prudence the Courts call for corroboration; a platitude it is, but witnesses have to be weighed and not counted: A.I.R. 1973 S.C. 2622.

Conviction can be based on testimony of a single credible witness—Unless required by statute corroboration of his evidence should not be insisted upon, except where it is required as a rule of prudence—Single witness, a soda vendor, having some convictions for petty offences—This does not lessen the credibility of his evidence: 1968 Cr.L.J. 1362 (Ker.).

Misapprehension implies a positive and demonstrable mistake or misunderstanding; whereas mis-appreciation of evidence is more subjective and by no means so capable of logical demonstration: I.L.R. (1938) Nag. 442: A.I.R. 1938 Nag. 394.

23. Corroboration.—There is no rule of law compelling a Court to accept uncorroborated testimony of any party: (1979) 1 Ren. L.R. 290 (Del.).

Corroboration is not an absolute requirement except for prudence and caution. *See* 1989 Cr.L.J. (N.O.C.) 218 (Ori.).

Corroboration renders other evidence more probable: 1980 All.L.J. 674 (D.B.).

Corroboration, in order to be of any value, must be on material particulars and the facts relied on for corroboration must be established by reliable and independent evidence. These facts must be such as to lend assurance to the crucial issue in question: 1962 Jab.L.J. 28: 1961 M.P.L.J. 1361.

Evidence is not sufficient to constitute corroboration if it is such as itself requires corroboration: 1970 Cr.L.J. 91 (Goa).

The testimony of a witness, though given traditionally on oath, has still to be judged by the Court on the touchstone of the probabilities of the case and conduct of the witness; if there is something inherently improbable, no question of seeking corroboration can arise; the acceptability of a witness's testimony is not determined merely because it is given on oath; the sanctity of oath is not always recognised by the witnesses. If the Court accepts a testimony merely for its having been given on oath, the Court would be failing in its duty of testing the veracity of evidence given in the Court: (1988) 1 Bom.C.R. 92 (D.B.).

The evidence of a witness who shifts his stand requires corroboration by other reliable evidence, at least in material particulars: 1976 Cr.L.J. 228. *See* also 1973 Cr.L.J. 1880 (Madh. Pra.).

It is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should itself be sufficient to maintain conviction. The independent evidence must not only corroborate that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular that the accused committed the crime. The corroboration must also come from independent sources and lastly the corroboration need not be by direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime. The nature of corroboration of the evidence of a witness from that of an accomplice is different. The standard of corroboration in the case of a witness is not as strict as it is in the case of an accomplice or an approver: I.L.R. (1962) Cut. 726: (1963) 2 Cr.L.J. 294: A.I.R. 1963 Ori. 144.

Criminal trial—Even evidence which is not completely reliable can be acted upon when corroborated by reliable evidence: 1966 Cr.L.J. 1363: 1966 All.L.J. 1046: A.I.R. 1966 All. 590.

Corroboration evidence—Principles of—Not applicable to rape cases—As a matter of prudence, however, Courts insist upon the need of corroboration: 1967 Cr.L.J. 922: A.I.R. 1967 Raj. 159.

Evidence, appreciation of—Statement of one partly reliable witness can be corroborated by statement of more than one similar witness—Partly reliable and partly unreliable witnesses—Corroboration by independent evidence not required and Court may act on circumstances lending assurance to testimony of witnesses: I.L.R. (1965) 15 Raj. 129: (1965) 1 Cr.L.J. 219: A.I.R. 1965 Raj. 32.

Where the witness is neither wholly reliable nor wholly unreliable the Court seeks corroboration from some independent evidence or from circumstances. There can be no corroboration of a false or doubtful witness by another witness of the same character: A.I.R. 1960 All. 585: 1960 Cr.L.J. 1276: 1960 All.L.J. 361.

A witness who is partly reliable and partly unreliable cannot be relied upon without adequate corroboration on material particulars by independent evidence: 1962 M.P.L.J. (Notes) 224. *See* also 1989 Cr.L.J. (N.O.C.) 188 (Ker.).

It is not possible to have corroboration by one witness in identical terms with the testimony of another; the proper course is to read the witnesses' evidence as a whole to find out whether there was corroboration on material aspects: A.I.R. 1985 Mad. 321: (1985) 98 Mad.L.W. 248: (1985) 2 M.L.J. 100 (D.B.).

It is generally not easy to find witnesses on whose testimony implicit reliance can be placed; it is always advisable to test their evidence on the anvil of objective circumstances appearing in the case: A.I.R. 1974 S.C. 1936.

The complainant in a trap case, being an interested witness, needs to be corroborated in some material particulars though corroboration on all material aspects should not

be expected: 1982 Cr.L.J. (N.O.C.) 211: 1982 Guj.L.H. 977: (1982) 23 Guj.L.R. 438.

Murder trial—Corroboration of witness who deposes as to material facts alleged by prosecution is desirable and in some cases necessary: 1967 Cr.L.J. 357: A.I.R. 1967 Goa 21 (F.B.).

24. Examination of only material witness.—(*See* also S. 114, *Illus.* (*g*)). The Evidence Act does not provide that any particular number of witnesses should be examined in proof of any fact and therefore, a conviction can be based even on the solitary testimony of a single witness provided that witness is believed by the Court. This principle will generally hold good when the fact to which he deposes is not within the knowledge of anyone else or when the incident or the occurrence is not witnessed by anybody else. But when there are others equally respectable and disinterested who have witnessed the occurrence, which is in issue and when those witnesses or at least some of them are not examined in corroboration of the evidence of the other witness and no explanation is offered for their non-examination, generally it is unsafe to rely on the uncorroborated testimony of a single witness in a case of this type where the liberty of the subject is at stake. The non-examination of the other material witnesses, though available, will very much weaken the evidence of the single witness, however respectable he may be: I.L.R. (1956) Mys. 118: A.I.R. 1956 Mys. 51.

Evidence—Prosecution not required to produce all witnesses—But must produce witnesses essential to unfolding of the narrative: (1965) 2 Cr.L.J. 499: A.I.R. 1965 Him. Pra. 49.

The prosecution need not examine all the witnesses; it is sufficient if it examines the witnesses whose evidence is essential to the "unfolding of the narrative": A.I.R. 1971 S.C. 1586: (1971) 2 S.C.C. 42. It does not require that all eye witnesses should necessarily be called: A.I.R. 1977 S.C. 701: (1976) 4 S.C.C. 348. But non-examination of material witness without assigning any acceptable and convincing reason may cast serious reflection on the propriety of the trial itself: 1976 Cr.L.J. 1504 (Mad.).

Once a witness examined on oath by the prosecution was believed and his evidence was found trustworthy by the Court, *held*, non-examination of further witnesses would be of no effect. [1977 Cr.L.J. 642 (S.C.) and 1979 Cr.L.J. 917 (S.C.), Rel. on]: 1981 Raj.L.W. 150: 1982 Cr.L.J. 36; A.I.R. 1970 Bom. 166.

The prosecution is only required to produce such witnesses who assist in unfolding the prosecution story and any other category of witnesses who do not assist in unfolding the prosecution story would not be necessary witnesses. Multiplicity in examination of witnesses, who do not in any manner add to or subtract from what has been stated by the witnesses is always to be avoided: 1979 Chand. L.R. (Cr.) 68: 1979 Sim.L.C. 371 (D.B.).

If the prosecution's evidence is reliable and trustworthy, any infirmity arising out of non-examination of other witnesses does not affect the credibility of the witness already examined: 1979 W.L.N. (U.C.) 252 (Raj.) (D.B.).

Where the prosecution gave up certain prosecution witnesses for having been won over by the defence, *held*, their non-examination would not affect the probative value of the evidence of other prosecution witnesses: A.I.R. 1989 S.C. 1456: 1989 Cr.L.J. 1466.

No doubt, one who reaches the spot after the occurrence may be treated as an independent witness and his evidence may be worth consideration; but his not being examined will not adversely tell upon the prosecution version supported by otherwise trustworthy and reliable evidence: (1992-1) 40 B.L.J.R. 436 (D.B.).

Non-examination of material witness throws doubt over the case of the prosecution—Cr.P.Code (1898), S. 367: 1968 Cr.L.J. 1390 (Manipur).

Non-examination of a person who could not give any material evidence is not fatal: A.I.R. 1992 S.C. 1602: 1992 Cr.L.J. 2421.

Non-examination of witnesses other than eye-witnesses, *held*, does not affect the prosecution's case: A.I.R. 1979 S.C. 1173: (1979) 4 S.C.C. 332.

The law laid down in A.I.R. 1978 S.C. 1558 is clear and manifest; it is not important as to who were not examined; it is more important whether the witnesses actually examined should be believed: (1989) 2 Bom.C.R. 475 (D.B.).

The witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution;

whether the effect of their testimony is for or against the prosecution case is of no consequence: (1987-2) 28 Guj.L.R. 878 (D.B.).

If the evidence of two eye-witnesses is believed, it is not necessary to multiply witnesses to prove the case; thus, the non-examination of a third witness, also injured in the occurrence, cannot cast any doubt on the prosecution case: A.I.R. 1980 S.C. 184: 1980 U.J. (S.C.) 70: (1980) 3 S.C.C. 55.

Examination of witnesses—Murder case —Child, a daughter of accused, said to be sleeping at time of occurrence—Child also staying with accused after occurrence—Prosecution's failure to examine child—Whether proper: 1967 Cr.L.J. 1023: A.I.R. 1967 Manipur 11.

25. Failure to examine independent witness.—An adverse inference can be drawn against the prosecution for omitting to examine independent eye-witnesses: 1979 W.L.N. (U.C.) 474 (Raj.). *See* also 1973 Chand. L.R. (Cr.) 304.

Prosecution's case cannot be thrown out merely because of its inability to produce independent witnesses: (1988-2) 29 Guj.L.R. 823: A.I.R. 1988 S.C. 696; A.I.R. 1988 S.C. 1998.

If the evidence adduced by the prosecution is found to be reliable, *held*, non-examination of witnesses of locality would by itself not render the accused's conviction unsustainable in law: 1995 Cr.L.J. 2583 (Bom.).

The question of examining independent witnesses assumes importance only when the Court has a genuine doubt about the reliability of the witnesses already examined; such witnesses are supposed to give an independent, dis-interested version which can corroborate or contradict the witnesses already examined and facilitating the Court's task in appreciating the overall evidence in proper perspective; the question of examining independent witnesses ultimately pertains to the satisfaction of the Court's judicial conscience. It is well known that corroboration is merely a rule of prudence, not a rule of law. It is a rule which must be present to the mind of every Court while appreciating evidence in criminal trials; but if the Court feels safe and secure in accepting and relying upon evidence of a witness, it need not seek for its corroboration examination of independent witnesses: (1990-2) 31 Guj.L.R. 1215 (D.B.).

Failure to bring independent witnesses of an offence committed in rural areas, *held*, should not be treated as an infirmity; it would be unrealistic to hold that the evidence actually adduced should be disbelieved on that count: 1981 Raj.L.W. 150: 1982 Cr.L.J. 36.

Where the only eye-witnesses examined in a murder case were the brother and maternal first cousin of the deceased attacked at 9.00 a.m. in the chowk and despite the presence of other persons nearby in the shops, the Patwarkhana and the Gurudwara none else was examined and their testimony abounded in gross contradictions and their conduct was wholly against the course of human nature, *held*, such evidence could not be relied upon to hold the accused persons guilty of murder. However, two accused who in the course of their examination under S. 313 of the Code of Criminal Procedure admitted that they had inflicted injuries on the person of the deceased with hockey and *gandasi* and the injuries so inflicted being sufficient in ordinary course of nature to cause the death, they were convicted for murder under Ss. 302/34 of the Indian Penal Code; their statements amounted to evidence. [A.I.R. 1953 S.C. 468, Rel. on]: 1995 Cr.L.J. 1333 (Raj.) (D.B.).

Where the eye-witnesses' presence at the thickly populated scene of occurrence was not natural but doubtful and no independent local witness was examined and the prosecution version was materially different from the deceased's dying declaration and even the names of the accused in the dying declaration were also different and there was no mention of the so-called eye-witnesses having seen the occurrence and the injuries on the accused were also not explained by the prosecution, *held*, the accused was rightly acquitted: A.I.R. 1989 S.C. 1519. *See* also 1979 Cr.L.J. 236 (All.) [Overruled on another point in 1981 Cr.L.J. 379 (All.) (F.B.)].

As it is well known that in case of Police Nakabandi, it may take hours to get any result of the Nakabandi; a normal citizen would not agree to spend his time and energy in such police pursuits and, therefore, witnesses available being Police Officers or being under their influence cannot be

disbelieved for that reason only: (1976) 78 Punj.L.R. 288.

In a matrimonial cause under S. 13 of the Hindu Marriage Act, 1956, the wife, allegedly beaten by the husband inside the house, has no independent corroborative evidence; its witnesses by and large would be the husband's family members or neighbour or servants: (1983) 2 D.M.C. 77: 1983 Rajdhani L.R. 729 (Del.).

Major and minor contradictions in evidence of witnesses—Non-examination of independent witness in case of minor discrepancy—Effect. *See* (1965) 1 Cr.L.J. 580: A.I.R. 1965 Pat. 176.

Where on complaint of a person, accused in four criminal cases, a trap was laid 10 days after the payment of Rs. 2 as bribe to a bench clerk in Court and another two rupees paid to him by the complainant were recovered from the clerk after taking him to the adjoining room after about 20 minutes without taking an independent witness from the Court hall or the next room, *held*, in appreciating evidence, the background should not be forgotten; though the *panch* witness corroborated the complainant but the delay in effecting the recovery, the failure to examine independent witnesses admittedly available in the Court hall and the next room to which the accused was taken, render the entire prosecution case to be unacceptable: A.I.R. 1980 S.C. 1558.

26. Position of Trial and Appellate Court.—An appellate tribunal may bring its knowledge of life and business to bear even in cases where in the lower Court contemporary communications and course of business are used, and it can say that evidence given about them at the trial cannot be true: A.I.R. 1915 P.C. 50: 34 I.C. 273 (P.C.).

In a matter of appreciation of evidence and the credibility of witness the opinion of the trial Judge should not be lightly disturbed on appeal: I.L.R. 39 Bom. 386: 42 I.A. 110: 28 M.L.J. 593 (P.C.). Also *see* I.L.R. 43 Cal. 707: 31 M.L.J. 1: 43 I.A. 73 (P.C.); A.I.R. 1941 Bom. 129: I.L.R. (1941) Bom. 211; A.I.R. 1943 Pesh. 29: 207 I.C. 342; 28 Cal.L.J. 306: 48 I.C. 561; I.L.R. 39 All. 426; 39 I.C. 666; 27 I.C. 276: 20 Cal.L.J. 501; I.L.R. 1 Rang. 461: A.I.R. 1923 P.C. 156: 46 M.L.J. 334 (P.C.).

Appreciation of evidence and credibility of witnesses—Opinion of Trial Judge has to be given due weight: 1969 Cr.L.J. 1393: A.I.R. 1969 Goa 116.

There are four ways by which a trial Court can hold a witness unreliable: (*a*) the witness's statement is inherently improbable or contrary to the course of nature; (*b*) the witness's deposition contains mutually contradictory or inconsistent passages; (*c*) the witness is found to be a bitter enemy of the opposite party and therefore, possesses ample motive for wishing him harm; (*d*) the witness's demeanour whilst under examination is found abnormal or unsatisfactory (a contingency provided for by S. 363, Cr.P.Code). With regard to items (*a*), (*b*) and (*c*) above, the Court of appeal in evaluating the testimony of a witness is not at all in an inferior position compared to the trial Court, but may stand in a position of greater advantage over the trial Court, for it can view the evidence of the witness concerned more objectively and so is in a better position to decide the question of his credibility. It is only in respect of item (*d*) that the trial Court can be deemed to be in a more favourable position, for it alone has the advantage of watching the demeanour of the witness whilst in the witness-box and can, if it so chooses, make a note about the demeanour. The statutory definition of 'proof' in S. 3, Evidence Act combined with the above analysis would go to show that when the trial Court as a result of its observation of the demeanour of a witness reaches a certain conclusion on the credibility of the witness and thereupon arrives at a finding of fact, that finding must be given great weight by the appeal Court; but if the trial Court's assessment is based on one or more of items (*a*), (*b*) and (*c*) above, there is no legitimate reason why the Court of appeal should not after taking into account the matters before it including the reasons advanced by the trial Court, find a fact 'proved' and thereby upset a finding on that point by the trial Court: A.I.R. 1957 All. 53.

The statement of the Judge, who presided at a trial, whether it be in a criminal or a civil case is, as to what has taken place at the trial, conclusive. But a distinction must be drawn between what is part of the record of the Court and a report submitted in response to or for the purpose of eliciting the truth of an allegation contained in an application for transfer or in an affidavit supporting it. Such a report to the superior Court does not

partake of the nature of the record of the Court and has no incontrovertible quality attached to it. Such a report does not partake of the character of a judicial proceeding; it is essentially administrative in character. It can be contradicted and can even be disbelieved for sufficient reasons. It is a different matter that ordinarily weight would be attached to a statement of the presiding officer of a Court. No doubt in such cases there is the possibility of the Magistrate being embarrassed but it is no unqualified duty of the superior Court to protect subordinate Courts from such embarrassment; it can never be at the cost of justice. Where a superior Court has to ascertain the truth of an allegation, no avenue can be shut out which might lead it to the truth: 1963 Jab.L.J. 314: (1963) 1 Cr.L.J. 820 (Madh. Pra.).

Appreciation of evidence — Position of trial and appellate Court — Factors to be considered: A.I.R. 1957 All. 53.

Appellate Court — Remarks regarding demeanour of witness, recording of—Non-compliance with rule—Effect: 1968 Ker.L.J. 123.

Where oral evidence is crucial and the trial Court had come to a finding after observing the witnesses' demeanour, *held*, the appellate Court would not interfere, notwithstanding some discrepancies therein: A.I.R. 1991 Andh. Pra. 47.

The highest judicial mandate in *Sarju Prasad*, A.I.R. 1951 S.C. 120 and *Madhusudan*, A.I.R. 1983 S.C. 114 lays down that primacy must be attached to the trial Court's opinion on the witnesses' credibility; the appellate Court must be very slow in discarding evidence of any witness in appeal who had been found reliable and accepted by the trial Court: A.I.R. 1987 Madh. Pra. 244: 1987 Jab.L.J. 462: 1987 M.P.L.J. 719.

The uniform practice in the matter of appreciation of evidence is that if the trial Court has given cogent and detailed reasons for not accepting the testimony of a witness, the appellate Court in all fairness ought to deal with those reasons before proceeding to form a contrary opinion: A.I.R. 1972 S.C. 1716.

If a trial Court or the first appellate Court does not consider it necessary to discuss in detail any relevant evidence on record, *held*, it should better indicate its reasons in short to that effect so that the second appellate Court is not required to probe into the matter like a first Court of appeal: A.I.R. 1978 Ori. 125.

In appraisal of oral evidence, the trial Court's opinion carries great importance because it had the opportunity to look to the demeanour of the witnesses; thus, but for cogent reasons, normally the appellate Court does not disturb the trial Court's findings based on oral evidences: (1990-2) 38 B.L.J.R. 1171; 1979 Raj.L.W. 103; A.I.R. 1973 Mys. 205; 1973 Cr.L.R. 475 (Bom.); 1980 M.L.J. (Cr.) 793; 1971 W.L.N. 360 (Raj.) (D.B.).

Evidence considered and accepted by the original Court, cannot be interfered with by the appellate Court, when it is supported by documentary evidence: A.I.R. 1991 Andh. Pra. 47.

Merely because the trial Court had seen the witnesses, watched their demeanour and accepted their evidence will not prevent the appellate Court from re-appreciating and disbelieving their evidence: (1994) 1 M.L.J. 44 (D.B.).

The question whether the plaintiff was a son of a particular person or not is a question of fact; it cannot be agitated in second appeal unless it satisfies the condition therefor set out in S. 100 of the Code of Civil Procedure: 1983 All.W.C. 87 (Rev.).

27. Maxim — *'Falsus in uno falsus in omnibus'*.—The maxim *'falsus in uno falsus in omnibus'* has not received general acceptance in different jurisdictions in India; nor has this maxim come to occupy the status of a rule of law. It is merely a rule of caution. All that it amounts to is that in such cases the testimony may be disregarded and not that it must be disregarded. The doctrine merely involves question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence': A.I.R. 1957 S.C. 366, followed in A.I.R. 1957 Mad. 750: 1957 Cr.L.J. 1298 (1); A.I.R. 1958 S.C. 813; I.L.R. (1962) Cut. 303. The principle is expressed in another form by saying that the Court must be careful to examine the entire evidence and must distinguish the chaff from the grain and must not take to an easy course of discarding the entire prosecution case merely because a part of the story is false: 28 Cut.L.T. 523: I.L.R. (1963) Cut. 67: (1963) 1 Cr.L.J. 550; 1994 Cr.L.J. 3624 (All.).

The maxim *'falsus in uno falsus in omnibus'* is a maxim of ancient origin which is now not

implicitly followed by Court in the appreciation of evidence. It is the duty of the Court to sift the evidence and separate the truth from the falsehood, if it can: A.I.R. 1923 Rang. 30. It is generally unsafe to apply the doctrine *'falsus in uno falsus in omnibus'* to evidence of witnesses in India. Where the evidence is substantially correct, simply because there are deliberate falsehoods in it, it should not be totally rejected: A.I.R. 1933 Oudh 269; 1969 B.L.J.R. 932.

The fact that a witness has been disbelieved on one point is no reason for discarding his evidence altogether. The fact that certain witnesses have not been believed against some of the accused is no reason for not believing them against others: A.I.R. 1942 Oudh 60.

Evidence which is unreliable must be deemed to be unreliable against all the accused persons. It cannot be said to be unreliable as against certain accused only and reliable as against others when the witnesses are more or less the same: 1939 M.W.N. 879: 50 Mad.L.W. 557.

Legal maxim *'falsus in uno falsus in omnibus'* (false in one thing, false in every thing) not applicable in India—Indian Court can reject a part while accepting the rest of the testimony of a witness; such rejection and acceptance of the evidence is not an error of law: 1966 All.W.R. (H.C.) 57: A.I.R. 1966 All. 515; 1995 Cr.L.J. 2583 (Bom.).

There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. It is really a matter to be considered on the facts and circumstances of each case. It is fully competent for a Court, for good and cogent reasons, to accept one part of the statement of a witness and reject another: (1960) 62 Punj.L.R. 413: A.I.R. 1960 Punj. 395.

The maxim *'falsus in uno falsus in omnibus'* is not an absolute rule of law, but a rule of caution. Even if there is anything untrue in the evidence of a witness, the true portions can be believed and the other portions disbelieved: 1960 Ker.L.T. 965.

The principle of *'falsus in uno falsus in omnibus'* does not apply to criminal trials; the Court is duty bound to separate the grain from the chaff instead of rejecting the prosecution case on such general grounds: A.I.R. 1980 S.C. 957: (1980) 1 S.C.C. 201; 1979 Cr.L.J. 603 (Karn.) (D.B.); (1983) 55 Cut.L.T. 472.

The maxim *'falsus in uno falsus in omnibus'* is not applicable in India; thus, a witness cannot be branded liar and his evidence discarded on the sole ground that a part of his testimony is not reliable; besides as held in *Sarju Prasad*, A.I.R. 1951 S.C. 120 and *Madhusudan*, A.I.R. 1983 S.C. 114 primacy must be attached to the trial Court's opinion on credibility of a witness; the appellate Court must be very slow in discarding in appeal the evidence of any witness found reliable and accepted by the trial Court: A.I.R. 1987 Madh. Pra. 244: 1987 M.P.L.J. 719: 1987 Jab.L.J. 462.

The maxim *'falsus in uno falsus in omnibus'*, cannot be applied to this country. Most of the witnesses for one party while giving out substantial truth introduce one or two falsehoods or exaggerations into their statements. If the Courts were to act upon the above maxim it will be very difficult, if not impossible, to decide majority of cases correctly. The Courts are, therefore, called upon to very carefully scrutinize the evidence produced before them and separate chaff from the grain and sift out truth from falsehood: 1958 Raj.L.W. 505.

The maxim *'falsus in uno falsus in omnibus'* (false in one thing, false in every thing) is neither a rule of law nor of practice. It is not a sound rule to apply in the circumstances of this country; where a witness has given unreliable evidence on certain particulars, the Court is duty bound to scrutinise the rest of his evidence with care and caution; if found trustworthy and the substratum of the prosecution case on the whole remains unimpaired, the Court should uphold the prosecution case to the extent it is safe and trustworthy: 1977 Cr.L.J. 59: 1976 Raj.L.W. 345: I.L.R. (1976) 26 Raj. 499 (F.B.); 1976 Cr.L.J. 39: 1975 Raj.L.W. 231; A.I.R. 1974 S.C. 21; 1974 All.Cr.R. 215.

The maxim *'falsus in uno falsus in omnibus'* is neither a sound rule of law nor a rule of practice. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments; it is the Court's duty to scrutinise the evidence carefully by separating grains from the chaff. But the Court cannot obviously disbelieve the substratum or the material parts of the prosecution evidence and reconstruct a story of its own out of the rest: A.I.R. 1965 S.C. 277; (1976) 2 Cal.L.J. 113; 1972 Cr.L.J. 1302 (S.C.);

1971 Cr.L.J. 1306 (S.C.); A.I.R. 1975 S.C. 667; 1985 M.P.L.J. 268.

The maximum *'falsus in uno falsus in omnibus'* cannot be mechanically applied; merely because the evidence of some prosecution witnesses was found unsafe for convicting the co-accused, the whole body of their testimony is not to be rejected; only the Court should be on its guard and should carefully scrutinise their evidence: A.I.R. 1993 S.C. 777: (1992) 2 S.C.J. 599: (1993) 2 S.C.R. 794: (1992) 3 S.C.C. (Supp.) 161: 1993 Cr.L.J. 426; A.I.R. 1974 S.C. 902: 1974 Cr.L.J. 755: (1974) 4 S.C.C. 479.

Witnesses cannot be branded as liars in toto nor can their testimony be rejected outright even if some parts of their testimony is demonstrably incorrect or doubtful; an astute Judge can separate the grains of acceptable truth from the chaff of exaggerations and improbabilities; sound commonsense demands that in assessing the worth of what necessarily is imperfect human testimony, the maxim *'falsus in uno falsus in omnibus'* should not be mechanically applied: A.I.R. 1974 S.C. 308: (1974) 3 S.C.C. 704.

Witnesses have a general tendency not to speak the whole truth; often they exaggerate and embellish; the entire fabric of their testimony is polluted obliging the Courts to disengage truth from falsehood by sifting the entire evidence as also the attending circumstances; and thus arrive at the witnesses' intrinsic credibility; there is no set measure for the same; each case depends upon its own facts and peculiarities; but only such infirmities would not render the testimony unreliable which reach the very core of the prosecution case: 1979 Cr.L.J. 727 (Del.) (D.B.).

The maxim *'falsus in uno falsus in omnibus'* is not to be blindly invoked in appraising evidence in Courts where witnesses seldom tell the whole truth but often resort to exaggerations, embellishments and 'padding up' to support a story, howsoever true in the main; the Court has to disengage the truth from falsehood and to accept what it finds to be true and reject the rest. It is only where truth and falsehood are inextricably mixed up, polluting beyond refinement down to the core and the entire fabric of the narration given by a witness that the Court may reject his evidence *in toto*. There is no hard and fast rule that simply because the prosecution witnesses did not explain injuries on the accused's person at the earliest stage, their entire evidence should be discarded: 1979 Chand. Cr.C. 166 (Punj.); (1979) 81 Punj.L.R. 444.

It is rare to come across a testimony without a fringe or embroidery of untruth, even if it is true in the main; it is for the Court to separate the grain from the chaff; to accept what appears to be true and reject the rest; if a testimony is tainted to the core, falsehood and truth being inextricably intertwined, the Court should discard it *in toto*. But merely because some witnesses did not admit or expressed ignorance about certain collateral facts is hardly a ground to reject their ocular account when there was general agreement among them about the substratum of the prosecution case: 1981 Cr.L.J. 23.

Merely because one portion of a witness's testimony is not reliable is no ground to brush aside his entire evidence: A.I.R. 1975 S.C. 1453: 1976 M.L.J. (Cr.) 140: (1975) 4 S.C.C. 257.

Maxim not of unqualified applicability: A.I.R. 1968 Pat. 481. *See* also 1963 Ker.L.T. 292: 1963 Ker.L.J. 369: 1964 M.L.J. (Cr.) 347: (1964) 1 Cr.L.J. 493.

As to appreciation of evidence, *see* 45 M.L.J. 438: 23 Cal.W.N. 589 (P.C.). Per *Young, C.J.*—Where the falsehood is merely an embroidery to a story, that would not be enough to discredit the whole of the witness's evidence. But if the falsehood is on a major point in the case, or if one of the essential circumstances of the story told is clearly unfounded, this is enough to discredit the witnesses altogether: (1940) 42 Punj.L.R. 570: A.I.R. 1940 Lah. 457. It may be that sometimes prosecution witnesses go a little further in favour of the prosecution than they ought to have gone and try to exonerate themselves but their whole testimony cannot be thrown out simply because they have been responsible for a little embroidery to a story. The entire evidence has to be read with great care and falsehood should be sifted from truth, chaff separated from grain and Court should try to come to the truth on a careful and judicial consideration of the evidence: 1959 Raj.L.W. 35.

Evidence of a witness cannot be discarded altogether merely because he deposes falsely on one point; if the witness is reliable on other points, his evidence thereon may be accepted; but if testimony comprises of the

bulk of falsehood inextricably mixed with traces of truth here and there, *held*, it can be disbelieved in toto. [(1965) 1 Cr.L.J. 226 (S.C.), Foll.]: 1982 Cr.L.J. 654 (Madh. Pra.).

It is now well settled that the Court has in every case to appraise evidence to determine the extent of its acceptability; merely because the Court considers it unsafe to rely on one part of a witness's testimony, it does not necessarily follow as a matter of law that it must discard it in all other respects; experience shows that interested witnesses have the tendency to exaggerate the guilt of the other party; imperfection of human memory and power of observation is also there; the Court has to sift evidence with care in each case and fully consider all relevant and material circumstances before deciding as to which part of the testimony it accepts and which it rejects: (1971) 2 S.C.W.R. 614: A.I.R. 1971 S.C. 2505.

It cannot be said that witness who tells lies on one point should not be believed on the other point. The only condition is that in such a case he can be believed if there is corroboration. It is a settled law that a witness can be believed on a part of the story if there is corroboration: 1967 M.P.L.J. 680: 1967 Jab.L.J. 504. *See* also S. 3, Note 29, *supra*.

Where a part of the evidence of a witness is disbelieved, the Court may act on the rest of his testimony provided it is unblemished and untainted; the Court has, thus, power to believe one part of a witness's evidence and disbelieve the other part; it may accept the testimony of some witnesses against one accused and may not accept it against the other: 1983 Raj.L.W. 639.

Court has right to disbelieve part of a witness's evidence and to believe part thereof: (1968-69) 73 Cal.W.N. 877: A.I.R. 1970 Cal. 292.

Merely because some accused are acquitted on the self-same prosecution evidence is by itself no ground to throw out the entire case. The maxim *'falsus in uno falsus in omnibus'* (false in one thing, false in everything) is neither a sound rule of law nor of practice. Rarely is there a witness whose evidence does not contain some untruth or exaggeration; the Court's duty is to scrutinise it and separate the grain from the chaff; if the remaining evidence is trustworthy and the substratum of the prosecution case remains intact, the Court should uphold the prosecution case to the extent it is safe and trustworthy. [1970 S.C.C. (Cr.) 146, Rel. on]: (1983) 55 Cut.L.T. 312: 1983 Cr.L.J. 953; 1981 Cr.L.R. 73: 1981 Cr.L.J. 1622 (Bom.).

Where the only evidence against the accused, who were charged under Ss. 34 and 302 and S. 324, Penal Code, was the oral evidence of prosecution witnesses who had to be classed as interested witnesses and some of the accused were proved to have been falsely implicated in the capital charge and given prominent parts in the occurrence which resulted in the murder, it is equally likely that the entire evidence against the rest of the accused was also false and cannot be relied upon as against the rest for convicting them: 1955 An.W.R. 813: A.I.R. 1956 Andhra 53.

A witness can be believed in parts; the maxim *'falsus in uno falsus in omnibus'* is neither a sound rule of law nor of practice; thus, where a minor girl victim of rape had immediately thereafter narrated the occurrence to a prosecution witness, a part thereof, severed from the rest of his statement, could be taken as corroborative evidence: A.I.R. 1971 Him. Pra. 17.

Judges of fact entitled to rely on one part of testimony of a witness while disbelieving another part: 1967 Cr.L.J. 1467: A.I.R. 1967 All. 532.

Where in a joint trial of two persons, accused of the same offence, the evidence of a witness was not believed by the Court as against one of the accused who was acquitted, it should not be believed against the other accused unless there were convincing reasons for believing it against him: (1940) 42 P.L.R.J. & K. 75. *See* also A.I.R. 1942 Bom. 37; A.I.R. 1959 J. & K. 5.

Where the improvements or additions made by the witness in his evidence were only minor and reflected his truthfulness, the fact that 15 of the accused who were also implicated by him were acquitted, did not warrant that his evidence should be disbelieved *in toto*: 1977 Cr.L.J. 538: 1976 J.&K. L.R. 549.

The testimony of a witness though not relied in respect of one accused, *held*, can be relied upon in respect of other accused: A.I.R. 1971 S.C. 991.

Merely because two of the four accused have been acquitted, though the evidence

against all of them, so far as the direct testimony went, was the same, it does not necessarily follow that the other two must be similarly acquitted. Where the lower Court had differentiated the case of the accused who had been acquitted from the other two on the ground of absence of motive in the former case and, in addition to that, the evidence of the witnesses as against the convicted accused was consistent and not shaken by cross-examination, there is no sufficient reason for the appellate Court to go behind the finding which was based by the lower Court on that evidence: 1956 Cr.L.J. 827: A.I.R. 1956 S.C. 460.

Where it was contended that evidence of eye-witnesses was liable to be rejected on the ground that their evidence had not been accepted with regard to the four acquitted accused, *held*, it is well settled that maxim *'falsus in uno falsus in omnibus'*, that is to say, false is one thing, false in everything is neither a sound rule of law nor a rule of practice. In such a circumstance, the Court has to analyse the prosecution evidence carefully and on such analysis if the evidence is found to be consistent and reliable, the Court can accept the same with regard to the other accused persons and hold them guilty, even though the Court is unable to rely fully on the prose-cution evidence with regard to some of the accused persons: 1995 Cr.L.J. 410: A.I.R. 1994 S.C. 2507.

The appreciation of oral evidence by a Court cannot conform to certain set formulae or be measured by the yard-stick common to all cases. Ordinarily, a Court should not convict an accused on the basis of evidence not accepted by it in connection with the other accused, unless the evidence is corroborated otherwise; but this is not an inflexible rule of law but a rule of prudence for the appreciation of evidence and is not intended to prevent a Judge of fact appreciating the evidence that is placed before him, having regard to the circumstances of each case: 1956 An.L.T. 664: A.I.R. 1955 Andhra 247.

There is no rule of law that where some statements of a witness are found not corroborated by other evidence or for the matter of that are found to be not correct, his statement with regard to other matters could not be believed. Unless the witness is stamped as a wholly untruthful witness or his presence at the place of occurrence is rendered improbable there is nothing to prevent the Court from relying upon his statement with regard to some matters. The duty of the Court would be to remove the grain from the chaff; the chaff would be discarded and the grain taken: 1957 M.L.J. (Cr.) 231: (1957) 1 An.W.R. 336.

"A witness should not be partially believed and partially disbelieved" is a dictum which cannot possibly be upheld: A.I.R. 1937 Nag. 394. The rule in India is not that if a part of a witness's evidence is found to be of a doubtful nature, then his entire testimony has to be thrown overboard: 1957 All.L.J. 857: 1958 Cr.L.J. 324.

Evidence of prosecution witness—Truth and falsehood not separable—Entire evidence has to be rejected: A.I.R. 1970 S.C. 219.

Where the Court accepts the story of the prosecution in respect of the crime in essential particulars, that is to say, the manner in, and the circumstances under which, it was committed, and, also that some of the persons, alleged to have taken part in it, had actually been participants in the crime, the Court should endeavour to find out which of them were the actual participants, and should not throw out the case, merely because the prosecution party has embellished the actual occurrence by making false embroideries to it, and there were discrepancies in the evidence of the prosecution witnesses. The doctrine of separating the grain from the chaff applies to such a situation. It is not intended to apply to the following cases: (1) Where the prosecution account of the occurrence is not, considered on the evidence produced, acceptable in material particulars forming the core of the happenings, the Court will not ordinarily be justified in such a situation to act upon any rival theory of the defence, attempted to be proved or suggested during the trial in such a way as to take out one part of it to supplement the prosecution evidence or to add strength to that case or to the evidence adduced by the prosecution in support thereof, and reject the other part of it, and then come to the conclusion that the prosecution had proved its case. (2) Where the case of the prosecution regarding the occurrence is sought to be proved by evidence which is wholly unacceptable, *e.g.*, witnesses are unreliable, by reason of enmity by telling an extravagant story, by reason of inconsistencies in their evidence, want of

corroboration in suitable cases on material parts of the story and other like infirmities, the case of the prosecution must be rejected outright, irrespective of the fact whether or not there is any rival theory of the defence, or if there is any that is untrue. (3) Where the facts proved beyond doubt, or admitted, indicate that some sort of occurrence must have taken place, there is no rule of law preventing a Judge from arriving at a theory of actual happenings, if this can be fairly done on all the evidence. But this is not permissible, when the prosecution story about the occurrence is found to be false in its fundamental aspects. It will then be seldom possible to accept the evidence of the witnesses who have evidently conspired to tell a false story: 1959 B.L.J.R. 416: 1959 Cr.L.J. 1009: A.I.R. 1959 Pat. 362.

When the evidence is interminably intertwined; where a part of statement cannot be seperated from the rest, which is unbelievable, the entire testimony has to be rejected: 1995 Cr.L.J. 930 (Cal.).

Principle of *'falsus in uno falsus in omnibus'* in proper cases can be applied in India—Witness found wholly unreliable—It is unsafe to rely on any part of his testimony—Each case has to be judged on its own merits: I.L.R. (1953) Mys. 201: A.I.R. 1953 Mys. 125.

No doubt, the Court can act upon the testimony of the P.Ws. in so far as some of the accused are concerned and discard their evidence with regard to other accused, as the maxim *'falsus in uno falsus in omnibus'* (false in one thing, false in all) has not received general acceptance in different jurisdiction in India. But where the prosecution came to Court with a distorted version giving up the true state of affairs and the prosecution witness also are untrustworthy and do not reflect the true state of affairs, it is highly hazardous to rely on it and hold the accused guilty of any offence: Credibility of witness—Interestedness is not a circumstance for disbelieving witness—But it has to be taken into consideration in judging truth and reliability of witness: 1968 Cr.L.J. 1237 (Manipur).

28. Contradictions and discrepancies in evidence.—A Court should not be called upon to choose between two irreconcilable versions of a case or an event at the instance of parties who being fully aware of the facts are not entirely frank with the Court. When two witnesses on the same side—one of whom is a party to the suit and the other is completely identified with him give accounts at variance with each other of the same incident of which they claim personal knowledge, neither of the versions could be accepted. The unwholesome attempt to mislead the Court and to take the chance of the Court being forced to decide upon its own assessment of probabilities even when the parties are in a position to depose to material facts from personal knowledge deserves to be condemned in no uncertain terms. Courts cannot discharge their duty of doing justice between the parties to a litigation unless the parties are prepared to assist the Court with the utmost candour. Parties cannot ask the Court to solve a riddle placing before it the minimum information possible and with conflicting versions on the same side even as regards that: 1956 An.W.R. 1004: A.I.R. 1957 Andh. Pra. 584.

Mere verbal contradictions and discrepancies are not sufficient to discredit the clear and consistent testimony of eye-witnesses which is also supported by the circumstantial evidence. The measure of stupidity of these witnesses especially when they are villagers, is not the measure of their veracity and truthfulness: I.L.R. 8 Luck. 570: A.I.R. 1933 Oudh 333. *See* also I.L.R. 56 Mad. 356: A.I.R. 1933 Mad. 225: 64 M.L.J. 439.

Reproduction of conversation—Disparties in—Effect: A.I.R. 1957 All. 177: 1957 Cr.L.J. 337.

The proof of a fact depends not upon the accuracy of statements made at different stages of a case but upon the probability of its having existed. Evidence of a fact and proof of a fact are not synonymous. While there may be inaccuracies in the evidence, the fact sought to be proved may be so probable that a prudent man may act upon the supposition that it exists. It is the broad fact that makes up those facts of the case, and not the little details that go to make up those facts that will make the existence of those facts probable or not. Discrepancies are bound to occur in human testimony and mathematical precision in the statements of witnesses cannot be expected. Unless the contradictions are of such nature as to affect the existence of the fact in issue, they cannot be regarded as material. The omission of a detail in an earlier stage of the proceedings is not to be treated

as a contradiction of the facts spoken to later unless it is a material fact: 19 Cut.L.T. 14: A.I.R. 1954 Ori. 33.

Contradictory statements at various stages of the case not only affect reliability but also create (serious difficulties for the Court to arrive) at the truth. If the contradictory statements are not explained in a reasonable manner and have been made deliberately and motivated by improper and ulterior consideration, they run the risk of being completely ignored: 1969 Raj.L.W. 68: I.L.R. (1968) 10 Raj. 1076: 1970 Cr.L.J. 558.

Contradictions of minor nature in the evidence of witnesses who witnessed the recovery of incriminating articles as a result of the statement by the accused, do not affect the factum of recovery: A.I.R. 1959 Him. Pra. 3.

Credibility of testimony, oral and circumstantial, depends considerably on totality of judicial evaluation, not its isolated scrutiny. While proof beyond reasonable doubt should necessarily be adduced in all criminal cases, the proof need not be perfect. Proof beyond reasonable doubt is a guideline, not a fetish; the guilty should not get away with it because truth suffers some infirmity when projected through human processes. Judicial quest for perfect proof often results in the police presenting fool-proof concoction; why? Because the Court asks for the truth to look true? No, we must be realistic: A.I.R. 1978 S.C. 1091: (1978) 3 S.C.R. 393: (1978) 4 S.C.C. 161.

Discrepancies—Prosecution case cannot be discarded by reason of discrepancies which are not material: 1967 Cr.L.J. 1250: A.I.R. 1967 All. 447.

Discrepancies do not necessarily demolish testimony; delay does not necessarily spell unveracity; and tortured technicalities do not necessarily upset conviction when the Court has had a perspicacious, sensitive and correctly oriented view of the evidence and probabilities to reach its conclusion. Proof of guilt is sustained despite little infirmities, tossing peccadilloes and peripheral probative shortfalls. The 'sacred cows' of shadowy doubts and marginal mistakes, processual or other, cannot deter the Court from punishing crime sensibly and substantially brought home: A.I.R. 1978 S.C. 1542.

Evidence of witnesses in this country cannot be discarded on the ground of discrepancies as to time and date of matters in respect of which they do depose. The witnesses are mostly illiterate and their evidence as to time and date cannot be expected to be arithmetically correct: I.L.R. (1967) Pat. 636: A.I.R. 1968 Pat. 481.

Cr.P. Code, 1898, S. 367—Appreciation of evidence—Discrepancies in testimony of witnesses on material points have to be carefully weighed in arriving at the truth—Broad facts of a case and not the little details are to be considered—No importance attached to discrepancy as to time: 1967 Cr.L.J. 52: A.I.R. 1967 Goa 4 (F.B.).

Slight variations and discrepancies in details are bound to appear in the testimony of a truthful witness; the Court is, therefore, required to inform itself that variances on the fringes, discrepancies in details and contradictions in narrations cannot militate against the veracity of the testimony's core if there is an impress of truth and conformity to probabilities of the case: 1977 Raj.L.W. 241 (D.B.).

Appreciation of evidence—Major and minor discrepancies. *See* 1966 Mad.L.W. (Cr.) 82. *See* also S. 3, Note 28, *supra*.

Overmuch importance cannot be attached to minor discrepancies because:—(1) a witness is not expected to possess a photographic memory to recall the details; (2) ordinarily, overtaken by the events; the witness could not have anticipated the occurrence, often a surprise, his mental faculties might not have been attuned to absorb the details; (3) the powers of observation and absorption differ from person to person; (4) people cannot accurately recall a conversation to reproduce the very words used or heard; they are not human tape recorders; (5) as to the exact time of an incident or the time frame of the occurrence, people make estimates by guesswork on the spur of the moment and time-sense varies from person to person; (6) ordinarily persons cannot accurately recall sequence of events occurring in rapid succession or a short time span and may get confused; (7) even wholly truthful witnesses sometimes get overawed and nervous by the Court atmosphere and piercing cross-examination. Thus, discrepancies which do not go to the root of the matter cannot be attached too much and undue importance: A.I.R. 1983 S.C. 753: 1983 Cr.L.J. 1096: (1983) 3 S.C.C. 217.

In appraising oral evidence to test whether several witnesses' testimony on

same facts is credible, the deposition on material facts alone should be considered; human minds are so differently constituted and influenced by differences of experience that same facts may produce in different individuals very different degrees of belief; minor discrepancies are bound to occur in human testimony; a mathematical precision in the statement of witnesses cannot be expected: I.L.R. (1978) 2 Del. 48. *See* also I.L.R. (1971) 1 Del. 432 (D.B.).

An apparent mistake or a minor discrepancy in a testimony would not render it entirely unreliable: 1975 Cr.L.J. 354.

Mere discrepancies in the eye-witnesses' statements is no ground to dub the prosecution case as false where discrepancies are of minor nature and do not affect any material facts; every witness on the scene cannot give identical accounts of what happened, especially when evidence was recorded long after the occurrence; discrepancies in matters of detail occur even in the statements of truthful witnesses; they are hardly a ground to discard the evidence out-right when there is general agreement and consistency in regard to the substratum of the prosecution case: (1981) 52 Cut.L.T. 155.

While scanning evidence, the Court must keep in view whether the scene of occurrence is rural or urban; when the witness is a village rustic or an uneducated young man, some contradictions are bound to appear in the statements of even truthful witnesses during the stress of cross-examination; photographic picturisation of the occurrence is not expected from untutored witnesses; rather, the effort to harmonise minutest details betray Police tutoring, not rugged truthfulness. Discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against veracity of the testimony: 1977 Raj.L.W. 212 (D.B.).

Minor contradictions are bound to appear in evidence of ignorant and illiterate women; even with trained and educated persons, memory sometimes plays false; besides the evidence of a witness would very much depend upon his power of observation; may be, some aspects of an incident are observed by one witness but not by the other though both were present at the scene; testimony of witnesses should not be rejected merely because of minor contradictions: A.I.R. 1976 S.C. 1541: 1976 U.J. (S.C.) 122: (1976) 1 S.C.C. 584.

In the depositions of witnesses, howsoever, honest and truthful, there are always normal discrepancies resulting from normal errors of observation and memory occasioned by lapse of time and mental disposition such as shock and horror caused by the occurrence; but material discrepancies are not normal; they are not expected of a normal person: A.I.R. 1981 S.C. 1390: (1981) 2 S.C.C. 752: 1981 Cr.L.J. 1012.

The evidence of a natural and disinterested witnesses is not to be thrown out merely because of some inconsequential omissions in their statements recorded by the Investigating Officer; but such omissions need not be in respect of material particulars or the accused's identity. [1979 Cr.L.J. 1027 (S.C.), Rel. on]: 1982 Cr.L.J. 2162 (Ori.).

Because of lapses of human memory, minor inconsistencies in the statements of witnesses are bound to occur; thus, the discrepancies, not shaking the basic prosecution version may be ignored: 1992 All.L.J. 749: 1992 Cr.L.J. 2294 (D.B.).

The Court cannot reject an eye-witness, who spoke with slight and inconsequential variations, on unsubstantial grounds and on the basis of insignificant discrepancies: (1963) 2 Cr.L.J. 294: A.I.R. 1963 Ori. 144.

Persons giving their testimony of an occurrence are liable to disagree on minor points. Their power of observation, recall and expression may not be the same and some differences are possible. It is only the broad facts and not the little details that are to be considered in weighing evidence: 1969 Cr.L.J. 1393: A.I.R. 1969 Goa 116.

Where witnesses had neither interest nor motive to falsely implicate and their evidence is consistent, straightforward and cogent in all respects, *held*, their evidence cannot be disbelieved merely because there were some minor discrepancies therein: A.I.R. 1984 S.C. 452: 1984 Cr.L.J. 185: 1984 S.C.C. (Cr.) 384.

It is settled that while appreciating evidence, the Court should always keep in view that discrepancies in details, contradictions in narration and embellishment in essential parts should not affect the core of the testimony; it is also settled that discrepancies in details occur even in evidence of truthful

witnesses because of natural differences in individual faculties; credibility of prosecution witnesses should be subjected to judicial evaluation of totality and not only of isolated scrutiny; sometimes even truthful witnesses become over-enthusiastic and exaggerate; that should not be taken as embellishment in their testimony: 1987 M.P.L.J. 382 (D.B.); 1986 M.P.L.J. 652 (D.B.).

It is well known that witnesses in India cannot be expected to be wholly witnesses of truth. Most of them are illiterate and uneducated, and necessarily there is likely to be some contradiction in their evidence. Mere contradiction, however, would not be the basis of an acquittal, if on a thorough scanning the essence of the prosecution case is found to be established. If, on the other hand, on the evidence of the prosecution the Court finds difficult to reject the defence story, though on its own merit it might not have been established, and the prosecution case does not appear to be established beyond reasonable doubt, the prosecution case is bound to fail and the accused is entitled to the benefit of doubt: (1969) 35 Cut.L.T. 278: I.L.R. (1969) Cut. 159. *See* also S. 3, Note 28.

It is common experience that the discrepancies do occur even in the statements of perfectly honest witnesses which are really due to difference in individual faculties with regard to observations, recollection and recital of details and unless there is any good ground to indicate that they are due to deliberate attempt to suppress or depart from the truth, it is unfair to discard the direct testimony of witnesses merely on account of such discrepancies, when there is general agreement as to material circumstances. [1987 Cr.L.J. 178 (Raj.), Disting.; 1973 Cr.L.J. 1783 (S.C.); 1981 Cr.L.J. 23 (S.C.); 1983 Cr.L.J. 1272 (S.C.); 1993 Cr.L.J. 1734, Rel. on]: 1995 Cr.L.J. 25 (Raj.) (D.B.).

Evidence of witnesses who are not relatives and whose presence at the scene of occurrence is not doubtful, *held*, cannot be rejected because of trifling contradictions: 1977 Raj.L.W. 241 (D.B.). Also *see* 1988 Cr.L.J. (N.O.C.) 10 (Pat.) (Witnesses—Village ladies —Wife and daughter of victim—*Held*, minor contradictions in their evidence was of no effect).

Merely because the eye-witnesses had succeeded in escaping unhurt, or there were discrepancies in their statements about the day they had gone with the deceased is no ground for jumping to the conclusion that they were not in the deceased's company or nearabout; discrepancies in collateral or subsidiary facts or matters of detail occur even in the statements of truthful witnesses, particularly when they are deposing to the events which occurred long before; such discrepancies are hardly a ground to reject the evidence when there is general agreement and consistency in regard to the substratum of the prosecution case: A.I.R. 1981 S.C. 697: (1981) 2 S.C.C. 1: (1981) 2 S.C.R. 615: 1981 Cr.L.J. 410.

While appraising inconsistencies between evidence of witnesses, *held*, the Court should be concerned with identifying and separating the main strands of truth; too minute an attention to immaterial detail may result in failure of justice: (1977) 2 Karn.L.J. 412: 1978 Cr.L.J. 290.

Unless on good grounds the discrepancies in the eye-witnesses' evidence constitute a deliberate attempt to keep back the truth, *held*, it would be unfair to discard their entire evidence because of the discrepancies; such of their evidence as is corroborated by other evidence or circumstances can be relied upon; thus, where the eye-witnesses had been trying to rescue the deceased under attack by the unlawful assembly, their inability to specify where the blows given by each individual accused had fallen, is not a valid reason at all to reject their evidence: 1982 Cr.L.J. 1167 (Ori.).

Witnesses deposing from memory some months after the incident—Discrepancies in statements would not by itself be a ground for discarding their evidence: 1968 Cr.L.J. 958: A.I.R. 1968 Pat. 258.

Evidence of past events—Witnesses cannot be expected to speak to details of events which happened several years before they give their evidence: A.I.R. 1970 Tripura 43.

Before a witness is disbelieved on a fact it must be clearly proved by evidence that the fact deposed to is contrary to either an admitted or proved fact; mere casting aspersion on the fact being possible is not sufficient to disbelieve him, especially when he was testifying fact occurring years ago: A.I.R. 1989 All. 17: (1989) 14 All.L.R. 814.

The mere omission of an eye-witness to mention all the details of the occurrence in

his statement before the Police cannot be a ground for brushing aside his sworn testimony in Court. It is wrong on the part of a Court to be influenced by matters of such details while appraising the evidence of a witness who has deposed before the Court about an incident which had taken place nearly 16 months earlier. The duty of the Court is to see whether on broad facts the evidence of the witness is consistent with his earlier statements or not. If the witness has omitted to state before the police what specific weapon a particular accused was armed with or which accused had assaulted whom, there is no contradiction in his evidence in Court which can be regarded as discrediting his testimony. Further, if the evidence of the witness is inconsistent with respect to the weapon in the hand of a particular accused person, then his evidence may be disregarded only with respect to the weapon which that accused was armed with, but that cannot justify the rejection of his evidence even with regard to the identification of a particular accused person as a member of the mob: I.L.R. 42 Pat. 293.

Where a witness had deposed before the Court, ten years after the occurrence, *held*, some discrepancies in his evidence have to be ignored; quite naturally lapse of memory is inherent in the case: (1986) 1 Bom.C.R. 50.

Where witnesses testify four years after the occurrence, *held*, their testimony is bound to have discrepancies: 1985 Cr.L.J. 563.

Statements given by the witnesses before the police are meant to be brief; they cannot take the place of evidence in the Court; where omissions in the statements to the Police are vital, they merit consideration; mere small omissions, however, do not justify a finding that the witnesses are self contradicting liars: A.I.R. 1979 S.C. 1234.

Contradictions between evidence given by witness at trial and that before committing Magistrate—Contradictions of minor details lose all weight and importance: (1965) 1 Cr.L.J. 160: A.I.R. 1965 Cal. 89; A.I.R. 1967 S.C. 1027.

Discrepancies and contradictions—Eye-witnesses: (1965) 2 Cr.L.J. 134: A.I.R. 1965 Tripura 22.

Discrepancies in prosecution evidence—Such evidence disbelieved in some respects —Entire prosecution evidence should not be rejected — Court should try to weigh the evidence properly — Availability of other corroborative evidence and non-production thereof cannot be a ground for rejecting the evidence led in the case if it is otherwise persuasive and convincing: 1961 Raj.L.W. 55: (1961) 2 Cr.L.J. 430.

Criminal trial—Complaint by Hindus under S. 298, Penal Code, on ground of bullock-slaughter in their sight—Eye-witnesses—One witness stating sight was from distance of 12 kanis while others stating from 1 kani or 1/2 kani—One witness stating colour of slaughtered bullock as spotted black and white, other stating it as Makra and white—*Held*, discrepancies were minor discrepancies which would not affect merits of testimony—*Held* further that when lower Courts had come to concurrent findings of fact, Court of Revision should not interfere with appreciation of oral evidence: (1965) 2 Cr.L.J. 134: A.I.R. 1965 Tripura 22.

Witnesses to raid — Discrepancies on points of minor importance not casting any reasonable doubt on prosecution version—Discrepancies no ground for disbelieving prosecution witnesses: (1964) 66 Punj.L.R. 81.

Conflicting versions — Murder case—Fight between two rival groups one belonging to village *B* and other to village *K*—As a result of injuries from the former group, *S* died and *M* received simple injuries—From other group one received three grevious injuries and two others received various simple injuries—Sessions Judge finding impossible to trace origin of fight due to conflicting versions and holding it to be free fight convicted both parties according to injuries inflicted on each other—On appeal, *held*, that conviction and sentences on either set of accused were unsustainable: (1969) 71 Punj.L.R. 393.

Where the murder took place on a moonlit night and the eye-witnesses who were familiar with and recognised voices of the accused, attributed overt acts to the accused and corroborated the deceased's dying declaration, and the accused, clearly identified by the eye-witnesses, bore enmity to the deceased whose blood tallied with the blood-stains on the accused's clothes, *held*, merely because the testimony of the eye-witnesses, illiterate ruralites as they were, had some discrepancy as to the type of the weapon of the offence is not sufficient to set aside the conviction: 1995 Cr.L.J. 25 (Raj.) (D.B.).

Where there are two statements of a witness mutually irreconcilable there is nothing to prevent the Court from applying its mind to discover which of them is true: A.I.R. 1942 Oudh 193: 1941 O.W.N. 1246.

Where it was alleged that accused persons attacked husband and wife as a result of which wife died and husband received injuries and there was a delay of 17 days in recording statement of husband and further husband shifted his stand regarding identity of accused persons, place of occurrence and the manner in which beating took place and the evidence of remaining witnesses was not reliable, *held*, the statement of husband could not be treated to be simple and straightforward statement and it could not form basis for conviction of accused: 1994 Cr.L.J. 3503 (Raj.) (D.B.).

When a witness makes a reckless statement which appears to be altogether false, the safest course is not to place any reliance on his evidence: 11 O.W.N. 950: A.I.R. 1934 Oudh 388.

Discrepancies in the statements of witnesses on material points should not lightly be passed over, as the value to their testimony is seriously affected by them: I.L.R. 36 All. 187: 26 M.L.J. 442 (P.C.).

Where a *solenama* is executed by the person who himself purchased the stamp papers, the purpose of the document as also the manner of payment is stated therein, and the attesting witnesses and the writers support the evidence of the plaintiff about the execution of document and its consideration, the document cannot be brushed aside on some minor discrepancy in the oral evidence since it will be a serious thing in the administration of justice: A.I.R. 1954 Sau. 26.

Appreciation of evidence—Discrepancies and contradictions—Effect of—One witness stating that motor cycle which knocked the deceased was black in colour—Another witness stating that it was of chocolate colour—Similarly, one stating that there was heavy traffic on road—Another stating that there was no heavy traffic—Contradiction because one spoke relating to time of accident while the otherspoke of time immediately after accident when there is naturally crowd gathered—Evidence, *held*, could not be ignored as contradictory: A.I.R. 1969 Mad. 180.

Three persons were prosecuted under S. 302, I.P. Code. The Additional Sessions Judge acquitted two of them as medical evidence was not in accord with oral evidence and there were discrepancies and contradictions in the oral testimony of eye-witnesses. The third accused was, however, convicted on the ground that the evidence of the witnesses was consistent so far as he was concerned that he was the assailant of the deceased.

Held, that if the evidence of the eye-witnesses was found discrepant, contradictory and unreliable so far as the other two accused were concerned, their evidence must be accepted with great caution even against the third accused and his conviction could not be based for murder on such evidence only. Such evidence ought not to be relied upon without strong corroboration: 1958 M.P.L.J. (Notes) 60.

Where the evidence of one eye-witness was corroborated by another eye-witness, *held*, the trial Court cannot discard their evidence because of some minor discrepancy in their respective evidence: A.I.R. 1994 S.C. 1581.

Where a transaction consists of a single act of payment, contradictions on the point cannot be easily elicited; even false witnesses would not falter; it is, therefore, usual to attack their credibility by eliciting their answers on minor details; for only then can the seemingly solid wall of falsehood can be breached: A.I.R. 1976 Goa 60.

Where discrepancies in the eye-witnesses' testimony were comparatively minor and did not go to the root of the prosecution story, *held*, their evidence has to be accepted: A.I.R. 1981 S.C. 1167: 1981 Cr.L.J. 630: 1981 S.C.C. (Cr.) 676. *See* also 1993 Cr.L.J. 1756 (Pat.) (Minor discrepancies in the evidence of natural and probable witness not going to the root of matter).

Some minor and nominal discrepancies in the evidence of an eye-witness, an unsophisticated adivasi woman, do not justify its rejection: A.I.R. 1981 S.C. 1163: 1981 U.J. (S.C.) 319: 1981 S.C.C. (Cr.) 607.

F.I.R. not by an eye-witness but based on information received—Minor discrepancies between statements in report and evidence should be ignored: 1969 Cr.L.J. 1393: A.I.R. 1969 Goa 116.

Where a medical certificate granted by a doctor was definite that he had advised the defendant, suffering from high blood

pressure, to take rest and undergo treatment for two weeks was rejected by the Court because the doctor had stated to have examined the defendant once while the defendant had stated that the doctor had examined him three to four times, *held*, such minor discrepancy did not render the doctor's evidence as unreliable; the memory of witnesses giving evidence more than year after the event may not serve them completely right: (1975) 41 Cut.L.T. 1117.

Appreciation of evidence in criminal cases—Woman complaining of rape on her both by *A* and *S* in F.I.R. and in her first statement to the Police completely exonerating *S* at the trial probably due to attempts made to suppress part played by *S*—*S* discharged by committing Court—*Held*, that would not make the rest of the story spoken to by prosecution witnesses against *A* any the less believable: (1962) 1 Cr.L.J. 671 (Tripura).

Contradictory testimony of eye-witness in murder case—*See* 1993 Cr.L.J. 1259 (Mad.).

Inconsistency in the statements of the prosecution witnesses in respect of the place of sealing of the packets of the articles seized, *held*, is fatal as sealing is an important part of the investigation: 1995 Cr.L.J. 3083 (Ori.).

A complaint lodged with the Police was investigated and the Police finding it false sent a final report. Being dissatisfied the complainant lodged a complaint case before a Court. The Court found Police investigation as unsatisfactory and of perfunctory nature and that the findings arrived at by the Police were unreliable. It was contended that the evidence led by the prosecution in the complaint case should be discarded as the same was found false by the Police. *Held*, the weight of prosecution evidence cannot be displaced by such comparison. Even discrepancies found in the statements by witnesses made in Court and those recorded in case diary will have no substantial weight in view of the fact that faithful recording of statements by the Police was itself suspicious and no sanctity could be attached to them: 34 Cut.L.T. 585: 1968 Cr.L.J. 1196: A.I.R. 1968 Ori. 172.

Discrepancies in evidence duly noticed and considered by law Courts—No inference in revision: 1969 Cr.L.J. 1986 (Ori.).

29. Improvements / variations in evidence.—Improvements and variations between their earlier and latter statements, *held*, are not by themselves sufficient to dub their testimony as infirm: 1983 Cr.L.J. 218: (1983) 1 S.C.C. 218: A.I.R. 1983 S.C. 126. A parrot like reproduction is not expected from an independent witness. Thus, even if the witnesses do not relate the incident in the same language or manner which, in the opinion of the Court, is natural, *held*, same does not effect the credibility of the witness; indeed absence of such variations could lead to the doubt whether the witnesses are tutored: 1994 M.P.L.J. 57 (D.B.).

Witness trying to improve upon prosecution story—Effect: A.I.R. 1969 Cal. 321.

It is rare to come across the testimony of a witness which does not have a fringe or an embroidery of untruth although in the main it may be true; it is for the Court to separate grain from the chaff and accept what appears to be true and reject the rest. It is only when a testimony is tainted to the core and falsehood and truth are inextricably intertwined, that the Court should discard it *in toto*. The mere fact that some witnesses did not admit or had expressed ignorance about certain collateral facts was hardly a ground to reject their ocular account when there was general agreement among them with regard to the substratum of the prosecution case: A.I.R. 1981 S.C. 897: 1980 (Supp.) S.C.C. 489; 1974 Ker.L.T. 328.

In criminal trials when a particular witness or batch of witnesses are shown to have swerved from the path of truth either by suppression or by concoction, or by embellishment of facts which are untrue, such evidence must as a rule, be discarded in the absence of any independent and reliable corroboration by aid of which the truth out of the tarnished evidence can be sifted and falsehood distinguished. Once it is found that a witness is lying in part in absence of any sure test to distinguish the truth from falsehood in the case, the whole testimony becomes discredited and cannot be relied upon for any purpose whatsoever: 34 Cut.L.T. 215: 1968 Cr.L.J. 1251. *See* also 1994 Cr.L.J. (N.O.C.) 344 (Ori.) (D.B.).

Where a witness who in his earlier statement to the Police had not stated that he witnessed the occurrence and did not see the accused running, tries to make improvement and tries to become an eye-witness of the occurrence, *held*, his testimony cannot be

believed and he cannot be said to be an eye-witness to the occurrence: 1995 Cr.L.J. 1944 (Raj.) (D.B.).

Where during her life time the deceased-wife had never complained regarding the alleged ill-treatment by her husband and in-laws, *held*, evidence that she was put to torture and humiliation was unreliable: 1995 Cr.L.J. 930 (Cal.).

Where in course of trial witnesses testified that husband and in-laws of the deceased had subjected her to cruelty but such a version was not presented during investigation, *held*, testimony of such witnesses could not be relied upon: 1995 Cr.L.J. 930 (Cal.).

Where the defendant claiming benefit of S. 3(2) of the T.N. Occupant Kudiyiruppu (Conferment of Ownership) Act, 1971 had not contended in his written statement that either he or any of his family members were cultivating agricultural land by his or their own manual labour but only orally contended in his testimony that his son was cultivating the land but without examining the son as a witness and without producing any extract from the Adangal register, *held*, the defendant's evidence constitute improvements upon his pleadings; he could not be declared as an agriculturist entitled to the benefit: A.I.R. 1981 Mad. 196: (1981) 94 Mad.L.W. 253: (1981) 1 M.L.J. 506.

30. Admissions—Appreciation of.—(*See* also S. 17, *et seq*). A clear cut admission of a fact made by a party, *held*, is *prima facie* proof of that fact: (1981) 1 Sim.L.J. 253.

Admission by a person—Person can lead evidence to prove the admission to be erroneous. [A.I.R. 1960 S.C. 100, Rel. on]: 1967 Cr.L.J. 1036: I.L.R. (1967) Cut. 106: A.I.R. 1967 Ori. 110.

The Court cannot decide a case on small admission here and there, when evidence is given after a lapse of eight years. Some allowance must be made for forgetfulness and lapse of memory. A case, in such a situation must be judged on broad probabilities: (1966) 68 Bom.L.R. 228: I.L.R. (1966) Bom. 420: 1967 Mah.L.J. 65: A.I.R. 1968 Bom. 112.

An admission or concession by a party should be strictly construed: 1976 All.W.C. 720.

A retracted admission allegedly obtained by coercion, is not to be acted upon: 1982 Lab.I.C. 1745 (Andh. Pra.).

An offer made by the guardian of a minor to be bound by the statement made on special oath by the other party, not amounting to a compromise, *held*, does not require the Court's leave; it is binding on the minor: 1973 All.L.J. 103: 1973 All.W.R. 49: A.I.R. 1973 All. 464.

Where a plaintiff abandons her case at any stage and practically accepts her opponent's case and claims the relief based on the facts pleaded and proved by her opponent, *held*, she cannot approbate and reprobate; she cannot allege one set of facts and on finding them unsustainable, to stage a *volte face* and seek for relief on the basis of inconsistent set of facts: A.I.R. 1978 Mad. 361: (1977) 2 M.L.J. 179 (D.B.).

Modes of giving evidence—Two alternative modes allowed by Act—Before second mode is adopted first has to be fulfilled—Depositions in prior judicial proceeding—Admission in present suit—Before admission conditions mentioned in S. 33, have to be fulfilled—Consent of parties is not enough: (1962) 3 Guj.L.R. 418: A.I.R. 1962 Guj. 68.

Where after the decree of partition of family properties, certain parties failed to take over the plot allotted to them in the decree, *held*, it amounted to surrender by conduct of the rights granted to them under the decree: 1977 All.W.C. 66.

31. Suppression of evidence—Inference from.—(*See* also Ss. 101-104 and 114, *Illus.* (*g*)). There is no rule of law or of prudence which lays down that the evidence of witnesses must be discarded if they suppress the fact that they were armed and if they do not explain the injuries received by members of the party opposed to them. The matter depends entirely upon the facts of each case. [A.I.R. 1956 S.C. 460, Rel. on]: 1957 B.L.J.R. 756: 1959 Cr.L.J. 71: A.I.R. 1959 Pat. 22.

Where a party has been guilty of suppression of evidence, no conclusion in his favour should be arrived at merely on the ground of paucity of evidence which is of his own creation and a trial Judge would not be justified in giving his decision in favour of such a party on a mere application of the rule of onus of proof: A.I.R. 1949 F.C. 88: (1949) 1 M.L.J. 568 (F.C.).

Where the defence is founded on a relevant and vital document seized from the

accused's custody but not deliberately produced by the prosecution, it would be difficult to sustain his conviction; thus, where a store keeper of the Food Corporation of India was caught at night while getting wheat bags loaded in the truck and the Police, also having seized the release order in favour of a co-operative society, did not produce it at the trial, *held*, prosecution was duty bound to produce the release order to show that the goods being loaded were not covered by it; the release order, a very relevant and vital document, having been deliberately withheld by the prosecution, the accused's conviction could not be sustained: A.I.R. 1987 S.C. 856: (1987) 1 U.J. (S.C.) 477: (1987) 2 S.C.C. 104: 1987 Cr.L.J. 773.

Notwithstanding the burden of proof, an adverse inference may be drawn if a party withholds evidence in his possession which can throw light on the facts and issues; it is not a sound practice for those desiring to rely upon a certain State of affairs to withhold from the Court the best evidence in their possession which could throw light upon the issues and to rely upon the abstract doctrine of the onus of proof: (1978) 91 Mad.L.W. 636.

Where a defendant had not come out with the best evidence in his possession, *held*, he cannot be permitted to rely upon the abstract doctrine of onus of proof: (1983) 96 Mad.L.W. 693 (D.B.).

In criminal trials when witnesses are shown to have swerved from the path of truth, either by suppression or by concoction or by embellishment of untrue facts, their evidence must, as a rule, be discarded in the absence of independent and reliable corroboration, by the aid of which, the truth out of the furnished evidence can be sifted and falsehood distinguished; their testimony is tainted, suffers from intrinsic infirmities and makes the prosecution case highly improbable: 1976 Cr.L.J. 262: 42 Cut.L.T. 726.

Concealment of fact by one party—Effect—Evidence of opposite parties standing at 'oath against oath' on a certain point—One party found to have concealed facts on another point—Such party will lose weight of its testimony: (1968) 2 An.W.R. 564.

32. Falsity of defence—Effect of.—Falsity of defence is no proof of facts which the prosecution has to establish; a false defence plea can at best be an additional circumstance, if other circumstances point unfailingly to the accused's guilt: A.I.R. 1981 S.C. 765: (1981) 2 S.C.C. 35: (1981) 2 S.C.R. 384.

Falsity of the defence does not relieve the prosecution from proving its case beyond reasonable doubt—The burden of proving guilt is always on the prosecution except in certain cases: A.I.R. 1967 Goa 60.

It is for the prosecution to prove its case; falsity of defence is no proof of the accused's guilt unless the prosecution's case is otherwise established; it is only when other circumstances unfailingly establish the accused's guilt that the falsity of his defence may provide an additional link to the chain of incriminating circumstances. [1979 Cr.L.J. 921 (S.C.) and 1981 Cr.L.J. 325 (S.C.), Rel. on]: (1982) 54 Cut.L.T. 321: 1982 Cr.L.J. 2342.

It is only when the various links in the chain of prosecution evidence have been satisfactorily proved, they point to the accused's guilt with reasonable definiteness and they are in proximity to the time and situation that the Court may take into account the falsity of the accused's explanation and defence as an additional link in evidence to lend assurance that the accused is indeed guilty. [A.I.R. 1984 S.C. 1622, Foll.]: 1995 Cr.L.J. 169 (Madh. Pra.).

It is perfectly open to the accused to say that his defence may be false but that cannot make the case of the prosecution true or rather such as if accepted would constitute an offence for which he is sought to be made liable: (1966) 1 L.L.J. 71: 1966 Cr.L.J. 1429: A.I.R. 1966 Guj. 293.

Merely because the defence had not been able to say as to how and why a case had been instituted against the petitioner or some witness had been deposing against him, which law does not require the defence to show, the case of prosecution cannot be accepted as true and reliable: (1982) 53 Cut.L.T. 368.

33. Absconding—Inference from.—(*See* also S. 8). "Running away from justice must always be considered as evidence of guilt"—Clerk, *L.J. Muir's* case: (1793) 23 How. St. Tr. 230: A.I.R. 1935 Pesh. 75.

"Flight or an escape from arrest for felony, is acknowledgment of guil.... Every man, who is accused, is bound to submit himself to the judgment of the law; and, whether it be a trespass, whether it be a

felony with which he is charged, it may, with truth, be said of him who shrinks from trial—*Faciuns fatetur qui judicium Fugit" Day, J., Johnson's* case: (1805) 29 How St. Tr. 192. *See* 1941 O.W.N. 981: A.I.R. 1941 Oudh 517.

"Flight in criminal cases is itself a crime. If an innocent man flies for treason or felony, he forfeits all his goods and chattles. Outlawry, in a capital case, is as a conviction for the crime. And many men who never were tried have been executed upon the outlawry." *Lord Mansfield, Rex* v. *Wilkes,* (1769) 4 Burr. Part IV, p. 2549. Mere absconding of an accused person should not form the basis of a conviction. It comes in as a very useful piece of corroborative evidence if there is other evidence to connect the accused with the crime, but *per se* absconding is not enough to bring home the charge to the person who has absconded: 37 Cr.L.J. 988: A.I.R. 1936 Pesh. 169. *See* also 1941 O.W.N. 981: A.I.R. 1941 Oudh 517 (An absconding accused being unable to give proper explanation is a point in favour of the prosecution).

Where a murder was sought to be proved by circumstantial evidence but the prosecution witnesses turned hostile and the blood-stained knife recovered on the accused's disclosure was not proved to carry human blood, *held,* merely because the accused had absconded immediately after the occurrence is not sufficient to convict the accused of murder; his acquittal by the trial Court upheld: 1995 Cr.L.J. 735 (Madh. Pra.) (D.B.).

34. Statement of accused.—Statement must be taken as a whole—Court not entitled to tear from it only those passages which go to support the prosecution case: I.L.R. (1960) 2 All. 235; 1983 All.L.J. (N.O.C.) 13; A.I.R. 1967 Manipur 11.

Though statement of an accused is not evidence under S. 3, Evidence Act, it can be used against accused—If it is confessional statement, it cannot be so used: 1968 Cr.L.J. 992 (Goa).

It is not open to Court to dissect statement and pick up part which is incriminating and reject part which is exculpatory: 1969 Cr.L.J. 409: A.I.R. 1969 Guj. 69. *See* also (1969) 35 Cut.L.T. 400; 1980 Rajdhani L.R. 43 (Del.).

Statements made by accused in examination under S. 342, Cr.P. Code—Utility in considering his defence—Not useful as evidence: 1969 Cr.L.J. 1149: A.I.R. 1969 Ori. 228.

Unless the circumstances appearing against an accused are put to him in his examination under S. 342 or S. 313 of the Code of Criminal Procedure, *held,* they cannot be used against him: A.I.R. 1984 S.C. 1622: (1985) 1 Bom.C.R. 208.

A cross-complaint made by the accused before the police is nothing but a former statement of the accused and can be used to corroborate or contradict the accused only if the accused gives evidence in Court. It may also be used as an admission of the accused but not by the accused in his favour in view of S. 21, Evidence Act. Hence, when an uncertified copy of such a cross-complaint is produced by the accused himself through a defence witness and the accused has not given any evidence in Court, the document is inadmissible in evidence under the provisions of Ss. 21, 145 and 157: 1963 (1) Cr.L.J. 355: (1963) 4 Guj.L.R. 448.

The recording of the accused's confession under S. 164 of the Code of Criminal Procedure, 1974, must necessarily and exclusively be by the Judicial or Metropolitan Magistrates; such a statement recorded by an Executive Magistrate-cum-Tehsildar is without jurisdiction and, therefore, inadmissible: 1995 Cr.L.J. 396 (P.&H.) (D.B.).

Murder case—Statements of eye-witnesses in committing Court and under S. 164, Cr.P.Code connecting the accused with crime—In Sessions Court witnesses resiling from their statements on the ground that statements were obtained under coercion—Statements cannot be relied upon under S. 288, Cr.P.Code: A.I.R. 1963 J.&K. 34: 1963 (2) Cr.L.J. 148 (D.B.).

Where the genesis of the occurrence could not be known as no witness was present there, the only direct version would be in the statement of the accused, if he chooses to give his version; his statement should be considered in the light of the prosecution evidence and weighing it in the scale of probabilities: A.I.R. 1978 S.C. 315: (1978) 1 S.C.C. 130.

Statements of detenu and accomplices recorded under S. 108 of Customs Act are not confessions and, therefore, the question of falling back upon requirement of S. 164,

Cr.P.Code does not arise. The statements are admissible in evidence and form sufficient and adequate material to form opinion for detaining authority for purposes of preventive detention. [1992 Cr.L.J. 231 (Andh. Pra.), Overruled]: 1994 Cr.L.J. 112 (Andh. Pra.).

Statement of accused recorded under S. 108 of Customs Act cannot be relied upon to corroborate evidencing witnesses: A.I.R. 1992 S.C. 1583: 1992 Cr.L.J. 2516.

35. Accomplice.—(*See* Notes under S. 133). There is no warrant for the extreme proposition that if a man sees the perpetration of a crime and does not give information of it to anyone else, he might well be regarded in law as an accomplice and that he could be put in the dock with the actual criminals. Indeed, there can be no doubt that the evidence of such a man should be scanned with much caution and the Court must be fully satisfied that he is a witness of truth, especially when no other person was present at the time to see the murder. Though he was not an accomplice, the Court would still want corroboration on material particulars as he is the only witness to the crime and as it would be unsafe to hang the accused (four in this case) on his sole testimony unless the Court feels convinced that he is speaking the truth. Such corroboration need not, however, be on the question of the actual commission of the offence; what the law requires is that there should be such corroboration of the material part of the story connecting the accused with the crime as will satisfy reasonable minds that the man can be regarded as a truthful witness: 1956 S.C.J. 382: 1956 S.C.R. 247: A.I.R. 1956 S.C. 379; 1965 M.L.J. (Cr.) 38.

The Court must consider the accomplice's evidence with great caution: 1979 Raj.L.W. 99.

Evidence of an accomplice cannot be accepted without further corroboration: A.I.R. 1979 S.C. 1127: 1979 Cr.L.J. 919: 1979 S.C.C. (Cr.) 621: (1979) 3 S.C.C. 319: (1979) 3 Mah.L.R. 298: 1980 M.L.J. (Cr.) 1.

Evidence of accomplice should be corroborated in material particulars: 1984 Cr.L.J. 1289 (Ori.); (1987) 3 Bom.C.R. 241. *See* also A.I.R. 1976 S.C. 449: (1976) 1 S.C.C. 644.

The statement of a co-accused recorded under S. 313 of the Code of Criminal Procedure, *held*, cannot be used against another co-accused: 1985 Cr.L.J. 1501 (Him. Pra.).

Accomplice witnesses—Pimps and prostitutes are accomplice witnesses in a case against accused for keeping a brothel—Evidence not sufficient without independent corroboration: 1969 Cr.L.J. 1553: A.I.R. 1969 Cal. 416.

36. Reputation and hearsay.—Distinction between. *See* 14 Pat.L.T. 482: A.I.R. 1933 Pat. 189. No standard of special strictness is applicable to the proof of collateral relationships in India, and there is no rule that a person claiming as a collateral heir is bound to allege and prove his title through the common ancestor in all its stages. [I.L.R. 6 Cal. 626, Expl.]: 168 I.C. 881: 46 Mad.L.W. 88: 39 Bom.L.R. 1005: A.I.R. 1937 P.C. 201 (P.C.).

The Evidence Act does not contain any express provision making evidence of general reputation admissible as proof of relationship: 168 I.C. 881: A.I.R. 1937 P.C. 201 (P.C.). In India, it is most dangerous to accept vague statements of hearsay information. Often what a man hears he believes that he saw it himself: 24 Cr.L.J. 791: A.I.R. 1924 Oudh 187. Testimony of *A* relating to what *M* told *N* and the latter passed on to *A* is hearsay and is, therefore, inadmissible in evidence: 1956 Raj.L.W. 211: A.I.R. 1956 Raj. 58 (S.B.).

Prosecution under S. 294, Penal Code for using obscene words towards school girl and teasing her on road—No eye-witness or informant (girl) produced by prosecution—Prosecution relying on sole testimony of witness who had reached the spot after the incident and was told about the words used by the girl—Evidence pure hearsay and inadmissible—Ss. 6 and 8, Evidence Act do not apply—Offence not proved: 1964 Kash.L.J. 267: (1965) 1 Cr.L.J. 554: A.I.R. 1965 J.&K. 37.

37. Pleadings.—A statement of a party before Court but not on oath is only part of the pleading and not legal evidence: (1933) 35 Punj.L.R. 99: A.I.R. 1934 Lah. 234. Evidence in a previous suit or affidavits filed in a previous litigation do not prove anything. Such evidence or such affidavits can be used powerfully when put to a witness as a means of destroying that witness's testimony and if the attack thus launched is successful it results in the witness leaving the box discredited. That does not however prove what is

contained in his previous evidence or affidavits. The matter ends with a witness discredited: 1941 Nag.L.J. 596.

38. Medical examination/blood group test.—(*See* also S. 45). Medical certificate—Value of: A.I.R. 1937 Cal. 697. It is well settled that in a defamation case based on an allegation that a woman has had illicit pregnancy she cannot be compelled to submit to a medical examination against her consent and her refusal to do so is not evidence against her: 31 Cr.L.J. 584: A.I.R. 1930 Lah. 159.

A Court has no power, either under the Code of Civil Procedure or the Evidence Act or the Hindu Marriage Act, to compel a person to undergo the blood grouping test against his consent; it can only give directions and, if unreasonably refused, it can draw adverse inferences: 1979 W.L.N. (U.C.) 71 (Raj.).

39. Expert's evidence.—(*See* also S. 45). Evidence of an expert, like any other witness, has to be appreciated in accordance with law and accepted only if found trustworthy. An opinion evidence of an expert after its acceptance by the Court becomes the decision of the Court and ceases to be an opinion evidence of the expert. Under the circumstances, evidence of an expert also has to be interpreted like any other evidence. In so doing, the effort should be made to explain the same and correlated with the evidence of eye-witnesses. It is only when the two become irreconcilable that the question of accepting one or the other arises and not otherwise: 1994 M.P.L.J. 57. *See* also 1980 Raj.L.W. 96 (D.B.).

Where, on the one hand, the opinion evidence of experts points to the improbability of a certain happening and excludes the happening either as impossible, or as so highly improbable as to be a practical impossibility, and on the other the direct evidence is to the effect that the event did actually happen, then the Court should hesitate to accept direct evidence for the simple reason that miracles do not happen. Certainly, where the direct evidence itself is doubtful and is rendered improbable then also Court should hesitate to accept it. But where the direct evidence is quite convincing and the witnesses are intelligent and independent and further the expert evidence does not exclude it then direct evidence has to be accepted: 1965 Jab.L.J. 1196: A.I.R. 1965 Madh. Pra. 107.

A comparison microscope is the most important and most widely used scientific instrument in comparing the crime cartridge with the test cartridge. Though there has been considerable difference of opinion amongst investigators regarding the use of photographs in a Court for the purpose of illustrating the matching of the markings, and while it may be that microscope photographs, when taken with the due care and in the best of conditions, may enable the evidence to be placed on the record in a visible form, it cannot be denied that a Court would not be justified in rejecting the opinion of an expert who has examined the markings under the comparison microscope and categorically stated that he had compared the land and groove markings on the bullets under a comparison microscope, simply because he did not think it necessary to take the photographs. [(1971) 3 S.C.C. 208, Disting.]: A.I.R. 1978 S.C. 1204: (1978) 3 S.C.C. 86.

When there is a vast divergence of opinion between various writers on the subject, and their opinions could not be said to have been given on circumstances exactly similar to those in the case, *held*, the testimony of the medical expert and other witnesses cannot be discredited only on the basis of passages from the books on Medical Jurisprudence: 1977 Raj.L.W. 241 (D.B.).

Before a Court can act on the opinion evidence of a handwriting expert two things must be proved beyond any manner of doubt, namely, (*i*) the genuineness of the specimen or admitted handwriting; and (*ii*) the handwriting expert's competence, reliability and dependability and his evidence inspiring confidence: A.I.R. 1992 S.C. 2100: 1992 Cr.L.J. 3454.

It cannot be laid down as a general rule that on the defendant choosing to deny his signatures, the plaintiff must examine a handwriting expert; nor is the Court bound to accept the evidence of a handwriting expert as true; the Court has to apply its own mind to the evidence of the expert and either to believe or disbelieve it. [A.I.R. 1957 All. 119, Dissent. from]: A.I.R. 1973 Raj. 12: 1973 Raj.L.W. 182: 1972 W.L.N. 658.

Where an expert had testified that the insect infected *maida*, when its sample was lifted, could possibly contain only eggs, *held*, the Court could not discard his opinion on the basis of some passages in a book without

putting them to the expert: 1985 Cr.L.J. 285: 1984 F.A.J. 407 (Del.).

Where two reports of the contents of an export consignment were contradictory, one based on scientific analysis and the other disclosing no basis, *held*, the report on scientific basis is to be preferred: 1985 Tax.L.R. 2584 (Mad.).

The mere opinion of a witness about the goods' condition based on guess-work and not from personal knowledge is not acceptable; thus, where witnesses testified that the sluice valves enclosed in packets were lying in rows and must have been in good condition, their opinion of the condition of the valves was liable to be rejected: 1979 U.J. (S.C.) 203: (1979) 4 S.C.C. 351: A.I.R. 1979 S.C. 1225.

When the report of the expert is produced and marked as an exhibit the accused cannot argue that he did not get an opportunity to know the contents of the report at any time. Thus, where the accused even after his examination under S. 313, Cr.P.Code did not ask for an opportunity to cross-examine the expert, *held*, non-furnishing of details contained in the report to the accused was not fatal to the prosecution case: 1994 Cr.L.J. 3562 (Ker.) (D.B.).

A gold dealer is competent to testify about gold's purity; his opinion is entitled to some weight, even if he had not tested it like a regular scientist, unless something negatives his opinion: 1976 Cr.L.J. 165.

Possession of contraband opium—Evidence—Failure to subject article to chemical analysis not fatal to prosecution in every case—Persons familiar with article can prove that it is opium by ordinary tests of sight and smell: 1963 M.P.L.J. 830: (1964) 1 Cr.L.J. 44: A.I.R. 1964 Madh. Pra. 11.

Opium Act, 1878, S. 9(*a*) and (*b*)—Offence under—Evidence—Chemicals test not necessary in every case—Experienced witnesses testifying articles as opium is sufficient: (1963) 2 Cr.L.J. 714 (Madh. Pra.).

Where accused was convicted for carrying illicit liquor in motor tube but sample was not sent to Chemical Analyst instead it was examined by Excise Sub-Inspector who was not specially skilled or trained officer to come to any conclusion in that regard and conviction was based on his evidence alone, *held*, conviction was unsustainable: 1994 Cr.L.J. (N.O.C.) 350 (Ori.).

Where an auctioneer of Government goods deposing three years afterwards that the goods sold looked like new and his impression was based on superficial examination unaided by record, *held*, his testimony could not be accepted: 1979 U.J. (S.C.) 203: (1979) 4 S.C.C. 351: A.I.R. 1979 S.C. 1225.

Till the guns recovered at the instance of the accused are sent for ballistic examination and a report is obtained that they are in working order, mere recovery of guns cannot connect the accused with the crime. [1984 W.L.N. (U.C.) 15 (Raj.), Foll.]: 1994 Cr.L.J. 2952 (Raj.) (D.B.).

In case of close range firing, the brown parchment-like appearance of the zone of scorched skin and embedded specks of unburnt powder are permanent. It is the accepted view of medicolegal experts that these are the unmistakable signs of a 'near' discharge of a weapon—When such a firearm is discharged from a distance, there will be total absence of characteristic of a 'near' discharge; ingraining of unburnt particles of powder is absent if fired from beyond ten feet. It is also the medico-legal view that at a distance of six or nine feet the wound is still ragged, the shot entering *en masse*, at the same time the pellets show a tendency to scatter, for the wounds at this distance shot holes may be found above the main wound due to the upward jerk of the muzzle caused by recoil kick of the weapon. These medico-legal experts give several examples as a general guide in determining the distance at which the weapon was discharged; at the same time they also express that there are so many circumstances to be considered such as, length of barrel, choke or cylinder, black or smokeless powder, size of shot, etc., that a series of experiments must first be carried out with the same weapon and loading as were used in the case under investigation before a definite opinion can be given: I.L.R. (1964) Cut. 623.

40. Doctor's evidence.—(*See* also S. 45). A doctor is not always a witness of truth; but generally the Courts act on the doctor's findings while appraising evidence of other witnesses because the doctor's evidence is objective, and not tainted in the sense as coming from a partisan or interested witness: (1989-2) 37 B.L.J.R. 18 (D.B.).

There is no irrebuttable presumption that a doctor is always a witness of truth; his evidence is to be appreciated like that of any other witness: A.I.R. 1983 S.C. 66: (1982) 2 S.C.C. 396.

Even if the medical evidence is negative still if the circumstances warrant and unerringly point to the guilt and only to the guilt of the accused, then the Court will be justified in convicting the accused on the basis of circumstantial evidence irrespective of the fact that the medical evidence in the case is negative. [A.I.R. 1960 S.C. 500, Foll.]: 1995 Cr.L.J. 1964 (Karn.) (D.B.).

True, medical evidence, primarily being evidence of opinion and not of fact, is hardly conclusive or decisive; and equally true, when medical evidence is in conflict with the eye-witnesses' statements, it discredits the eye-witnesses, and all the more where eye-witnesses cannot be unreservedly believed; it is extremely unsafe to act upon the testimony of interested eye-witnesses if contradicted by the medical evidence though the case may be different where the eye-witnesses are totally disinterested and their evidence is cogent and convincing: 1982 Kash.L.J. 194. *See* also 1989 Cr.L.J. (N.O.C.) 76 (Ker.); 1989 Cr.L.J. 288 (S.C.) (Medical opinion pointing to alternative possibilities).

The eye-witnesses may not give a very correct and accurate account of the version and may at places make exaggerations or may fail to give correct facts either on account of lapse of memory or on account of inability to observe minutely or to recount and recite correctly. Sometimes, the Medical Officers also do not bestow sufficient care while performing examinations and their opinions may not be properly formed on account of inadequate or defective examinations or lack of complete knowledge. Naturally, therefore, the Court must carefully examine the discrepancies and if it is reasonably open to arrive at a substantial and true version of the prosecution case, the Courts should adopt the easy course of throwing away the prosecution case on the alleged discrepancies between the medical evidence and the eye-testimony: (1961) 1 Cr.L.J. 155: A.I.R. 1961 Raj. 24.

Where the expert evidence, including medical evidence, is at variance with ocular evidence, *held*, the conflict can be resolved after proper scrutiny; if after close and careful analysis, the oral evidence is found to be convincing, it has to be preferred; exaggerated picture of the occurrence and minor discrepancies, if any, have to be ignored; otherwise, the safest course is to rely on medical evidence. The Court, however, has to keep in mind that expert evidence is corroborative; one of the methods of appraisal of oral evidence is to test it on touchstone of medical evidence to find out whether the injuries could have been caused in the manner alleged by the prosecution; beyond that, it does not carry much weight: (1988) 36 B.L.J.R. 337 (D.B.); 1989 Cr.L.J. (N.O.C.) 186 (Pat.).

Medical evidence cannot override direct evidence if direct evidence is satisfactory and reliable: 1984 Cr.L.J. 921: 1984 S.C.C. (Cr.) 484: A.I.R. 1984 S.C. 1233.

If there is inconsistency between occular account and medical evidence and the occular account is beyond reproach, the Court should overlook the conflict and accept the occular account: 1995 Cr.L.J. 1432 (Bom.) (D.B.).

Where the deceased sustained two massive injuries one on his chest and other on his thigh but alleged eye-witness was absolutely silent about the thigh injury and infact in the entire evidence adduced by the prosecution there was no explanation about the thigh injury of the deceased, *held*, said witness could not be relied upon. [1979 Cr.L.J. 51 (S.C.), Rel. on]: 1995 Cr.L.J. 792 (Bom.) (D.B.).

Where accused was alleged to have killed driver of Police jeep in a Police encounter and the testimony of ocular witness did not accord with medical testimony inasmuch as ocular witness deposed that shot was fired at from a long distance while medical evidence showed that deceased received two gun shot injuries, both from a close range resulting in charring of the skin, *held*, conviction of the accused under Ss. 302 and 34 I.P.Code was not proper. [1955 Cr.L.J. 930 (S.C.), Rel. on]: 1994 Cr.L.J. 3770 (Raj.) (D.B.).

Where the Doctor's evidence does not corroborate the statements of the prosecution witnesses, it would be unsafe to convict the accused on such a statement which is not corroborated by medical evidence.

Where the statement of the Doctor was hypothetical and he gave his own experience of cases like the one in question, the opinion

of the medical man cannot be allowed to outweigh the testimony of disinterested eye-witnesses: 1957 M.L.J. (Cr.) 231: (1957) 1 An.W.R. 336.

Medical evidence conflicting with oral evidence of eye-witnesses—Oral evidence of eye-witnesses not corroborated in material particulars by any circumstantial evidence—*Held*, eye-witnesses evidence stood discredited and Court was wrong in convicting accused on such evidence: A.I.R. 1969 Cal. 321.

Medical evidence is an opinion evidence given by an expert and deserves respect by the Court, such evidence cannot be brushed aside without any justifiable reason: 1994 M.P.L.J. 57 (D.B.).

Where the Doctor who treated the victim of a dowry death deposed that the deceased had told him that her mother-in-law had burnt her, *held*, merely because the Doctor did not record this statement in the medical register is no ground to disbelieve him; he is a Government Doctor then on duty in the hospital; and nothing was elicited from his cross-examination that he was interested in the prosecution or inimically disposed towards the accused; as he himself had treated the victim, there was no question of finding out whether the victim was in a position to make statement or not; and the statement made by her before the Doctor was not a dying declaration, only a communication by the patient to the Doctor treating her: A.I.R. 1988 S.C. 1785: 1989 Cr.L.J. 2070.

Medical evidence—Appreciation of. *See* A.I.R. 1965 S.C. 364.

The evidence of a medical witness, however eminent he may be relating to the condition of a patient on a previous date, is not of much evidentiary value when there is positive evidence as to his actual condition at that previous time: 1964 Ker.L.J. 724: 1964 Ker.L.T. 497: I.L.R. (1964) 2 Ker. 259: A.I.R. 1965 Ker. 189.

No medical officer indicates in the certificate the exact condition of the patient; thus, absence of indication in a medical certificate that its holder was unable to move during the period he was ill and unable to appear in the Court was not fatal to the plea of illness: A.I.R. 1986 Ori. 102.

The best person to give an opinion about the nature and shape of the weapon is the Medical Officer who had conducted the autopsy. Thus, where the doctor testified that the injuries could have been caused with a *pharsa* or some other sharp-edged weapon, *held*, the High Court was clearly in error in substituting its own opinion based on conjectural premises for that of the Medical expert: A.I.R. 1981 S.C. 897: 1980 (Supp.) S.C.C. 489.

Unless the injured person is present in the Court and identified by the doctor, no document even the one said to be a wound certificate relating to the injuries found on that person when examined by the doctor, could be brought on record. Thus, where injured person died long before the trial commenced, *held*, it was not open to the prosecution to bring on record wound certificate in respect of said person: 1995 Cr.L.J. 701 (Andh. Pra.) (D.B.).

Merely because a doctor witness (who proved the medical certificate) was not found reliable does not entitle the Tribunal to throw out his entire evidence: (1979) 1 Ren.L.R. 681 (Del.).

Where Modi's Medical Jurisprudence mentioned different times for digestion of European and Indian Foods and also other factors that may lead to variations in time, *held*, the Courts in appraising such evidence should not impute exactitude to medical evidence oblivious to variables noticed by experts and otherwise; the Court must not abandon a scientific attitude to medical science to avoid judicial superstition: A.I.R. 1973 S.C. 2622. *See* also A.I.R. 1994 S.C. 672: 1994 Cr.L.J. 626 (Inconsistency between ocular and medical evidence).

The fact that the deceased's bladder was full of urine shows that, in all probability, he had a few hours' sleep at the time of his death: (1963) 2 Cr.L.J. 198 (All.).

One of the modes of testing the eye-witnesses' account is to seek whether the injuries said to have been inflicted according to them can actually cause the medical results as found by the doctor. In a case of murder by gun when there is a contradiction between the statements of the eye-witnesses and the medical testimony not only with regard to injuries inflicted on deceased but also with regard to the manner in which the gun was fired, it behoves the prosecution to have the matter clarified by the evidence of ballistic expert. But it cannot be said that the

eye-witnesses' account should be discredited merely because their evidence does not harmonise with that of medical witness: 1967 Cur.L.J. 51.

Evidence with regard to time of occurrence—Statement of eye-witness not consistent with medical evidence—Medical evidence value of—Witness being illiterate lady of village, she may not have exact idea of time—*Held*, that there was no reason to doubt prosecution story regarding time of occurrence—Cr.P.Code, 1898, S. 509: 1969 Pat.L.J.R. 482: 1969 B.L.J.R. 897. *See* also S. 3, Note 62, *supra*.

41. Evidence of tracks.—(*See* also S. 45). Where the site of murder was a ploughed field and though two persons were placed there by the Police as guards, there was no evidence to show that any foot-prints were preserved at the spot and the four moulds of the accused's foot-prints were lifted therefrom only when the Investigating Officer came at the spot, and noticed the foot-prints of which no mention at all is made in the inquest report but the concerned witness referred it in his testimony before the Court; besides, nothing on the record indicated that while taking the accused's specimen foot moulds he was asked to wear the same shoes as he was wearing when he committed the offence, *held*, such and other similar circumstances showed that no reliance could be placed on the foot-print moulds to hold him guilty of murder; the accused acquitted. [1990 Cr.L.J. 2296 (S.C.), Rel. on]: 1995 Cr.L.J. 248 (P.&H.) (D.B.).

Evidence of tracks measured three days after the occurrence and examined twelve days after would not be of much use since the peculiarities of the foot-prints would in all probability be obliterated by the physical forces of nature: 33 Cr.L.J. 935: A.I.R. 1932 Lah. 557. It is unsafe to rely completely on the evidence of trackers as to the correspondence of foot-prints: 42 I.C. 129: 18 Cr.L.J. 897. *See* also A.I.R. 1942 Sind 11 cited under S. 7, *infra*.

42. Evidence of age.—(*See* also S. 35). The date of birth given in the High School certificate, *held*, should not be lightly disbelieved: 1992 All.L.J. 873.

Where a certified copy of a date of birth entry in the school register, proved by its Headmaster, was fully supported by other documentary evidence and circumstances, *held*, his evidence may be safely acted upon: A.I.R. 1983 Andh. Pra. 181: (1983) 1 A.P.L.J. 78.

A public servant under S. 21(9) of the Indian Penal Code is an officer in the Government's service on pay; an employee in a non-Government school is not a public servant; an entry made by him in the school register is not admissible in evidence under S. 35. [A.I.R. 1940 Rang. 191; (1968) 70 Punj.L.R. (S.N.) 31; A.I.R. 1936 Lah. 598; (1969) 71 Punj.L.R. (S.N.) 21 and A.I.R. 1965 S.C. 282, Foll.]: A.I.R. 1975 P.&H. 198.

Under the Educational Rules, every school has to maintain registers of admissions with prescribed particulars; such records can be considered as official records admissible under S. 35; the section does not forbid the admissibility of a certified copy of an entry showing the date of birth mentioned in the school register. [A.I.R. 1960 Andh. Pra. 253, Foll.; 1936 Mad.W.N. 111; A.I.R. 1959 Ker. 12 and A.I.R. 1975 P.&H. 198, Dissent. from]: A.I.R. 1983 Andh. Pra. 101.

Though birth certificate is a conclusive proof of age of a person but in absence of such evidence, oral testimony of his mother is more authentic and is preferable to that of doctor: 1971 Raj.L.W. 456.

In absence of a school certificate, age can be proved by some other mode, parents being the best witnesses therefor; horoscope entries can also be used but by examining its author or the person who had read it soon after it was prepared. But there is a very great confusion of thought in civil Courts where a horoscope is often accepted as substantive evidence with a vague idea that such a document contains a relevant fact under S. 32, while a horoscope is helpful in proving the date of birth under S. 159 or S. 160: A.I.R. 1986 Madh. Pra. 218: (1987) 1 Hindu L.R. 241.

Original horoscopes have little evidentiary value, though they may be admissible under S. 32(5). [A.I.R. 1941 All. 385; A.I.R. 1957 Ker. 103 and A.I.R. 1965 Him. Pra. 32, Rel. on]: A.I.R. 1978 Mad. 42: (1978) 91 Mad.L.W. 4: (1978) 1 M.L.J. 460.

In criminal proceedings, the statement of a witness's age forms no part of his deposition and is not usually the statement of the witness himself, but an estimate of the Court: A.I.R. 1933 Pat. 627.

A witness's age mentioned above his deposition is not an authentic statement and cannot be relied upon as proof of his age: A.I.R. 1984 Ori. 26: (1983) 56 Cut.L.T. 496.

An approximate estimate of the age of a party made by third parties who might not have had any specified means of knowledge is not of much value: I.L.R. 56 All. 766: A.I.R. 1934 All. 406 (F.B.).

Where a person who has no expert knowledge on the question of the age of trees is appointed a Commissioner, his estimate as to the age of certain trees can be treated only as a rough one and cannot be taken as the last word on the subject: 1948 R.D. 274.

Appearance or rather description as regards age of a person and estimate of age or reliance on memory regarding post events as to the time they took place is hardly a reliable basis to come to a definite finding about the age of any person. The best evidence of age has always been considered to be the evidence regarding the actual date of birth: (1962) 64 Bom.L.R. 86: I.L.R. (1961) Bom. 963: A.I.R. 1963 Bom. 25.

In matters of genealogy reliance can be placed upon memory and tradition: 30 Pat.L.T. 359.

It is a well-known fact that when the age is not in issue villagers are particularly careless in stating their age. As such the statement of age cannot be of such positive character in determining a particular issue long after the date, when the determination of age was not one under consideration when the statement was made: 1939 All.W.R. (B.R.) 44: 1939 R.D. 164.

Only Doctor's opinion regarding age of a lady being 18 years, *held*, is not conclusive regarding her age: 1979 Raj.Cr.C. 122.

43. Contempt cases.—For an incident or happening in a Court, the Presiding Officer's version is entitled to pre-eminence and acceptance; it is only in the rarest case that it should be disregarded; for an incident resulting in contempt of Court proceedings, the Presiding Officer clearly falls in the category of wholly truthful and reliable witnesses; his solitary, oral testimony indeed is sufficient to sustain his version, more so if it was forthrightly and credibly given. [A.I.R. 1957 S.C. 614, Rel. on]: I.L.R. (1978) 2 P.&H. 63 (F.B.).

A contempt case is not a lis between a contemner and the Presiding Officer; no evidence in justification of contempt can be allowed; the plea of justification and recording of evidence in fact is a fresh contempt: I.L.R. (1978) 2 P.&H. 63 (F.B.).

The charge of contempt must be proved beyond reasonable doubt: I.L.R. (1975) 1 Del. 250.

44. Title/possession.—(*See* also Ss. 35 and 110). It is settled law as laid down by the Privy Council in 53 Ind. App. 220: A.I.R. 1926 P.C. 100; 47 Ind. App. 57: A.I.R. 1920 P.C. 46; A.I.R. 1948 P.C. 210; A.I.R. 1961 Andh. Pra. 361, and by the Supreme Court in (1978) 1 S.C.R. 177: A.I.R. 1977 S.C. 2012 and (1991) 2 S.C.R. 531: A.I.R. 1991 S.C.W. 1303 that mutation of names in revenue record is no evidence of title, though it may be relevant for other purposes; it is an equally settled law that in case of open land title follows possession: A.I.R. 1994 S.C. 1496.

Record-of-rights—*A*'s properties mutated in favour of his reversioners on a certain date—Certain other properties were entered in *A*'s name on the same day—Entries, *held*, did not necessarily prove that '*A*' died: (1968) 70 Punj.L.R. 1046: 1968 Cur.L.J. 268.

Presumption of correctness of entries in record rights: A.I.R. 1967 Cal. 10.

A mere entry in the Settlement Khatian that the petitioner has a *Sthitiban* (occupancy) status, *held*, cannot create title: (1971) 1 Cut.W.R. 558.

In absence of proof of the terms of a will either by producing the original or by secondary evidence, *held*, the beneficiaries title to the suit property cannot be upheld: (1973) 2 M.L.J. 506.

Rent receipts will not prove title—Only prove possession: I.L.R. (1966) Cut. 483.

To prove the factum of possession over disputed land, *held*, mere residence of the claimant in the village where the land is situate is not sufficient or conclusive: 1983 All.C.J. 305.

Title — Proof of — Municipal record — Value of — Entries in the municipal *jamabandis* cannot prove title: 1960 Nag.L.J. 113: (1960) 62 Bom.L.R. 322: A.I.R. 1961 Bom. 169.

'Proof and its method'—Mere entry in the current settlement or record-of-rights is no conclusive proof of ownership in separate acquisition by a person—It is so especially in

the presence of evidence that the property is part of the joint family property: A.I.R. 1967 Ori. 74.

Wajib-ul-arz—Entries in—Weight of. *See* A.I.R. 1961 All. 206.

Land revenue receipts do not *ipso facto* prove actual possession of the land by the holders of the receipts: A.I.R. 1979 Gau. 55.

In a proceeding under S. 5(1)(*iii*) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Lands) Act, *held*, the question of possession cannot be determined on the basis of the report of the Circle Officer as it is not a statutory report and can-not take the place of evidence to be adduced in such proceedings: 1977 B.B.C.J. 452 (D.B.).

Title — Proof — Sale certificate cannot prove title: A.I.R. 1961 Guj. 115. *See* also S. 3, Note 44, *supra*.

The oral evidence of an independent witness as to possession cannot be brushed aside unless there are strong reasons for doing so. The fact that no writing has been produced about panchayat having given possession of land to a particular person is not such a reason: 1959 Raj.L.W. 35.

45. Corruption cases.—(*See* also Ss. 101-104). There is slight difference in the mode of proof in civil and criminal cases; in a civil case a finding can be given on preponderance of probabilities, in a criminal case the finding of guilt can only be recorded if evidence is sufficient to prove the guilt beyond any shadow of doubt. Even though a charge of bribery in an election is akin to a criminal charge, yet in the very nature of things it is a civil dispute; if in case of a charge of bribery, the accused is found to be guilty of misconduct, *held*, his plea of innocence stands shattered: A.I.R. 1985 P.&H. 6.

The fact that the party is alleged to have accepted bribe in a civil case does not convert it into a criminal case, and the ordinary rules applicable to civil cases apply. Therefore, the contention that when bribery is to be inferred from circumstantial evidence, the circumstances must be such so as to exclude any other reasonable possibility cannot be accepted: A.I.R. 1966 S.C. 1734.

The Anti-Corruption Department Officers must seriously endeavour to secure really independent and respectable raid witnesses to inspire confidence in the Court's mind so that the Court is not left in doubt as to whether or not any bribe was paid to the accused public servant: A.I.R. 1976 S.C. 91: (1976) 1 S.C.C. 145. *See* also (1981) 83 Punj.L.R. 402.

It depends on the circumstances of each case whether the complainant bribe-giver was willing to give bribe or he was compelled and reluctantly agreed to give bribe; in the latter case, he cannot be treated as an abettor and his evidence cannot be treated as that of an accomplice and if the Court feels it safe after due caution it may convict the accused on their evidence where the *panch* witnesses turned hostile and were not independent, the Court may rely on the complainant's and the Police Officer's evidence to convict the accused if the attending circumstances were consistent with his guilt and not with his innocence: (1987-2) 28 Guj.L.R. 878 (D.B.).

In a bribery case, the official to whom the bribe was offered cannot be disbelieved (*i*) merely because some complaints had been made against him but ultimately no substance was found therein or (*ii*) that he had used inappropriate language in describing his powers and functions: A.I.R. 1973 S.C. 2679.

Mere recovery of money from the person of the accused, in the absence of a demand and voluntary acceptance of the bribe by him, *held*, is not sufficient to establish the offence: 1980 Cr.L.R. 162 (Guj.).

Where prosecution evidence in a case under the Prevention of Corruption Act, 1947, had material contradictions and no scientific test to show that the accused had handled the currency notes was employed, *held*, it is a ground for legitimate doubt on the truth of the prosecution story; conviction set aside: A.I.R. 1977 S.C. 674.

Where a public servant tried for possessing assets disproportionate to his known sources of income had shown by vast documentary and other evidence that those assets belonged to his father-in-law, a man in affluent circumstances, *held*, the public servant was entitled to acquittal; he is not required to prove his innocence beyond all reasonable doubt; he has merely to bring out preponderance of probability: A.I.R. 1981 S.C. 1186: (1981) 3 S.C.C. 199.

Prevention of Corruption Act, 1947, S. 4(1)—Accused shown to have accepted money as gratification other than legal remuneration—Presumption under S. 4(1) that amount was received as motive or reward such as is mentioned in S. 161 of Penal Code must arise and burden will be on accused to rebut that presumption—Rebuttal must be by explanation supported by proof within meaning of S. 3 and not merely by putting forth reasonable and probable story: 1967 Cr.L.J. 21: A.I.R. 1967 Bom. 1.

Where in a bribe case against a Government servant, the complainant's and the Police Officer's oral evidence is corroborated by circumstantial evidence which is consistent with the accused's guilt and not with his innocence, *held*, prosecution version can be accepted even if the trap witnesses turn hostile or are not independent: A.I.R. 1984 S.C. 1453: (1984) 1 S.C.C. 254.

Where in a prosecution for accepting a bribe the currency notes smeared with phenolphthalein powder were recovered from the accused's shirt pocket; the pocket was not washed with a solution of sodium corbonate but in water which did not, indeed could not, change its colour; *held*, it did not amount to proof of the currency notes not having been placed in the accused's pocket: 1980 Cr.L.J. 538. *See* also (1978) 80 Punj.L.R. 242.

While appreciating the evidence in a prosecution for acceptance of bribe the background of the prosecution story should not be forgotten: A.I.R. 1980 S.C. 1558: 1980 Cr.L.J. 1096.

Where in a bribery case, the prosecution witnesses and the complainant came from the same village and same *patti*, *held*, that did not mean that they were mutually related and their evidence should be discarded: A.I.R. 1987 S.C. 1441: (1987) 1 U.J. (S.C.) 687: (1987) 2 S.C.C. 486: 1987 Cr.L.J. 1180. *See* also (1982) 23 Guj.L.R. 438.

Where Patwari accused of bribery pleaded enmity with the complainant based on the Patwari having got reviewed the mutation entries in the names of the complainant's sons *held*, it is not an acceptable ground for grudge; the complainant's evidence could not be discarded on such ground: A.I.R. 1987 S.C. 1441: (1987) 1 U.J. (S.C.) 687: (1987) 2 S.C.C. 486: 1987 Cr.L.J. 1180.

An offer of bribe, an electoral offence amounting to a corrupt practice, partakes of a quasi-criminal nature; the onus to prove it lies initially on the election petitioner: A.I.R. 1976 S.C. 1599: (1976) 2 S.C.C. 455: (1976) 2 S.C.R. 445.

A corrupt practice is a serious thing; it leads not merely to the setting aside of the election of the successful candidate but his also being disqualified to stand for election for a certain period; it should be proved beyond reasonable doubt: A.I.R. 1975 S.C. 1053: (1975) 1 S.C.C. 531.

46. Election matters.—(*See* also Ss. 101-104). In appreciating evidence, particularly in election matters, the witnesses' interest in, and support to any particular political party, are relevant factors to determine their bias; there are also other factors such as their knowledge of the pamphlets' contents, their preserving the same, the action they took and whether they are chance witnesses or had an opportunity of knowing about the incident; there may be some witnesses who may claim to have supported the successful candidate but they might have changed their loyalty afterwards: (1974) 3 S.C.C. 719: A.I.R. 1974 S.C. 405.

Standard of proof required in election matters in proving corrupt practices is the same as that for criminal offence: 1967 Cr.L.J. 691: A.I.R. 1967 Andh. Pra. 155. *See* also S. 3,Note 46, supra.

The broad and general unqualified contention, that in election cases, merely because a witness has supported a candidate of the political party of his liking, he must for that reason alone and without more be described as an interested witness not worthy of belief, could not be sustained. This is undoubtedly a relevant circumstance, but in each case the evidence of a witness has to be weighed and evaluated on its own intrinsic worth in the background of all relevant surrounding circumstances including his personal and political leanings and social status, etc: A.I.R. 1965 Punj. 463.

Corrupt practice affecting election—Circumstantial evidence has the same place and relevancy in election matters as in civil or criminal proceedings: 1967 Cr.L.J. 691: A.I.R. 1967 Andh. Pra. 155. *See* also S. 3, Note 46, *supra*.

Testimony of an election agent admitting allegations of corrupt practices by him is not

admissible in evidence in absence of proof that he was engaged by the candidate to carry on his propoganda and was in charge of his publicity: (1973) 52 Elec.L.R. 333 (Raj.).

The Police are presumed to be concerned with law and order; at a large gathering, anything might happen for which the Police might be held responsible; thus, where the Police had taken down the speeches at an election meeting, the audio cassettes and short-hand notes of such speeches may become relevant in an election petition and might be summoned as evidence; they are neither inadmissible nor irrelevant: (1991) 4 Bom.C.R. 156.

Where in an election petition the testimony of C.I.D. officers in regard to specific public meetings was rejected on the ground that the returned candidate's list of public meetings kept by the Police had not mentioned those meetings, *held*, it was an erroneous approach; obviously the lists were not exhaustive; they refer only to those public meetings where the Police staff is sent for maintenance of law and order; it is difficult to appreciate how the oral testimony of a witness can be contradicted by a negative inference from the absence of an entry in the register maintained by another witness, when that other witness has not deposed that his register or list was exhaustive and no other public meetings were held; the positive evidence of the C.I.D. officers supported by a chart furnished by the Inspector General of Police could not be rejected: A.I.R. 1975 S.C. 308: (1975) 3 S.C.C. 646.

In a petition under the Representation of the People Act, 1951, for setting aside an election for slanderous speeches and distribution of libellous leaflets against the defeated candidate in some public meetings, *held*, negative evidence is ordinarily no good to disprove the factum of meetings; but to disbelieve a witness for having appeared to give evidence without summons is altogether wrong: A.I.R. 1975 S.C. 290: (1974) 2 S.C.C. 660. *See* also 1970 U.J. (S.C.) 753; A.I.R. 1985 N.O.C. 44 (Del.); A.I.R. 1985 N.O.C. 235 (Him. Pra.).

Distribution of an objectionable pamphlet, undoubtedly a corrupt practice, is indeed very easy to allege but very difficult to rebut; as it can be printed by anybody in any Press with utmost secrecy and is deemed to be proved merely by its publication, by giving a free licence to any defeated candidate to get an objectionable pamphlet published and circulated amongst his supporters and produce them as witnesses to testify that it was printed or published or circulated by the successful candidate; the Court in such circumstances frowns on such evidence from tainted or interested sources: A.I.R. 1976 S.C. 1599: (1976) 2 S.C.C. 455: (1976) 3 S.C.R. 445.

Election—Representation of the People Act 1951, S. 98 — Election petition — Witnesses examined by either side found to be interested—Evidence of Returning Officer—Few circumstances would not justify rejecting of his evidence *in toto* though he was found to be not totally disinterested and independent witness—His evidence will have to be scrutinised carefully and must be accepted at least to the extent to which it may be supported by circumstantial evidence: (1969) 1 S.C.C. 636: (1969) 2 S.C.J. 759: A.I.R. 1969 S.C. 1034. *See* also A.I.R. 1977 S.C. 1.

Though, ordinarily the opinion of the Election Tribunal on appreciation of evidence is entitled to great weight where the Presiding Officer who delivered the judgment recorded the evidence of only one witness he having no opportunity to watch the demeanour of other witnesses when deposing, he was in no better position in assessing the value of the evidence and the appellate authority could examine the evidence relied by him and form its own opinion from the same: 1962 Jab.L.J. 28: 1961 M.P.L.J. 1361.

Where in an election petition, the petitioner's polling agent deposed that the elected candidate had asked his polling agents at the polling station that he was leaving some persons behind and they should see to it that no one is permitted to vote for the rival candidate but he had made no complaint in writing to the Presiding Officer, *held*, no reliance could be placed on his evidence: A.I.R. 1986 S.C. 3: 1985 (Supp.) S.C.C. 611.

Where in an election petition, the village *chowkidar* deposed that when he was at the polling booth to cast his vote he saw the supporters of a candidate having an altercation with a voter whom he rescued with some other persons' help, but he made no report to the Deputy Commissioner or the Sub-Divisional Officer or the Assistant Sub-Inspector of Police present there, *held*, his failure to make reports speaks volumes against the

credibility of his evidence: A.I.R. 1986 S.C. 3: 1985 (Supp.) S.C.C. 611.

Where the witnesses deposing on a point generally speaking fall under two heads, one set consisting of those who worked for the petitioner in the election and the other set of those, who worked for the opposite elected candidate, it is not proper to dismiss them with the observation that the first set is interested, while the second set has come to depose against its own party; this is a thoroughly wrong approach to the evidence and would tend to deprive the Court of the most competent material available. The evidence has to be appraised on its own merits in the light of the other materials placed on record: A.I.R. 1959 Assam 200.

Where in an election petition the defence of *alibi* is raised against the charge of bribery, *held*, not only it should be pleaded in the written statement but should also be suggested to the petitioner and his witnesses in cross-examination: I.L.R. (1972) 2 Cal. 618.

47. Eviction matters.—(*See* also Ss. 101-104, Note 43 and S. 106, Note 12). It is not necessary that the landlord alone should go into the box and depose about his *bona fide* requirement; his agent or anybody on his behalf can do so if his evidence is cogent, convincing and trustworthy; the landlord's failure to enter the witness box does not by itself negative his claim for *bona fide* requirement: (1983) 96 Mad.L.W. 394.

There is no rule of law requiring the Court to accept unrebutted evidence of tenants; the Judges are entitled to draw upon their own experience, and probabilities and circumstances of the case for coming to their conclusions: (1979) 1 Ren.L.R. 806 (Del.).

As leave to contest an eviction application is granted to the tenant under S. 23-C of the M.P. Accommodation Control Act, 1961, only when his application for leave, supported by an affidavit, discloses such facts as would disentitle the landlord from seeking his eviction on the ground specified in S. 23-A, but once the leave has been granted, the landlord's application under S. 23-A has to be disposed of on inquiry on evidence alone; the landlord has to discharge the burden of proving several factual situations pleaded by him except the nature of his requirement being *bona fide* which is made a rebuttable presumption under S. 23-D (3); thus, the tenant cannot be asked to adduce evidence in rebuttal without first requiring the landlord to prove his position except the *'bona fide'* nature of his requirement: A.I.R. 1990 Madh. Pra. 106.

Prima facie case—Inquiry as to suit for eviction—Application for stay of suit under S. 8 of Kerala Prevention of Eviction Act (XII of 1966)—Evidence on record should be considered although not elaborately, to find whether *prima facie* case of tenancy is made out: 1969 Ker.L.T. 664.

Where one brother was evicted by the other brother as an ex-licensee but the Additional District Judge reversed the eviction order on finding that there was sufficient nucleus of *ejmali* fund left by their father for purchasing the property; it was, thus, a joint family property; *held*, this being an inference from the totality of facts and circumstances, it is not without evidence or totally unwarranted by the evidence on record: A.I.R. 1981 Cal. 285.

Normally, where the husband's evidence is sufficient to establish certain facts, the wife need not enter the witness box unless some facts have to be established on her own evidence; but where eviction of a tenant was sought from the wife's property on the ground that it was required for the husband's business, *held*, the husband was a necessary witness and ought to have been examined: (1987) 100 Mad.L.W. 612.

Burden of proof—Right of tenant after redemption of mortgage: (1965) 67 Punj.L.R. 134: A.I.R. 1965 Punj. 232.

48. Accident cases.—(*See* also Ss. 101-104, Note 16 and S. 106, Note 8). In case of an accident occurring in split seconds, it is not expected of an eye witness to give its graphic description; the only safeguard that the Court must bear in mind is that such witness should be reliable and truthful, inspiring the Court's confidence, and his evidence should be capable of legal inferences as to the manner of the accident: (1989) 2 Bom.C.R. 49 (D.B.).

Where the accident had occurred on an open road in an uninhabited area and the evidence showed that the driver had applied foot brakes which were in order and the truck had stopped 30 ft. away, *held*, it could not be said that the truck was driven at a very high speed; rash and negligent driving was

not proved: 1979 Raj.L.W. 310. *See* also (1971) 2 Cut.W.R. 121; I.L.R. (1980) 1 Del. 360.

Merely because the driver immediately removed the victim to the hospital, *held*, is no evidence of his being not negligent: I.L.R. (1981) Him. Pra. 323: A.I.R. 1982 Him. Pra. 67.

As a rule, mere proof that an event or accident has occurred, with its cause unknown, is no evidence of negligence; but peculiar circumstances constituting the event or accident, in a particular case, may by their concordant, clear and unambiguous voices prove somebody's negligence as the cause; it is to such cases that the maxim *res ipsa loquitur* may apply, where the cause of the accident is unknown and no reasonable explanation as to the cause comes forth from the defendant; it needs to be reiterated that such an event or accident must be of a kind which in the ordinary course of things does not occur if persons entrusted with the management and control use due care. But some decisions indicate that satisfaction of such a condition alone is not enough without further evidence that it was within the defendant's control to prevent the cause for in such an event the defendant is in a better position than the plaintiff to explain how the accident occurred. Instances of such special kind of accidents which "tell their own story" of being offspring of negligence are where a motor vehicle mounts or projects over a pavement or one car rams another from behind, or even a head-on-collision on the road's wrong side. The *res* must not only bespeak negligence but also pin it on the defendant: A.I.R. 1979 S.C. 1848.

Where in a motor accident claim case, the evidence of a witness about the driver driving the vehicle rashly and negligently was found to be reliable, *held*, his non-examination in the criminal case would not affect his credibility: A.I.R. 1989 Andh. Pra. 337.

In a motor accident claim case, burden lies on the Insurance Company to establish breach of the policy conditions; it is for the Company to prove that the vehicle was being driven by a driver holding no valid licence: A.I.R. 1979 Karn. 114 (D.B.).

The Police are often unable to record statements of all eye-witnesses. It would, thus, be wrong to disbelieve a witness in a motor accident claim case solely on his admission that to his reckoning, the Police had previously not recorded his statement: A.I.R. 1993 Madh. Pra. 79 (D.B.). *See* also 1972 Acc. C.J. 375 (Mys.) (D.B.).

Where a witness claiming to be a passenger on the motor vehicle deposed before the Motor Accident Claims Tribunal that he had written a complaint in the complaint book kept in the vehicle and two other witnesses claimed to be also signatories to that complaint but the complaint book was neither referred in the criminal case against the bus driver nor was it shown to, or seized by, the investigating officer, *held*, the Tribunal was justified in not relying on their evidence: A.I.R. 1977 Gau. 31 (F.B.).

Where in a motor accident claim case arising out of a truck accident there was positive evidence of the persons carried in the truck that they had not paid the driver and there was no suggestion that they had any reason to give false evidence, *held*, their positive testimony has to be accepted: A.I.R. 1985 Andh. Pra. 69: (1984) 2 A.P.L.J. 122.

Merely because an eye-witness, in a motor accident claim case, called it a Fiat and not an Ambassador car which was involved in the accident, *held*, it was not a sufficient ground to disbelieve him; it could as well be a mere lapse of memory: A.I.R. 1983 All. 409: 1983 All.L.J. 230 (D.B.).

Where in a motor accident claim case, the vehicles' photographs taken on the date of accident were exhibited but without producing their negatives or examining the person who had developed the negatives, *held*, the Tribunal had rightly not relied upon the photographs: A.I.R. 1977 Gau. 31 (F.B.).

In a claim petition under S. 110-A of Motor Vehicles Act, 1939, a discrepancy in the age of the victim does not justify the conclusion that the claimants were not related to the deceased as his daughter-in-law and son, respectively, unless there is positive evidence on record to that effect: A.I.R. 1992 Ori. 32 (D.B.).

Where in a motor accident claim case it was found that the deceased, an Assistant Engineer, was having a monthly salary of Rs. 1,000 per month, *held*, having regard to his circumstances, the deceased must have been spending Rs. 500 upon himself and contributing only Rs. 500 for the welfare of his family per month; the evidence of his widow that he was spending only Rs. 150 or so on

himself and used to give the remaining amount to her for family expenses, coming from a highly interested witness, could not be accepted: A.I.R. 1984 All. 119 (D.B.).

Where in a compensation case under the Workmen's Compensation Act, 1923, there is no direct evidence of the accident but only very scanty material is available on record about the circumstances in which the incident took place, *held*, the Court was not relieved of its duty to arrive at a conclusion on the vital issues on the basis of available material: (1990) 1 C.L.R. 465 (Bom.) (D.B.).

49. Borrowing by *karta* of HUF for immoral purposes.—(*See* also Ss. 101-104, Note 60). Where a Hindu son assails the sale of a joint family property by his father, the burden lies upon him to establish that the debt for payment whereof the sale was effected was of such a nature that he, as a son of the Hindu father, was under no pious obligation to discharge; it is, thus, for the son to establish that the debt was incurred for an immoral purpose. Adduction of evidence tending to show his father's general immorality is not sufficient; though it is not necessary to prove by direct evidence that the money borrowed was expended on vices but the son must establish the connection between the debt and his father's immoral habits, either by direct evidence, if available, or by circumstances, which are more telling and can never tell lies. Thus, where the son established that his father, when he contracted the debt, was indulging in a life of vice which, but for the borrowings, he could not afford, and that there was no other necessity or purpose for such borrowing to connect it with the family, *held*, it would be reasonable to infer that the debts borrowed were for immoral purpose; it is not necessary for the son to further establish by direct evidence that the debts borrowed were indeed utilised to feed the vice: 1984 Hindu L.R. 53 (Andh. Pra.).

The receipt of money by a person lawfully entitled to do so creates a debt binding upon his sons as well; merely because he had subsequently misappropriated the amounts so received would make no difference to the binding nature of the debt and liability therefor upon the sons' shares in the joint family property: (1986) 2 Hindu L.R. 454: (1986) 99 Mad.L.W. 662.

Recitals in mortgages or deeds of sale about the existence of necessity for alienation cannot be treated as evidence by themselves of such necessity; to substantiate it, there must be evidence *aliunde*: (1986) 1 Hindu L.R. 175 (Karn.) (D.B.).

Where in a suit for partition and separate possession the plaintiffs had challenged the very necessity of raising the loans and had specifically alleged that they were raised for immoral purposes, *held*, recitals in the sale deeds, being of recent origin and having come into existence within three years anterior to the date of the suit could not be accepted as proof of the facts stated therein in the absence of other evidence to prove them: (1988) 1 Hindu L.R. 770 (Karn.) (D.B.).

50. Credibility of witnesses.—Where the evidence produced by one party is in direct conflict with the evidence produced by the other, the following tests may be applied for judging the veracity of the witness: (*1*) the evidence which is consistent with the finding which is already established; (*2*) the comparative nearness in relationship of the witness; (*3*) the impartiality of the witnesses; (*4*) the inherent probability of their statements; (*5*) the impression created in the minds of the Judge by the demeanour of the witnesses in the box: I.L.R. 9 Luck. 121: A.I.R. 1933 Oudh 197. *See* also (1935-36) 40 Cal.W.N. 257: A.I.R. 1936 P.C. 60: 70 M.L.J. 225 (P.C.); 1942 O.W.N. (B.R.) 578; 1941 A.M.L.J. 67.

No one is bound to suspect dishonesty in a person of good credit and reputation with whom he is dealing merely because that person occupies a position which would enable him to act dishonestly if he were a rogue: I.L.R. 37 Bom. 122: 40 Ind. App. 1 (P.C.).

It is undoubtedly true that the law has not laid down any clear standard for the sufficiency of evidence to induce belief. It is also true that belief is rarely the consequence of a strictly logical process and that sometimes the same evidence which to one may be convincing, to another may seem absurd. But nevertheless the matter of believing evidence is not left to the mere intuition of an individual Judge, for a Judge, in believing or disbelieving evidence acts on his reason in conformity with his knowledge, observation and experience which always furnish adequate grounds for believing or disbelieving evidence: 1957 All.L.J. 857: A.I.R. 1958 All. 214.

It is well settled that credibility of a witness should not be accepted merely because

it is corroborated by the evidence of other witnesses, but such credibility should be tested on the touch-stone of the broad probabilities of the case. If doubt arises with regard to any material fact in a criminal case, the accused is always entitled to the benefit of such doubt: 1995 Cr.L.J. 2036 (Ori.).

In appreciating the prosecution evidence the Court's prime duty is to ensure that the evidence is legally admissible, the witnesses are credible and have no interest or ulterior motive to implicate the accused: A.I.R. 1972 S.C. 975: 1972 Cr.L.J. 606.

Where it is alleged that a certain transaction was collusive, a practical down to earth thinking is needed and a commonsense appraisal of the situation is required. The case must be determined on the total impression created on the mind of the Court by all the facts and circumstances disclosed in the case. It is open to the Court to lift the veil and look behind the same in order to see who were the real parties and what was the real nature of the transaction: 1960 B.L.J.R. 30: A.I.R. 1960 Pat. 182.

When a person gives evidence on oath the presumption should be that he has spoken the truth—that is the oath he takes—and the burden must lie on him who challenges the veracity of that statement to show that it is not true and if that burden is not discharged by any of the recognised legal methods, then a Court can have no legal justification for not relying on the evidence of a witness given on oath. Throwing over-board the sworn testimony of witnesses merely by using phrases 'the statement does not ring true' or 'the statement does not carry conviction' is never legally sufficient. A Court has to give reasons for coming to the conclusion as to why 'the statement does not ring true' or 'the statement does not carry conviction' or why it does so: 1957 All.L.J. 857: A.I.R. 1957 All. 214.

The law does not recognise the impeachment of a witness on communal grounds, and the argument that the witnesses belonged to the plaintiff's community and, therefore, their evidence should not be believed, is against the spirit of the Constitution of India: 1958 M.P.L.J. 494: A.I.R. 1958 Madh. Pra. 407.

It is not safe to assume that a case must be false if some of the evidence in support of it appears to be ambiguous or is clearly untrue. There is on some occasions a tendency amongst litigants to back up a good case by false or exaggerated evidence: 24 Cal.W.N. 626 (P.C.).

Where two witnesses for the prosecution tell practically the same story, it is absurd to disbelieve one and believe the other and base a conviction on his evidence: (1941) 43 Bom.L.R. 946. The fact that the witnesses deposed with consistency their version cannot be characterised as parrot like and devoid of naturalness and credibility: 1977 M.L.J. (Cr.) 583 (D.B.).

Credibility of evidence — Opinion of medical man cannot outweigh testimony of dis-interested eye witnesses: 1957 M.L.J. (Cr.) 231: (1957) 1 An.W.R. 336.

While dealing with a version spread over several consecutive stages, careful regard should be had to them all and their truth or falsehood must be rested on a review of the entire case. The incidents have to be judged in the light of what preceded and followed, and it would be an error to seggregate the incidents and test their veracity in isolation: 52 Mad.L.W. 57: A.I.R. 1940 P.C. 93 (P.C.).

A witness's credibility is to be judged from his behaviour in the witness-box particularly when confronted with inconvenient facts or his contradictory statements made earlier: 1972 Cr.L.J. 956 (Him. Pra.) (D.B.); 1976 Cr.L.J. 1310 (J.&K.) (D.B.).

In order to judge the credibility of the witnesses, the Court is not confined only to the way in which the witnesses have deposed or to the demeanour of witnesses but it is open to it to look into the surrounding circumstances as well as the probabilities, so that it may be able to form a correct idea of the trustworthiness of the witnesses. The issue, namely, whether the testator did execute a will and if he did, then whether it was duly attested by the witnesses, cannot be determined by considering the evidence adduced in the Court separately from the surrounding circumstances which have also been brought out in the evidence, or which appear from the nature and contents of the document itself: (1964) 6 S.C.R. 814: A.I.R. 1965 S.C. 354; (1967) 12 Law Rep. 92 (Mys.).

A person's ability to speak the truth depends upon his knowledge and power of expression; his knowledge depends partly on his accuracy in observation, partly on his

memory and partly on his presence of mind; his power of expression depends upon infinite circumstances and varies in relation to the subject-matter; his will to speak the truth depends upon his education, his character, his courage, his sense of duty, his relation to the particular facts he is to testify, his humour for the moment and so many other circumstances; no single circumstance is decisive or determinative; it is the cumulative effect of all the circumstances: (1978) 1 An.L.T. 407 (D.B.).

The fate of every criminal case depends upon its facts and the intrinsic worth of evidence rather than what was said about evidence of witnesses in other decided cases in the context of their own facts; the credibility of a witness has primarily to be decided upon his evidence and how he had fared in cross-examination and the impression created by his evidence in the context of other facts; criminal cases cannot be put in a strait jacket; though despite similarity between the facts of some cases, there would always be shades of difference which, quite often, may prove to be crucial. Decided cases can be of help on questions of law like admissibility of evidence or applicability of some general rule of evidence like the weight to be attached to the accomplice's evidence; but reference to decided cases hardly seems apposite when the Court is to decide whether the evidence of a particular witness should or should not be accepted: A.I.R. 1975 S.C. 246: (1975) 1 S.C.R. 561: (1975) 3 S.C.C. 39.

Evidence of witnesses cannot be discarded merely because they did not react in a particular manner: A.I.R. 1983 S.C. 680: 1983 Cr.L.J. 1272: (1983) 3 S.C.C. 329.

Persons react to situations in different ways; villagers may not have the sense to report everything coming to their notice; they may not voluntarily get involved; their evidence, therefore, cannot be discarded because they had not openly declared to have seen the occurrence before they were traced and interrogated by the police; they cannot be deemed casual or chance witnesses if they are probable witnesses by the standards of rural life. Thus, where some villagers had met the accused at odd hours (night) while performing their usual share of duty immediately after the murder, had a close vision of them, seen one of them carrying the weapon and had a short talk with the accused, *held*, their evidence could not be discarded merely because they had not mentioned those facts to any body before their interrogation: 1985 Cr.L.J. 114.

Where rural witnesses deposed that they had seen the accused assaulting the deceased, *held*, it necessarily implies that there was sufficient visibility for them to recognise the assailants; in villages, people are well known to each other and can identify persons even from a distance in dark nights by their gait, stature and manner of movement: (1983) 55 Cut.L.T. 312. *See* also 1994 Cr.L.J. (N.O.C.) 165 (Ori.).

It is common ground that villagers are usually reluctant to get involved in an occurrence, especially if the accused are desperadoes; non-examination of neighbours would be of no effect, when on testimony of independent witnesses the prosecution had satisfactorily proved its case: A.I.R. 1978 S.C. 368: (1978) 1 S.C.C. 142.

There is no warrant for the extreme proposition that if a man sees the perpetration of a crime and does not give information of it to anyone else, he might well be regarded in law as an accomplice and that he could be put in the dock with the actual criminals. *See* 1956 S.C.R. 347: A.I.R. 1956 S.C. 379, cited under Note 35, *supra*.

Considering the habits of the people of this country, particularly of the undeveloped districts there is nothing unusual in the conduct of not disclosing the occurrence until the police arrives. No adverse inference therefore can be drawn: I.L.R. (1962) Cut. 726: (1963) 2 Cr.L.J. 294: A.I.R. 1963 Ori. 144.

There is nothing unusual, having regard to the habits of Adivasis in their conduct in not disclosing the occurrence until questioned by the Police. There is a natural tendency on the part of such people not to get mixed up in such matters—That is not a ground for not giving credence to their evidence: A.I.R. 1970 Ori. 100.

The testimony of an ignorant and rustic woman from the countryside cannot be judged with the same standard of exactitude and consistency as that of an urban, sophisticated lady; her evidence has necessarily to be tested on the anvil of objective circumstances: 1980 Rajdhani L.R. 126: I.L.R. (1979) 2 Del. 302 (D.B.).

All are well aware as to how an illiterate or semi-literate witness behaves in the witness-box for cross-examination; such witnesses are often unable to give the exact year of the particular incident they may be deposing about. Their evidence need not be scrutinized on mathematical calculation; their entire evidence should be considered to find out if it is reliable, satisfactory and trustworthy: A.I.R. 1981 Pat. 204: 1981 B.L.J.R. 501: 1981 B.L.J. 273: 1981 B.B.C.J. (H.C.) 414.

Village witnesses generally have vague ideas of placing incidents in a particular year by calculation of years in relation to other incidents; their evidence in this respect cannot be judged by mathematical accuracy: A.I.R. 1974 Ori. 120: (1973) 1 Cut.W.R. 809 (D.B.).

Where an unlettered Harijan deposed about the date of his knowledge of the *ex parte* decree, *held*, his statement should not be construed mathematically: (1971) 1 Cut.W.R. 329: A.I.R. 1971 Ori. 262: 37 Cut.L.T. 378.

Witness, a villager, stating that he was irrigating his field alongwith his wife and son at about midday he went to his house to take his meals and to bring the food of his wife and his son—Trial Court impressed by the fact that normally not the witness himself but the wife should have gone to the house to fetch food for her husband and the son—Reason not proper to reject testimony, in view of fact that food had already been prepared at home and it was kept there and it was only to be brought to the field—If the wife did not go to house and he came to fetch it, it could not be said that the circumstance was such that his testimony should be disbelieved: I.L.R. (1967) 2 All. 360: 1968 All.L.J. 423.

While appreciating the evidence of a witness, the Court must see whether the evidence read as a whole appears to have a ring of truth; once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence, more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluating them to find out whether they are against the general tenor of the evidence and whether the earlier evaluation is shaken as to render it unworthy of belief; minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there, attaching importance to some technical error committed by the Investigating Officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole; even honest and truthful witnesses may differ in some details unrelated to the main incident; the power of observation, retention and reproduction differs from individual to individual and cross-examination is an unequal duel between a rustic and a refined lawyer: A.I.R. 1985 S.C. 48: (1985) 1 S.C.C. 505.

Witnesses, eyes and ears of justice, should not be discarded on flimsy grounds; their evidence should be appreciated and approached with care and caution keeping in view reasonable improbabilities, deficiencies, drawbacks and infirmities; the Court should be concerned with inherent basic realities, merit and the general trend or tenor of the evidence; the Court should go by the yardstick of probabilities and intrinsic truth and value; it should try to see if there is a ring of truth therein. The Court should not exaggerate the defects, contradictions, deficiencies or inconsistencies that do not go to the root of the matter; but when the discrepancies, contradictions and falsehood are so glaring as to destroy the Court's confidence in the witnesses, the Court should not accept their evidence: (1992-1) 40 B.L.J.R. 436 (D.B.).

A statement made by a witness need not necessarily be true because no other witness contradicts it. For an assessment of truth or acceptability of the oral evidence given even by a party in favour of his own case, it is necessary for the Court to derive support from other evidence placed on record relating to his previous statement and previous conduct, and general probabilities suggested by the entire evidence: A.I.R. 1966 Mys.178.

Appreciation of evidence—Proof of fact—Does not rest on any prescribed quantum of evidence—Credibility of oral testimony is primarily the satisfaction of trial Court which has first hand knowledge of witnesses: (1966) 1 An.W.R. 65.

It is an error of law to reject evidence of a certain class of persons merely because they belonged to that class: A.I.R. 1972 All. 369: 1972 Ren.C.R. 448.

The veracity of a witness does not necessarily depend upon his status in life; clerks are not less truthful or more amenable than superior officers; clerks, called as panch

witness would not cease to be independent merely because they would fear disciplinary action if they did not support the prosecution. [(1965) 1 Del.L.T. 362, Overruled]: A.I.R. 1980 S.C. 873: (1980) 2 S.C.C. 390: (1980) 2 S.C.W.R. 161.

Unfortunately, witnesses belonging to a respectable class and lawyers' profession are prone to state facts not as they are but as what they believe to be just; scruples tend to vanish when a witness believes that his evidence, though somewhat untruthful, serves a justifiable end: A.I.R. 1971 All. 304. It is the duty of the members of the legal profession to be frank and truthful because the Courts always rely upon on mere statements made at the bar: I.L.R. (1972) 2 Cal. 480.

If there is any presumption of truth attaching to oral evidence and the onus be on the accused to prove that it is not true, the Court would be bound to act upon it if the witness concerned cannot be proved to be a liar. That would practically throw the burden on the accused to prove his innocence and go against the basic presumption of innocence of the accused. The oral testimony is one of the materials for consideration by the Court in coming to its findings but it has to be tested by the yard-stick of probability along with the other materials on record and it must pass that test before it can be accepted. In spite of the evidence on oath, it is the duty of the prosecution to satisfy the Court that evidence is capable of acceptance and if the Court is not satisfied, the evidence in spite of the oath to support it, is of no avail. To cite a simple case, the Court may reject an evidence on oath in view of the suspicious demeanour of the witness and that is because the demeanour of the witness is one of the materials to be taken into consideration before his testimony is accepted: (1965) 1 Cr.L.J. 160: A.I.R. 1965 Cal. 89.

Testimony of partially unreliable witness—Value of: A.I.R. 1967 All. 64.

Witness naming five assailants—Fact that Court gives benefit of doubt to two of them and acquits them is no reason for disbelieving testimony of witness: (1962) 3 S.C.R. 590: 1962 M.L.J. (Cr.) 263: A.I.R. 1962 S.C. 424.

Suppression of truth by witness on minor point—Does not discredit evidence which otherwise is true: 1969 Cr.L.J. 1393: A.I.R. 1969 Goa 116.

Where in a deposition, truth and falsehood were inextricably mixed up and the entire fabric of narration was polluted, *held*, its rejection in totality is justified: 1979 B.B.C.J. 701 (D.B).

It often happens in the case of witnesses in this country that their statements given soon after the occurrence are nearer the truth and their version gets embellished or curtailed with the passage of time according to their susceptibility of being influenced by one party or the other. Unless a Court takes into consideration this circumstance and gives full weight to it, it may often lead to a miscarriage of justice. It would, therefore, appear not safe to accept the testimony of the witnesses given in an omnibus manner in the Court implicating all the accused in the offence of mischief but the Court has to test their evidence with reference to the first information report: I.L.R. (1964) 2 Mad. 978.

It is common experience that when two persons have seen a mob, then one is in a position to give more names than the other, of persons taking part in the occurrence, depending upon his individual power and opportunity of observation. It is also common experience that a witness who has sustained severe injuries in course of an occurrence is not in a position to be so keen in the matter of observing the faces of the culprits as another witness who is present at the scene but has escaped unhurt. A witness who has been attacked and assaulted by the rioters is not expected to have identified all the accused persons when another eye-witness has claimed to have identified. It is no business of a witness who has identified twelve accused persons in a mob to protect, if in his presence another witness who was undoubtedly involved in the occurrence, is able to give out the names of only three accused persons: I.L.R. 42 Pat. 293.

The decision in 1959 Ker.L.T. 709, does not lay down any general rule that a Court can safely believe witnesses who give false statements to the Police first and then swear to entirely different versions in Court. The acceptability of their evidence depends upon the *bona fides* of the explanation for their varying statements. The question whether such an explanation is genuine is of course a question of fact and would depend entirely on the circumstances of each case: 1959 Ker.L.J. 1405: 1960 Ker.L.T. 166.

There is no rule of law or of prudence which lays down that the evidence of witnesses must be discarded if they suppress the fact that they were armed and if they do not explain the injuries received by members of the party opposed to them. The matter depends entirely upon the facts of each case: 1957 B.L.J.R. 756: 1959 Cr.L.J.71: A.I.R. 1959 Pat. 22.

When many persons are being tried on a charge as grave as that of murder, the responsibility of the witnesses appearing at the trial is correspondingly onerous as any false statement by a witness can put some or all accused on the board of gallows: 1968 Cr.L.J 929: A.I.R. 1968 Goa 72.

It is not safe to act upon uncorroborated testimony of an eye-witness especially when his evidence has been rejected in the case of the three persons who were equally implicated by him and who have been acquitted by the trial Court: 1959 Cr.L.J. 42: A.I.R. 1959 J. & K. 5.

Where the informant who knew the accused lodged the emergency Police report within an hour or an hour and half of the occurrence and names of only two accused appeared therein and neither the convicts' names nor the weapons of offence, namely, the sword and soda water bottles, were mentioned therein, the names of two convicts were interpolated therein later on, and the medical evidence negatived the use of soda water bottles as there were neither contusions nor glass splinters as per the autopsy reports, on the bodies of the deceased, *held*, the conclusion is irresistible that the prosecution case is concocted: 1994 Cr.L.J. 3602 (Bom.) (D.B.).

Credibility of witness—Absence of inherent vice—Adverse presumption on any matter cannot be drawn in absence of opportunity to explain it: A.I.R. 1970 Cal. 38.

In appraising oral testimony, the Court should not ignore the balance of probabilities; where it finds that the witnesses speak in unison about an incident, the Court may reasonably infer that they are singing to the tune of a common master; for true witnesses are bound to differ on minor details: 1979 Hindu L.R. 123: 1979 Marriage L.J. 477 (Del.).

Appreciation of evidence — Eye-witnesses: I.L.R. (1960) Mys. 1126: (1961) 1 Cr.L.J. 403: A.I.R. 1961 Mys. 74. *See* also 1960 Cr.L.J. 1681: A.I.R. 1960 S.C. 1340; A.I.R. 1966 All. 570; 1966 All.Cr.R. 213; A.I.R. 1963 S.C. 1728; A.I.R. 1965 Punj. 463.

The testimony of a witness not related to the complainants assumes greater sanctity: 1979 Chand. Cr.C. 190 (D.B.).

Evidence of eye-witness—Not giving many details of occurrence in her statement under S. 161 and S. 164, Cr.P.Code—Not a ground to reject her evidence: A.I.R. 1994 S.C. 826: 1994 Cr.L.J. 938.

When the Police take signatures of witnesses on their statements, despite the ban under S. 162 of the Code of Criminal Procedure, it need not always be presumed that the Police did not consider them to be reliable; it is a question of fact to be determined on its own facts in each case: A.I.R. 1981 S.C. 631: 1981 (Supp.) S.C.C. 567.

Ocular version by a person injured in the same incident is of great value to the prosecution: A.I.R. 1976 S.C. 2027.

Where presence of eye-witness, who is also injured at the time of occurrence is beyond question having regard to the fact that he had sustained injuries in the course of very same transaction at the very time and place of occurrence, *held*, the facts deposed by him about the deceased and his deposition about his own injuries has to be attached great value when his presence at the scene of occurrence was natural: 1995 Cr.L.J. 1160 (Raj.) (D.B.).

A witness posing to have been injured and even duly corroborated by the medical evidence, does not become a speaker of gospel truth; it is well known that medical evidence at the most strives to corroborate the injured witness mainly on three points: (*i*) the Doctor had found on examination the injuries on the witness's person; (*ii*) the injuries could probably be caused by the weapon used in the offence; and (*iii*) at best, the presence of injuries establishes the presence of the witness at the time and place of occurrence. Thus, far and no further; corroboration by medical evidence cannot be further projected into evidence as also establishing the accused's identity or authorship of the injury; that has still to be established. Thus, before a Court can safely accept and rely upon the evidence even of an injured witness, it has to closely scrutinize the evidence by examining (*i*) whether the injury was received in the same incident; (*ii*) whether the accused

was previously known to the injured; (*iii*) if not, whether the accused was distinctly described in the statement before the Police; (*iv*) whether there was sufficient light at the time and place of the incident to identify the accused; and (*v*) whether the injury ruled out self-infliction. An injured witness passing these four tests carries with him an inbuilt guarantee of truth; the Court could certainly place implicit reliance upon his evidence: (1990-2) 31 Guj.L.R. 1215 (D.B.).

Where the High Court had given very cogent reasons for accepting the evidence of eye-witnesses and the evidence of one of them who was an injured witness who had made statement at the hospital shortly after the incident was corroborated by the evidence of other witnesses, *held*, the order of conviction and sentence passed by the High Court was not to be interferred with: 1995 Cr.L.J. 2687 (S.C.); (1995) 2 S.C.J. 75.

Where a large number of persons attack, it is very difficult for a witness to state as to who caused which injury to which particular part of a particular individual; a witness attempting to do so may rouse grave suspicion about his veracity: 1978 Raj.L.W. 289 (D.B.).

In cases of concerted attacks by a mob on the victim, it is often difficult to determine the role of each accused therein; but that is no ground to reject prosecution evidence on the substratum or the main incident: 1973 Cr.L.J. 1443.

Fight between the rival parties over land dispute—Injuries caused to members of both parties and death of one member—Conflicting versions of incident given by rival parties—Court should attempt to find out which version is more probable bearing in mind the basic fact that burden is always on prosecution to prove their case beyond doubt—Evidence Act (1872), S. 3, 'Proved' and Ss. 101-104: (1964) 1 Cr.L.J. 101 (Ker.).

Fight in broad day-light between rival parties—Equally serious injuries caused to members of both sides—Failure of prosecution to explain injuries caused to accused—Safe for Court to act on prosecution evidence: (1964) 1 Cr.L.J. 101 (Ker.).

See Penal Code, 1860, S. 34: (1964) 2 Cr.L.J. 567: A.I.R. 1964 Ori. 251.

Penal Code, 1860, Ss. 302, 147 and 149—Murder caused by blows of lathis by unlawful assembly—One accused sentenced to death while others to imprisonment for life—In case of rioting it is difficult to say whose lathi blow fell on whom and who caused particular injury and probability that fatal injuries were caused by accused other than one sentenced for death cannot be ruled out—*Held*, further that in view of advanced age of accused there could be no reason for awarding him more severe punishment than life imprisonment: 1966 All.Cr.R. 330.

Where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault. Where, for instance, several weapons were carried by different members of the unlawful assembly but it appears that the guns were used and that was enough to kill 5 persons, it would be unreasonable to contend that because the other weapons carried by the members of the unlawful assembly were not used, the story in regard to the said weapons itself should be rejected. Appreciation of evidence in such a complex case is no doubt a difficult task; but criminal Courts have to do their best in dealing with such cases and it is their duty to sift the evidence carefully and decide which part of it is true and which is not: (1964) 8 S.C.R. 133: (1965) 1 S.C.J. 605: I.L.R. (1964) 2 All. 694: A.I.R. 1965 S.C. 202.

The Court is not entitled to attribute to the witnesses conspiracy and perjury, unless the story told by them, coupled with the surrounding circumstances is of itself so unnatural and improbable that only one conclusion, *viz.*, conspiracy and perjury, is reasonably possible: A.I.R. 1934 P.C. 12: 66 M.L.J. 151 (P.C.).

Where the prosecution case was that the four deceased and the two witnesses were inside the house when it was set on fire; the deceased came out one after the other and ran in different directions; they were chased and attacked by different sets of the accused; and the two witnesses continued to remain inside till the last, *held*, it is not an artificial and improbable version; the deceased, inside the house, might have felt afraid to come out in a

body and become easy targets; they might have, for the same reason, run in different directions; the two witnesses might have thought that since the fire had not spread beyond the chappar portion, they would be safer inside; the fact that the four dead bodies were found lying at different places lends credence to the evidence of the witnesses: A.I.R. 1989 S.C. 2004.

Attempt to murder—Use of fire-arm—When a fire-arm is used in offences such as an attempt to murder, it is hardly ever that the companion of the accused who is armed with a fire-arm goes and catches the victim, as he is afraid of being hit by the shot if fired: (1961) 2 Cr.L.J. 396 (Punj.).

Simply because the witnesses are the accused in the counter case their evidence cannot be discarded; but it has to be scrutinized thoroughly: (1981) 51 Cut.L.T. 186.

Conviction of a lawyer for demanding bribe from the accused for payment to the Magistrate for seeking favour for the accused in a criminal case, *held*, cannot be based on sole testimony of that accused: 1980 Raj.Cr.C. 28.

The question of believing or disbelieving a witness arises only after his examination; a party cannot decline to produce a witness merely on the presumption that if produced, he would be treated as an interested witness: (1981) 94 Mad.L.W. 192 (D.B.).

Where a prosecution witness, a young boy of 15-16 years, had received no injuries on his body and on that score was disbelieved by the trial Court, *held*, such reasoning is merely speculative. Various persons react differently in similar circumstances; it is difficult to probe into the accused's minds as to how they will act in a particular situation; where they had already assaulted two men and two ladies with weapons, they might have thought that it was enough and they spared the young boy. Lack of injuries on his person could not thus be a valid ground to reject his entire testimony: A.I.R. 1976 S.C. 2499: (1976) 4 S.C.C. 362.

Where in the State and Gaon Sabha's suit for declaration of ownership and possession over certain plots, the Pradhan appearing as a witness stated that he did not know whether the Gram Samaj was a party to the litigation, *held*, it is unbelievable that the Pradhan would not know it; from his statement, he appears to be a brazen-faced liar; it is unsafe to rely on his testimony for finding out the truth: A.I.R. 1976 All. 121: 1975 All.W.C. 632 (D.B.).

Where the only witness was very much interested in denying his liability under the documents and in disclaiming his signatures thereon, *held*, the prosecution was duty bound to establish its case by producing more reliable evidence; the High Court erred in relying on the word of that witness and thereby giving the benefit of doubt to him and not to the accused who deserved it; the onus of proof being always on the prosecution, it has to establish beyond reasonable doubt all ingredients of the offence: A.I.R. 1979 S.C. 1012: (1979) 3 S.C.C. 391.

Once evidence of a witness has been discarded by the Court, it should not be used to judge the veracity of other witnesses; it would not be a reliable yard-stick: A.I.R. 1975 S.C. 856: (1975) 3 S.C.C. 742.

Quite often a shop owner, engaged in his business, might not have witnessed an incident occurring nearby; but another person near the scene might have seen it; merely because the other person was there by sheer coincidence and saw the incident, his evidence, if trustworthy, is not to be discarded on the ground that no shop-keeper was cited as a witness; as stated in A.I.R. 1983 S.C. 680, in a street murder only passersby will be witnesses; their evidence cannot be brushed aside or viewed with suspicion because they are mere 'chance witnesses'; to discard evidence of street hawkers and street vendors on such a ground is to abandon good sense and take too shallow a view of evidence: (1992) 2 Ker.L.J. 952 (D.B.).

Per *Desai, J.*—After a witness has been found to be competent to give evidence and has made a statement which is admissible in evidence, the question whether it should be believed or not is essentially a question of fact. Neither the Evidence Act nor any other Act lays down any law to determine as to which statements should be believed or not: 1962 All.L.J. 1119: A.I.R. 1963 All. 161: I.L.R. (1963) 1 All. 585 (F.B.).

The fact that the Police had examined the witnesses only after a very long time is certainly a circumstance to be taken into account to consider whether their evidence before the Court could be relied on: A.I.R. 1974 S.C. 1901.

Delayed in examining a vital witness is a suspicious circumstance; the Court should, therefore, endeavour to uncover the reason for such delay; it is only after it gets a plausible explanation therefor that the Court can rely upon his evidence: 1994 Cr.L.J. (N.O.C.) 348 (Ori.) (D.B.).

Where accused committed murder of five innocent persons by pouring petrol in their room and a rickshaw driver after reading about the incident in the newspaper deposed that accused had hired his rickshaw on fateful day and in that rickshaw they carried tins to the petrol pump and brought back the said tins filled with petrol and went to a particular place and there was no evidence showing any enmity between accused and the rickshaw driver, *held*, evidence of said witness could not be discarded simply on the ground that he came forward for giving statement after seven days: 1995 Cr.L.J. 1956 (Bom.) (D.B.).

Where eye-witness to the occurrence was not examined immediately after the occurrence and he stated that because he was frightened, he left the village but it was not stated as to what he was afraid of, or from which source he apprehended danger and further he did not disclose the incident before anybody till he deposed in the Court, *held*, evidence of such an eye-witness was unworthy of credence: 1995 Cr.L.J. 2255 (Ori.) (D.B.).

Murder charge—Eye-witness not coming forward and telling the Investigating Officer what he had long after stated in Court—His omission to do so condemns his testimony as an afterthought: A.I.R. 1975 S.C. 216: 1975 Cri.L.J. 26.

Where in a murder case, the Chowkidar of the locality had lodged a report of the incident in details, before the murder was discovered and before even any one had suspected that the accused had a hand in the crime, the truthfulness of the evidence of such a witness could not be challenged: A.I.R. 1974 S.C. 1723: 1974 Cr.L.J. 1171.

Testimony of witness—Suit by depositor against Bank for recovery of amount deposited—*A* deposing that the plaintiff, who was already known to him had twice deposited money in that branch office some 13 or 14 years ago—*Held*, that it was not improbable for *A* to remember name of plaintiff and his testimony could not be ignored—Evidence Act, 1872, S. 3: A.I.R. 1963 J.&K. 29.

Case under Ss. 147, 448 and 353, Penal Code—Witness, in his first report, naming only a few of the accused—Judge rejecting evidence of witness as untrustworthy in respect of those accused—Evidence cannot be relied upon to convict other accused not mentioned and to whom no particular conduct was attributed: 1961 M.L.J. (Cr.) 699: (1962) 1 Cr.L.J. 832 (Mys.).

The mere non-mention of the name of a witness in the first information report is not by itself enough to hold that the witness did not see the occurrence: 1957 All.L.J. 857: 1958 Cr.L.J. 324.

Merely because the name of a witness is not mentioned in the first information report, his evidence cannot be rejected on that ground; it should be reckoned at its probative value: 1979 All.L.J. 222 (D.B.). Neither any rule of law nor of prudence require that if evidence of an eye-witness is consistent with the story narrated in the first information report, his evidence should be accepted on its face value: 1975 W.L.N. (U.C.) 77 (Raj.) (D.B.).

The credibility of the testimony of the witnesses who could name the accused at the trial, *held*, cannot be discarded simply because the name of this accused was not mentioned in the statement under S. 161 or 164, Cr.P.Code or before the warden who tried to gather facts from different persons who claimed to have witnessed the occurrence: 1978 Raj.L.W. 123 (D.B.). An omission in the statement of a witness under S. 161, Cr.P.Code only affects its reliability, not its admissibility: (1978-79) 83 Cal.W.N. 248 (D.B.).

Criminal trial—Credibility of witness: (1962) 2 Cr.L.J. 156 (Raj.); 1994 Cr.L.J. (N.O.C.) 157 (All.).

Tribunal not making any note about demeanour of a witness in his deposition—Only thing noted was that he sometimes smiled and sometimes laughed while giving evidence—No material to show as to why the witness behaved in such manner—It is not correct to think that evidence given by witness is not entitled to credence by reason of such demeanour—Tribunal was not justified in disbelieving the witness on account of his demeanour, in his judgment given after

long delay: I.L.R. (1960) Mys. 1307: A.I.R. 1961 Mys. 106.

Sea Customs Act (1878), Chap. XVII—Absence of provision in Act regarding maintenance of diary by Customs Officer cannot be a good ground for rejecting their testimony: I.L.R. (1965) Bom. 648: (1965) 2 Cr.L.J. 616: A.I.R. 1965 Bom. 195.

Evidence of witnesses cannot be rejected as "highly incredible" on the ground that it does not satisfy certain notions of propriety: A.I.R. 1953 Nag. 374: I.L.R. (1954) Nag. 204.

A Judge cannot travel beyond the record of the case before him and rely for the rejection of an important witness in the case on information gained from other cases heard by him: 193 I.C. 327: A.I.R. 1941 Lah. 22.

Want of status or of riches can have no relevance on his credibility and reliance: 1965 Mah.L.J. 565: 1967 Cr.L.J. 21: A.I.R. 1967 Bom. 1.

No witnesses's evidence can be discredited by reason merely of the profession he pursues or the status he occupies in life. In all cases, the evidence of each witnesses has to be weighed on its own merits and considered in the light of the other accepted evidence in the case. It is only when there are inherent improbabilities in the evidence given by the witness that a Court of law is justified in coming to the conclusion that it is incredible. To characterise that a witness is a pleader's clerk and therefore, his evidence should not be accepted is a situation which is totally repugnant to the rules bearing on the appreciation of evidence: A.I.R. 1960 Andh. Pra. 359.

Evidence cannot be discredited merely on ground that witness belongs to a particular political party: 1967 Ker.L.J. 399: 1967 M.L.J. (Cr.) 311: 1967 Ker.L.T. 1122.

A witness's evidence should not be rejected merely because he appeared to be nervous while in the witness-box: 1940 All.L.J. 26: A.I.R. 1940 All. 175.

Appreciation of evidence — Confused statement of witness — Inference from: 1968 Cr.L.J. 584: A.I.R. 1968 All. 170.

It is very difficult to rely on the statement of a witness who is not in a position to disclose his source of knowledge. In the absence of such evidence, the statement of the witness would be nothing more than a mere opinion: I.L.R. (1956) Hyd. 868: A.I.R. 1957 Hyd. 29.

The fact that a party is not prepared to take oath is not by itself a ground for disbelieving his evidence: 1959 Ker.L.T. 1348: 1959 Ker.L.J. 1001.

The fact that there has been some litigation between the witness and the accused by itself is no reason for disbelieving his testimony if it is otherwise acceptable: 1957 Cr.L.J. 532: A.I.R. 1957 Punj. 81.

The fact that the witnesses for one of the parties to a suit happen to be his employees is not a sufficient ground for not relying on their evidence, especially when none but the employees could be witnesses to the transaction in dispute: 189 I.C. 232: A.I.R. 1940 Pat. 629.

In considering the question as to whether evidence given by the witness should be accepted or not, the Court has to examine whether the witness is an interested witness and to enquire whether the story deposed to by him is probable and whether it has been shaken in cross-examination.

It would be unsafe to discard the evidence of a witness which appears otherwise to be reasonable and probable merely because some suggestions were made to him without those suggestions being proved to be true: 1963 B.L.J.R. 226: (1963) 3 S.C.R. 722: A.I.R. 1963 S.C. 1728.

Though it cannot be laid down as a law of general application that in no case a Judge can accept a part of the prosecution story when he has disbelieved its other part, yet, as a rule of prudence, it will not be safe to rely on the evidence of witnesses on one part of the prosecution story when it has been disbelieved as to its material part: 1963 B.L.J.R. 332.

It is well known that a Burman Buddhist is as a rule reluctant to give evidence against an accused person in a murder case. If he can help it, he will always try and avoid it. The natural reluctance becomes more pronounced when the accused person happens to be a pongyi. Therefore, unless a more cogent reason than that of discovering a few discrepancies is given, evidence given by such persons should not be rejected: 37 Cr.L.J. 418: A.I.R. 1936 Rang. 60.

Evidence of a witness cannot be rejected outright on the ground that he was championing the cause of the party calling him when there is evidence that he had made

certain statements favouring the opposite party. [A.I.R. 1949 P.C. 207, Rel. on]: 1959 Jab.L.J. 78: A.I.R. 1959 Madh. Pra. 151 (F.B.).

A party who produces witnesses in Court produces them as witnesses of truth and simply because portions of their statements are not favourable to the party producing them, they cannot be condemned as biased witnesses: (1961) 2 Cr.L.J. 55 (All.).

Where a raid was conducted at a premises where illicit distillation of liquor was carried on and an independent witness in raid who was dropped by prosecution joined hands with the defence and his evidence that he was not party to raid was unshaken, *held*, merely because he came up as a defence witness his testimony could not be discarded more so when evidence of official witness was not free from discrepancies: 1994 Cr.L.J. (N.O.C.) 357 (P.&H.).

It cannot be laid down as a general rule that if the principal prosecution witnesses are interrelated, their statements should not be believed *in toto*. Each case is to be decided on its own merits and in the light of the circumstances disclosed: 41 P.L.R. 802. *See* also 1939 M.L.R. 78 (Cr.).

Appreciation of evidence in criminal cases—Woman complaining of rape on her both by *A* and *S* in F.I.R. and in her first statement to the police, completely exonerating *S* at the trial, probably due to attempts made to suppress part played by *S*—*S* discharged by committing Court—*Held*, that would not make the rest of the story spoken to by prosecution witnesses against *A* anytheless believable: (1962) 1 Cr.L.J. 671 (Tripura).

The correct method of appreciating and assessing the evidence of a witness is by scrutinizing the evidence on its merits, and it is only when a doubt arises whether the witness is in fact deposing to the truth or not that the necessity would arise to investigate into the possible reasons for his conduct and what could have motivated the same, such as intimate interest in the person on whose behalf he had come to Court to give evidence, or strong enmity or ill-will prevailing between the witness and the person against whom he had come to give evidence. Courts should not start with the investigation of these reasons without first making an impartial and judicious appreciation of the evidence of the witness on its own merits: 1961 An.L.T. 404: A.I.R. 1961 Andh. Pra. 461.

The moment a witness appears to consider as to whom he should name out the persons present at an occurrence, it immediately puts the Court on its guard and one normally hesitates from placing implicit reliance on such a witness for it cannot be said that he has told the whole truth and nothing but the truth: 1961 All.Cr.R. 323; (1961) 63 Punj.L.R. 632.

Witness trying to implicate persons in a serious charge of murder is unreliable: 1970 Cr.L.J. 1327: A.I.R. 1970 Assam 121.

Mere competence to depose as an eye witness does not necessarily mean that their evidence should be taken as reliable. Once it is established that the eye-witnesses belong to a hostile faction and that they are suppressing a material portion of the occurrence, it is difficult to accept their evidence as to how exactly the fight took place. Doubtless, if a consistent story is put forward, it may be possible for a Court even to accept the testimony of partisan witnesses specially where the village is divided into two factions and disinterested persons may not be available. But when the F.I.R. version and the case as put forward in the Court do not tally, it will be extremely hazardous for a Court to conjecture as to how the fight must have taken place: 25 Cut.L.T. 433.

Where the rejection of a witness's evidence by the trial Judge is solely based on the evidence, oral and documentary, placed before him, and he makes no comment on the demeanour of the witness or on his truthfulness apart from comments on the probabilities of the truth of the story actually told by the witness viewed in the light of the surrounding circumstances, the appellate Court is in as good a position to judge the matter as the trial Court; the appellate Court may reappraise the evidence and arrive at its own conclusion: A.I.R. 1934 P.C. 12: 66 M.L.J. 151 (P.C.). *See* also I.L.R. 8 Luck. 315: A.I.R. 1933 Oudh 128; 76 I.C. 63: 46 M.L.J. 334 (P.C.).

Appreciation of evidence by a Court of law cannot be based on any set principles. A Court of law should while deciding the facts of a case seek guidance from its experience when it is called upon to appreciate correctly the value of the evidence before it. In a trial by jury, usually it is for the jury to appreciate the evidence of a witness and it is left to the Judge to lay down the law. In India, where there is no trial by jury, the Judge is not the

Judge only of law but also of fact and in appreciating the evidence, he is to act as a jury. He is to form his own estimate of the evidence produced before him and should not be haunted by the idea that there is no ruling or precedent to guide him.

Where the statement of an approver made in examination-in-chief was found to be crammed and he repeated verbatim on cross-examination every detail of the story given in the examination-in-chief, *held*, that the crammed story of the witness created an impression that the Court should be extremely cautious in taking the story given by the approver at its face value and the Court should probe deeper into the matter: I.L.R. (1964) 14 Raj. 651: 1964 Raj.L.W. 264.

The prosecution story was that the accused demanded certain sum from the complainant and on latter's showing inability to pay, fired a gun at him, which the complainant cleverly avoided by lying flat. The trial Court disbelieved the story of firing but convicted the accused under S. 387, Penal Code.

Held, that the real accusation of firing having been disbelieved the same witnesses could not be relied upon for their statements with respect to the demand of money and the conviction for extortion could not be upheld: 1960 Cr.L.J. 78: 1959 M.P.L.J. 1186: A.I.R. 1960 Madh. Pra. 11.

Direct evidence of witnesses should not be brushed aside in the light of any circumstance unless the existence of the fact in issue is inconsistent with or rendered improbable on proof of the existence of that circumstance: 1980 All.Cr.R. 72: 1979 All.L.J. 1285.

Offence under S. 468, I.P. Code—Witness typing the document alleged to have been forged by accused—Testimony of such witness, almost of an accomplice, ought not to be relied upon without corroboration: 1963 Raj.L.W. 416.

Prosecution for rash driving—Prosecution witness cited but not examined—Examined in defence—His evidence acceptable and left unrebutted—Case of one witness against another—Accused *held* was entitled to benefit of doubt: 1970 Mad. L.W. (Cr.) 130.

Witness not summoned but called by party—Witness cannot become untruthful: (1964) 66 Punj.L.R. 1130: A.I.R. 1965 Punj. 140.

51. Past antecedents of witness.—Antecedents or mere interestedness of witnesses is not a valid ground to reject their evidence. Persons with questionable antecedents are not necessarily untruthful nor mere relationship with the deceased is a good ground to discard their testimony if their presence at the scene of occurrence was probable. All that is necessary is to scrutinize their evidence with more than ordinary care and circumspection to determine the part played by each of the accused. The effort should be to sift the grain from the chaff and to accept what appears to be true and reject the rest: A.I.R. 1981 S.C. 697: (1981) 2 S.C.C. 1: (1981) 2 S.C.R. 615.

Even if past antecedants of a witness are such that he cannot claim respectability, *held*, his evidence cannot be discredited on that ground alone: 1978 Cr.L.J. 324 (All.) (D.B.).

Where an eye-witness's evidence is found to be truthful, and he had been examined by the Police during investigation immediately, *held*, merely because his character is not above suspicion, his testimony cannot be rejected: A.I.R. 1987 S.C. 1328: (1987) 2 U.J. (S.C.) 116: (1987) 3 S.C.C. 360.

Appearance of person as witness in one or two other cases is not sufficient to discredit him on that ground alone: 1969 Cur.L.J. 957.

The evidence of a witness cannot be discarded merely because he had been appearing for the prosecution in earlier cases: 1980 Cr.L.J. 571 (All.). Simply because a witness is cited as such in more than one criminal case, *held*, his evidence does not become doubtful: 1994 M.P.L.J. 57 (D.B.). *See* also (1972) 74 Punj.L.R. 176; (1971) 73 Punj.L.R. 774; 1975 Cr.L.J. 1630 (Punj.). The fact that a witness is appearing again and again for the prosecution casts doubt on his credibility: 1974 Punj.L.J. (Cr.) 329.

Where a witness on his own admission, had appeared as a prosecution witness four or five times in police cases from the same police station, *held*, his evidence could hardly carry any weight: A.I.R. 1971 S.C. 356.

The fact that a public servant had previously been suspended is not by itself sufficient to render his statement unreliable: 1976 Cr.L.J. 274: 1974 All.L.J. 100 (F.B.).

The evidence of a witness cannot be rejected merely because he had once been convicted without indicating the time or the

nature of the offence; a man who has once erred may yet speak the truth: A.I.R. 1977 S.C. 701: (1976) 4 S.C.C. 348.

An occurrence inside a jail can only be testified by the prisoners then in jail; they are natural and probable witnesses; simply because they were undertrial prisoners, their evidence cannot be thrown out: (1987) 35 B.L.J.R. 127.

Where an offence is committed by a jail officer in jail premises against a convict the evidence of other convicts cannot be said to be unreliable. There is no reason to believe that those convicted of crimes of violence should be more untruthful than other persons. A person convicted of a crime of violence may be a man of admirable character: I.L.R. (1940) Lah. 521: A.I.R. 1940 Lah. 210.

The fact that the prosecution witness was once a history-sheeter, whose history-sheet had been closed 7 or 8 years before he had made the statement, or that the witness had appeared for police in one or two cases before appearing as a witness or the fact that he admitted that he could not identify the men arrested on the spot, is not sufficient to reject his testimony: 1959 All.L.J. 94: 1959 Cr.L.J. 1040: A.I.R. 1959 All. 559.

Theft case—Testimony of prosecution witness that accused sold goods to him—Testimony cannot be disregarded merely on ground that witness was habitual receiver of stolen property: 1966 Cr.L.J. 848 (Mys.).

Where a witness deposing in a murder case had been convicted of murder about 43 years ago, *held*, because of the long lapse of time, his testimony cannot be discarded or rejected on that sole ground: A.I.R. 1976 S.C. 2588: 1976 Cr.L.J. 1998.

52. Relations/interested/partisan/inimical witness.—Testimony of interested, partisan and inimical witnesses cannot be discarded altogether on that ground, however, testimony of such witnesses must pass the close and severe scrutiny before it can be safely acted upon: A.I.R. 1994 S.C. 76; 1994 M.P.L.J. 452; 1994 M.P.L.J. 551; (1990-2) 38 B.L.J.R. 1242 (D.B.); (1990-2) 38 B.L.J.R. 1251 (D.B.); 1989 Mah.L.J. 626 (D.B.); (1988) 36 B.L.J.R. 279 (D.B.); (1988) 36 B.L.J.R. 545 (D.B.); A.I.R. 1985 S.C. 1384: 1985 Cr.L.J. 2009: (1985) 3 S.C.C. 703; 1985 Cr.L.J. 575 (Ori.); 1985 Cr.L.J. (N.O.C.) 66 (Ori.); 1984 Cr.L.J. (N.O.C.) 161 (Gau.); 1983 Cr.L.J. 1939 (Ker.) (D.B.); 1982 Raj.L.W. 513; 1982 Cr.L.J. 1624 (Ori.) (D.B.); 1981 Cr.L.J. 1474: 1980 Raj.L.W. 112 (D.B.); A.I.R. 1976 S.C. 2304; A.I.R. 1976 S.C. 2499; A.I.R. 1974 S.C. 1153; A.I.R. 1972 S.C. 677; A.I.R. 1971 S.C. 1949.

The evidence of relations and partisan witnesses must be scrutinized with caution; but their evidence does not deserve to be rejected outright simply because they are relations or inimical: 1981 Cr.L.J. 530; 1981 Cr.L.J. 364.

Merely because the witnesses were relations or interested is by itself not sufficient to straightaway discard their evidence unless their evidence is shown to suffer from serious infirmities raising considerable doubt in the Court's mind: A.I.R. 1983 S.C. 839: 1983 Cr.L.J. 1112: 1983 S.C.C. (Cr.) 590: (1983) 3 S.C.C. 316; (1973) 1 Chand. L.R. 101.

The evidence of interested and partisan witnesses should be weighed in golden scale before relying upon the same: 1993 Cr.L.J. 1688 (Mad.).

The evidence of interested and inimical eye-witnesses is to be approached with caution; it cannot be discarded as of a partisan nature: A.I.R. 1981 S.C. 2073: 1981 Cr.L.J. 1701: 1981 S.C.C. (Cr.) 672; if the Court is satisfied about its credibility, such evidence can certainly be relied upon: (1982) 54 Cut.L.T. 527; 1983 Cr.L.J. 1717: (1983) 56 Cut.L.T. 205.

The testimony of eye-witnesses cannot be rejected merely because they were interested and partisan, if on careful scrutiny of their evidence the Courts below have believed it: A.I.R. 1975 S.C. 1501: (1975) 4 S.C.C. 148; it only puts the Court on guard to scrutinize it with more than ordinary care: A.I.R. 1975 S.C. 216: (1975) 3 S.C.C. 752.

'Related' is not equivalent to 'interested'; a witness is 'interested' only when he or she derives some benefit from the result of the litigation; but if he is a natural and the only possible eye-witness in a case, he cannot be said to be 'interested': A.I.R. 1981 S.C. 1390: (1981) 2 S.C.C. 752: 1981 Cr.L.J. 1012: 1981 All.Cr.L.J. 254: 1981 S.C.C. (Cr.) 593: 1981 All.Cr.C. 235: 1981 All.W.C. 465.

The prosecution witnesses being partisans and interested is not sufficient to reject their evidence; if it is corroborated by other independent evidence after it has been scrutinized with caution, it may still be relied upon: 1979 Jab.L.J. 304: 1979 Cr.L.J. (N.O.C.) 154 (D.B.).

Interested party or relation—Testimony cannot be fully reliable: I.L.R. (1965) 15 Raj. 529: 1965 Raj.L.W. 168.

The rule of careful scrutiny applies only to inimical or interested witnesses, not to independent witnesses: A.I.R. 1981 S.C. 1241: 1981 U.J. (S.C.) 270: 1981 S.C.C. (Cr.) 646: 1981 Cr.L.J. 752.

Relations.—A criminal Court evaluating evidence of witnesses closely related to the deceased has, of course, to be very careful but it ought not mechanically reject such evidence on the sole ground that they are interested witnesses; that would invariably lead to failure of justice: A.I.R. 1991 S.C. 318: 1991 Cr.L.J. 402.

The mere fact that a witness is the deceased's collateral in some degree, is no ground to hold that he is not a disinterested or independent witness: A.I.R. 1976 S.C. 83: (1976) 1 S.C.C. 181.

Relationship by itself is no ground to discredit the testimony of a witness if it is otherwise consistent and true; it is neither tainted evidence nor can it be equated to that of an approver: (1985) 1 An.W.R. 31 (D.B.); (1985) 1 An.W.R. 40 (D.B.); A.I.R. 1972 All. 369: 1972 Ren.C.R. 448; A.I.R. 1976 S.C. 2304: 1976 Cr.L.J. 1757: (1976) 4 S.C.C. 369: 1976 Cur.L.J. (Cr.) 230: 1976 S.C.C. (Cr.) 646; 1963 All.L.J. 977.

Evidence of close relatives and friends must be examined with great care and caution; such witnesses have a tendency to exaggerate, or add to, the facts: A.I.R. 1984 S.C. 1622: (1984) 4 S.C.C. 116: 1984 Cr.L.J. 1738.

Evidence of a witness cannot be discarded merely because he happens to be a close relative of the party: (1983) 2 D.M.C. 77: 1983 Rajdhani L.R. 729: 1983 Marriage L.J. 511: 1984 Hindu L.R. 74; 1995 Cr.L.J. 3255 (Andh. Pra.) (D.B.).

Evidence cannot be disbelieved on the ground of kinship; as only persons of one brotherhood had collected for a common cause, they were the only natural witnesses: 1979 Cr.L.J. 727 (Del.) (D.B.).

Merely because the eye-witnesses are related to each other and the deceased is no ground to reject their evidence out of hand, if otherwise it is found to be true and reliable: 1965 Ker.L.J. 412: I.L.R. (1965) 2 Ker. 33: (1965) 2 Cr.L.J. 647: A.I.R. 1965 Ker. 248.

Relationship of prosecution witnesses with the deceased is not a good reason to suspect their evidence against the accused, because they are far from likely to leave off the real culprit and name another person as the deceased's assailant: (1965) 2 An.W.R. 145: 1965 M.L.J. (Cr.) 602: (1965) 2 Cr.L.J. 440 (Andh. Pra.); 1957 Cr.L.J. 1200: A.I.R. 1957 All. 755; 1976 Kash.L.J. 253: 1976 Cr.L.J. 1310; 1975 Cr.L.J. 1405: I.L.R. (1974) 33 Pat. 644; (1974) 40 Cut.L.T. 159.

A witness is normally to be considered independent unless he springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused to wish to implicate him falsely. Ordinarily, a close relation of the deceased would be the last to screen a real culprit and falsely implicate an innocent person. Where the eye-witnesses have convincingly explained their presence and stated that they saw accused beating the deceased and nothing has been elicited against these witnesses that they were either hostile to the accused or were actuated by any private grudges, mere fact that the witnesses were related to the deceased would not render their testimony as untrustworthy: 1969 Cr.L.J. 1453 (Andh. Pra.).

In a trial for murder the evidence of the witnesses cannot be discarded merely on the ground that they are related to the deceased. That is based on the common sense view that ordinarily a relation should not implicate persons who are not involved in the murder. In such cases, however, the Court requires some sort of independent corroboration to lend assurance to the conviction that they are witnesses of truth: 35 Cut.L.T. 152: 1970 Cr.L.J. 1322.

In a case of murder the fact that the prosecution witnesses are relatives of the murdered man is no valid reason for discarding their evidence. What would be of importance is that the witnesses had enmity with the accused. Interest of the relatives is undoubtedly to see that the true criminal is prosecuted; they have no interest in accusing any one falsely unless they have enmity: A.I.R. 1936 Lah. 233.

It is erroneous in a murder case to reject evidence of witnesses because they are related to the deceased; close relative of the deceased would normally be most reluctant to spare the real assailants and to falsely

involve another person: 1974 Cr.L.J. 709: 1974 S.C.C. (Cr.) 420: 1974 S.C.D. 579: (1974) 4 S.C.C. 258: A.I.R. 1974 S.C. 839; (1972) 38 Cut.L.T. 725; 1975 Cr.L.J. 132: 1974 Punj.L.J. (Cr.) 338; 1979 Cr.L.J. 603 (Karn.) (D.B.); 1979 Jab.L.J. 301: 1979 Cr.L.J. (N.O.C.) 154 (D.B.); (1985) 1 An.W.R. 40.

A related witness would not shield the real culprit because of his affinity with the deceased and, therefore, evidence of a related witness is much more reliable than the evidence of an interested or inimical witness: 1994 M.P.L.J. 57 (D.B.).

Close relations are anxious to see that the true culprit is punished; it is unnatural for a daughter to falsely implicate her mother as the author of the murders; she would do so only if the mother had in fact committed the murder: A.I.R. 1978 Ori. 19 (F.B.).

Close relations do not falsely implicate somebody else in place of real culprits; but the chance of their including some innocent persons alongwith the guilty cannot be ruled out: 1979 Chand. Cr.C. 190 (D.B.).

Witnesses bearing no grudge or animus against accused—Witnesses not interested in the deceased also—Fact that the witnesses are related to accused or the deceased not sufficient to discard their sworn testimony: (1963) 65 Punj.L.R. 505.

Criminal trial — Eye-witnesses relatives of complainant — Their testimony is to be judged with caution and does not mean that their evidence is to be discarded altogether: 1967 All.W.R. (H.C.) 604: 1967 All.Cr.R. 391: 1967 Cr.L.J. 1102.

Relationship of the prosecution witnesses to the murdered man is no ground for not acting upon their testimony if it is otherwise reliable in the sense that the witnesses were competent witnesses who could be expected to be near about the place of occurrence and could have seen what happened: 1956 Cr.L.J. 827: A.I.R. 1956 S.C. 460; A.I.R. 1958 J.&K. 23.

In a trial under S. 307, Penal Code, the victim of the attack is the best witness to speak about what happened. It is safe to act on his testimony when it is corroborated by circumstantial evidence and his wife who is likely to have been present at the time. The mere fact of relationship is no ground for discarding her testimony: 1959 Ker.L.T. 1014.

Relationship by itself is not sufficient to discard the evidence of witnesses as unworthy of credit in the absence of other circumstances to detract from the evidentiary value of their testimony: 24 Cut.L.T. 108: A.I.R. 1958 Ori. 92; A.I.R. 1958 Manipur 47; A.I.R. 1960 Tripura 4; 1959 Raj.L.W. 381; (1959) 61 Punj.L.R. 902; A.I.R. 1960 Madh. Pra. 73. *See* also 1994 Cr.L.J. 848 (All.); A.I.R. 1961 All. 198; (1982) 53 Cut.L.T. 470: 1982 Cr.L.J. 1160; A.I.R. 1974 S.C. 276; 1979 Chand. Cr.C. 166; 1966 All.Cr.R. 330: 1966 All.W.R. 554; A.I.R. 1983 S.C. 114: (1983) 1 S.C.C. 35; 1989 Cr.L.J. 1876 (Gau.); 1994 Cr.L.J. 3602 (Bom.) (D.B.).

The mere fact that any witness is related to the deceased is not a ground for regarding him as an interested witness. The imputation of interestedness could be made only in cases where it is shown that the witnesses are inimically disposed towards the prisoner. It is only when it is established that there is either discord or hostility between the accused person and the witnesses that the evidence of a witness could be treated as tainted. In good many of the cases, the witnesses would be either relations of the deceased or friends of his and on that ground alone their evidence could not be discarded. No doubt, if the circumstances are such as to throw doubt on the trustworthiness of the witnesses, it may not be safe to rest a conviction on such evidence: A.I.R. 1957 Andh. Pra. 231: 1957 Cr.L.J. 815. *See* also 1994 Cr.L.J. (N.O.C.) 205 (Ori.).

Mere fact of relationship between the victim and the prosecution witnesses far from being a foundation for falsehood is often a sure guarantee of truth; they are likely to be most reluctant to spare the real assailant and falsely implicate another; mere relationship, when presence at the spot is corroborated, is not sufficient to suspect credibility. A witness is normally considered to be independent unless facts indicate to the contrary. Desirability of the testimony being subjected to close and severe scrutiny arises when it is shown that there was likelihood of an attempt to falsely implicate an accused; what is to be seen is whether the relative's testimony is credible and cogent. Thus, where the victim, his mother and the Doctor testified that the injury was on the left eye's upper lid, some confusion in the testimony of other witnesses does not affect the credibility of the mother's evidence: 1995 Cr.L.J. 390 (Ori.).

The fact that the prosecution witnesses in a murder trial are the sons and daughter of the victim does not detract from the value to be attached to their evidence, because naturally enough, they are interested in seeing

that the real murderer of their father is convicted of the offence and they cannot be expected to adopt a course by which some innocent person would be substituted, for the person really guilty of the murder and that too, when no enmity as such has been proved to have existed between the witnesses and the accused as would induce them to give false evidence and to substitute him as the murderer in place of the real guilty. In fact their feelings would be strongest against the real culprit and, consequently, their evidence cannot be discarded on the mere ground of their close interest in the deceased: A.I.R. 1968 S.C. 1438.

In case of a relation witness whether corroboration is necessary or not will depend on the particular facts and circumstances of each case. It would not be admissible to rely upon evidence of a partisan witness without corroboration. It would be equally clear that his evidence is not a tainted one, but it would only make a difference in the degree of corroboration required rather than the necessity for it: 28 Cut.L.T. 523: I.L.R. (1963) Cut. 67: (1963) 1 Cr.L.J. 550.

Trial for murder—Eye-witnesses closely related to victim—Evidence given by such witnesses to be closely scrutinised—Plea that their evidence cannot be accepted unless it is corroborated is not acceptable: A.I.R. 1965 S.C. 328.

Merely because the witnesses are related to the deceased, their evidence cannot be discarded; but it is required to be closely scrutinized; if found reliable, natural and trustworthy, the Court is bound to accept it: (1991-1) 11 Guj.L.H. 296 (D.B.); 1993 Cr.L.J. 1756 (Pat.) (One of the wintesses related to both the parties).

The corroboration required of a witness, who is a relation of the deceased in a murder case, is not that kind of corroboration which would be necessary to support the evidence of an approver or an accomplice, but only such corroboration is needed as would be sufficient to lend assurance to the evidence before the Court and satisfy the Court that the particular persons were really concerned in the offence: 1969 Cr.L.J. 1002: A.I.R. 1969 Raj. 219.

A close relative, a very natural witness, cannot be regarded as an interested witness; the term 'interested' postulates that the witness must have direct interest in seeing the accused being some how or other convicted either because he had some *animus* against the accused or for some other reason: A.I.R. 1977 S.C. 472: (1976) 4 S.C.C. 158: (1977) 1 S.C.R. 280.

Testimony of witness—Distant relationship—May be corroborated by other witnesses—Witness cannot be disbelieved: 1970 Cur.L.J. 93 (Punj.).

Evidence of eye-witnesses — Eye-witnesses closely related to each other—Their evidence cannot be rejected but has to be sifted carefully: 1967 Cur.L.J. 850: 1968 Cr.L.J. 712 (Punj.)

Evidence of—Close relatives of deceased—When they are natural and free from inherent improbabilities, conviction can be maintained on their evidence—Discrepancies in their statement—If inconsequential do not affect merit of testimony. [A.I.R. 1965 S.C. 328, Rel. on]: (1969) 71 Punj.L.R. 73.

Two eye-witnesses relatives of the deceased and themselves injured persons—One witness whose field adjoins the scene of occurrence a wholly independent and natural witness—Testimony of these witnesses free from blemish, consistent and credible—Evidence of the witnesses can safely form a basis for a judgment of conviction of accused persons: 1969 All.W.R. (H.C.) 243: 1969 All. Cr.R. 169.

Relationship—Appreciation of evidence: 1968 Cr.L.J. 64: A.I.R. 1968 Manipur 7.

Close relation of complainant appearing as defence witness—It cannot be presumed that he is invariably actuated by some feeling of animosity towards complainant—Inference as to animosity must rest on tangible facts or circumstances and cannot be founded on mere conjecture or presupposition: 1969 All.Cr.R. 240: 1969 All.W.R. (H.C.) 369.

If a relation is called as a witness by a party, *held*, the Court must exercise appropriate caution while appraising his evidence; its probative value should be assessed in the context of the entire facts and circumstances of the case; the Court cannot discard it merely because it is evidence by a relation: (1983) 56 Cut.L.T. 185: 1983 Cr.L.J. 1711.

Evidence of close relatives about the possession of the house, *held*, cannot be rejected

on that ground alone; such close relationship itself makes their personal knowledge probable: 1982 Kash.L.J. 263: A.I.R. 1982 J.&K. 141.

In a case relating to claim for compensation for death caused due to motor accident under S. 110-A, Motor Vehicles Act, the Claims Tribunal is not justified in rejecting the testimony of a witness on the ground that he is related to and, therefore, interested in the heirs of the deceased. Even in a criminal case, the evidence of an interested person is not to be rejected mechanically merely because the witness is an interested person, but the Court has to be careful in weighing such evidence and see whether the evidence strikes the Court as genuine or as probable: A.I.R. 1969 Del. 183.

In a motor accident claim case, evidence of the deceased's widow travelling with him in the car which met with the accident, *held*, could not be brushed aside merely because she was the widow of the deceased victim: A.I.R. 1983 All. 409: 1983 All.L.J. 230 (D.B.).

In a motor accident claim case, the evidence of an occupant of the vehicle, a relative of the deceased driver, *held*, cannot be discredited as of an interested witness in the absence of defence evidence to the contrary: A.I.R. 1982 Mad. 65 (D.B.).

Where in case of a motor accident, the deceased's brother lodged the F.I.R. soon after and claimed that he saw the accident from the field he was then working in, rushed to the spot and thence to the Police Station, *held*, his testimony could not be disbelieved merely because his presence at the scene was doubted when his version was natural and corroborated by an independent witness: 1979 All.L.J. 222 (D.B.).

A village wedding, unlike a city wedding, is not a formal affair; in second marriages, no invitations are usually issued; a witness visiting his relations and learning about the wedding being performed in the accused's house, also related to him, may as well go there and watch the marriage ceremony; his being related to both the sides is not of much importance; he is not a got-up witness: A.I.R. 1981 Bom. 283: 1981 Mah.L.J. 614: (1981) 83 Bom.L.R. 312.

Where the point in issue was as to whether the marriage was solemnised in the Kudiavaippu form, *held*, such a ceremony is one conducted inside the house attended to mainly by near relations only and, thus, persons competent to swear to the ceremony can only be the near relations: A.I.R. 1973 Ker. 250.

Where it is possible to explain the presence of all relative witnesses at the scene as their residential tenements were in its vicinity, *held*, their evidence cannot be discarded on the ground of relationship: (1971) 3 S.C.C. 413: A.I.R. 1974 S.C. 1983.

Murder case — Three prosecution witnesses, relations of deceased — Witnesses present near scene of offence and in a position to see assailants—Besides them, there was one disinterested and independent witness—Evidence of these witnesses, *held* to be natural piece of evidence, and accepted—Fact that individual act was not described, could not be considered to be infirmity: (1969) 71 Bom.L.R. 375: I.L.R. (1969) Bom. 654: 1970 Cr.L.J. 621.

In a murder case, one of the eye-witnesses, apart from being a near relation of the deceased, was also one of the bitter enemies of the accused. The other eye-witness was the cooly engaged by 'the deceased'. Apart from their interestedness there was a fatal omission on the part of these two witnesses to name the assailants of the deceased, immediately after the commission of the crime. There was no satisfactory explanation for this serious omission. The two witnesses did not also give a consistent version as to where exactly the assailants were hiding themselves just before attacking the deceased. *Held*, that these circumstances led to a reasonable inference that those witnesses did not see the actual giving of the fatal blows by the assaillants. Their evidence so far as their claim to be eye-witnesses is concerned, must be rejected: (1964) 5 Ori.J.D. 145: (1964) 1 Cr.L.J. 464.

Where the murder had taken place in front of his house, his wife's presence at the scene was natural and probable and her testimony was corroborated by medical evidence, *held*, she should not be disbelieved merely because the accused's father had testified against her in a previous litigation: 1985 Cr.L.J. 1625: I.L.R. (1984) 2 Del. 388.

Where eye-witnesses, close relations of the deceased, had testified in the earlier trial that the five accused had killed the deceased

and on their acquittal, they deposed in the second trial that other persons accused in the second trial had murdered him, *held*, the eye-witnesses were prepared to implicate the five persons acquitted on the earlier occasion and now they are accusing the new accused of the same serious charge; no credence could be given to their evidence; they were willing to lend their oath to any story that the prosecution advanced. [(1983) 1 Crimes 675 (Madh. Pra.), Reversed]: A.I.R. 1984 S.C. 911: (1984) 2 S.C.C. 350: 1984 Cr.L.J. 814: 1984 S.C.C. (Cr.) 250.

The witness being wife of the deceased is no ground for rejecting her evidence; but her evidence should be scrutinized with care: (1981) 3 S.C.C. 635: 1981 S.C.C. (Cr.) 774: 1982 Cr.L.J. 850: A.I.R. 1982 S.C. 1076.

Merely because the solitary eye-witness was the deceased's full brother is not sufficient to brush aside his testimony as interested when injuries found on his person lent assurance to his presence at the spot and his deposition is amply corroborated by the medical as also from the circumstantial evidence: A.I.R. 1978 S.C. 414: 1978 U.J. (S.C.) 84: (1978) 1 S.C.C. 474. *See* also A.I.R. 1977 S.C. 1085: 1977 Cr.L.J. 705.

Where though the two eye-witnesses were highly interested witnesses being the mother and real brother of the deceased, respectively, but their evidence was found to be implicitly reliable and trustworthy and was in conformity with the medical evidence, *held*, reliance could be placed on their testimony: 1995 Cr.L.J. 2583 (Bom.).

Where the only eye-witnesses happened to be wife and daughter of the deceased, *held*, merely because they were related and interested witnesses their evidence could not be thrown away or discarded: 1995 Cr.L.J. 1537 (Del.) (D.B.).

Where the prosecution witnesses were said to be related *inter se* and with the complainant but the accused had failed to point out the relationship, *held*, their evidence could not be discarded; at best, it was liable to be scrutinized with caution: 1985 Cr.L.J. 1829.

Where all the four eye-witnesses were consistent in their evidence about the accused having assaulted the deceased, *held*, merely because one of them was the deceased's grandson would not, by itself, justify viewing his evidence with distrust: A.I.R. 1979 S.C. 702.

Where the parents of the victim had spontaneously named the assailants and the prosecution witness who had lodged the F.I.R. immediately thereafter had also mentioned therein their names as having been given by the victim's parents, and inspite of the fact that the parents had been subjected to intensive and incisive cross-examination, nothing tangible had been brought out from the parents for discarding their testimony, also corroborated by various other circumstances, *held*, the parents' testimony could not be brushed aside as being of interested witnesses; as parents of the victim, they would be the least disposed to falsely implicate the accused or substitute them for the real culprits: A.I.R. 1992 S.C. 891: 1992 Cr.L.J. 1091.

Where the presence of the eye-witnesses, who were relatives of the deceased, at the scene of occurrence was beyond question as all of them had sustained injuries in the occurrence, *held*, the fact of their being related to the deceased did not detract from the value of their evidence when their presence at the scene of offence was natural: A.I.R. 1988 S.C. 2249; A.I.R. 1979 S.C. 1822; A.I.R. 1993 S.C. 1544; A.I.R. 1983 S.C. 1081 [When the witness was common friend of both the deceased and one of the accused, his testimony not to be discarded as one of interested witness]; A.I.R. 1979 S.C. 1433: (1973) 3 S.C.C. 423 [Witness deposing against his nephew, *held*, his statement cannot be discarded simply because he is declared hostile].

Where a murder took place near about the midnight inside the house, *held*, the deceased's near relations living practically in the same house cannot be dubbed as interested witnesses; they are very natural witnesses; one cannot expect witnesses from outside to see the occurrence in such circumstances. [A.I.R. 1977 S.C. 472, Foll.]: A.I.R. 1980 S.C. 184: 1980 U.J. (S.C.) 70: (1980) 3 S.C.C. 55.

Interested witness.—Mere interestedness of a witness by itself is not a valid ground for discarding or rejecting his sworn testimony; nor can it be laid down as an invariable rule that an interested witness's testimony can never result in conviction; all that is necessary is that the evidence of interested or related witnesses should be subjected to a very careful scrutiny with extreme care and

caution; if it is found to be intrinsically reliable in the circumstances of the particular case, conviction may well be based thereon: 1992 All.L.J. 364: A.I.R. 1992 S.C. 1011: 1992 Cr.L.J. 1115.

Interestedness of witnesses alone is no ground for rejecting their testimony—Same has to be judged on his own merits: 1963 M.P.L.J. (Notes) 96: 1963 Jab.L.J. 415: A.I.R. 1963 Madh. Pra. 234.

It is well settled in case of interested witnesses' evidence that it should be tested in the light of probabilities, the previous statements and the surrounding circumstances: A.I.R. 1994 S.C. 549: 1994 Cr.L.J. 1116.

Eye-witness, highly interested in the prosecution and inimically disposed towards the accused, may not be absolutely immune from the tendency to rope in some innocents along with the guilty; the Court should, as a rule of caution, seek corroboration from independent source *qua* every accused: A.I.R. 1975 S.C. 216: (1975) 3 S.C.C. 752.

There is no absolute rule that the evidence of interested witnesses cannot be accepted without corroboration; but where they have poor moral fibre, weighed by a heavy load of bad antecedents and having a possible motive to harm the accused who was opposed to their immoral activities, *held*, it would be hazardous to accept their testimony without independent corroboration on crucial points: A.I.R. 1976 S.C. 294: (1976) 1 S.C.C. 727: (1976) 2 S.C.R. 11: (1976) 78 Punj.L.R. 194: 1976 S.C.C. (Cr.) 160: 1976 Cr.L.J. 295: 1976 Mah.L.J. 174: 1976 M.P.L.J. 206: I.L.R. (1976) Karn. 720.

Interestedness of witnesses even if proved, will not justify rejection of their evidence *in toto* though it may necessitate scanning their evidence more carefully and with caution: (1969) 35 Cut.L.T. 1105: 1970 Cr.L.J. 298.

Where testimony receives ample and very strong corroboration from the documentary evidence, it should be accepted in spite of its being of a highly interested character: 1969 All.L.J. 190.

May be, witnesses are interested in the well-being of a person but if on scrutiny it is found that there was no indication of their depositions being coloured with such interest, the same need not be necessarily disbelieved; only such statements as are tainted by such considerations alone should be discarded: A.I.R. 1979 J.&K. 6 (D.B.).

Interested witnesses—Reliability: 1966 Cr.L.J. 772: A.I.R. 1966 Manipur 8.

Interested evidence must be corroborated by some other evidence—Otherwise it cannot be given full value: 1966 All.Cr.R. 297: 1966 All.W.R. (H.C.) 481.

Where the eye-witnesses to the occurrence had received injuries in same occurrence, *held*, merely because they were interested witnesses, their evidence could not be rejected outrightly: A.I.R. 1994 S.C. 1624.

In a case where injuries have been caused on both sides and a precise counter version is being pleaded on behalf of the accused, it is but natural that the testimony of their eye-witnesses should be partial to the version which they have chosen to give. All the eye-witnesses, therefore, come clearly within the ambit of the term 'interested testimony' and their testimony cannot possibly be final: 1970 Cr.L.J. 352: A.I.R. 1970 Punj. 85.

In a faction ridden village people who are really neutral, will be reluctant to come forward as witnesses to support one or the other side, lest they should invite trouble for themselves. This is a common tendency. So, in spite of the fact that prosecution witnesses are interested persons, the Court may, in the circumstances of a particular case, rely on their testimony: 1960 Cr.L.J. 1222 (2): A.I.R. 1960 Mys. 228: 1960 M.L.J. (Cr.) 575.

The fact that it is not an easy task in a village where there are factions to secure independent evidence does not obviate the necessity of the Court satisfying itself that the evidence on the strength of which it is asked to convict the accused is sufficiently reliable. Nor should the Court apply two different standards to the evidence on the side of the prosecution and to that on the side of the defence. Such a course cannot be justified by reason or by principle: 190 I.C. 366: 1939 M.W.N. 1256. *See* also 61 Cr.L.J. 209.

Oral evidence of witnesses from a faction ridden village has to be scrutinized with great care and caution; and the trial Court's views, which had the occasion to mark their demeanour should not be lightly brushed aside except for cogent reasons to do so: A.I.R. 1981 Pat. 103: 1981 B.L.J.R. 255.

In faction ridden localities the general tendency is to implicate some innocents as well, besides the guilty; if the Court finds evidence of a prosecution witness as unreliable, it must scrutinize the rest of his evidence with care and caution; if he finds it trustworthy and keeping intact the substratum of the prosecution case, it may uphold the same: 1979 M.L.J. (Cr.) 692.

In cases arising out of acute factions, there is a tendency to falsely implicate persons belonging to the opposite faction; to avert the danger of convicting innocent persons, the Courts should closely scrutinize the evidence of interested witnesses as also the F.I.R. with greater care and caution to separate the grain from the chaff; but in the absence of indications of fabrication, the Court cannot reject the prosecution version given in the F.I.R. and substantiated by evidence merely because of delay. However, all being matters for appreciation, much would depend on the facts and circumstances of each case: A.I.R. 1991 S.C. 63.

Interested evidence—Meaning of: A.I.R. 1967 Cal. 390.

Interested witness—Value of evidence: A.I.R. 1967 Assam 55.

Interested witness—Evidence of witness cannot be disregarded merely because he is interested—But Court will need extra caution in evaluating evidence of such witness. (Per *Govinda Menon, J.*): 1966 Ker.L.J. 868.

Credibility of witnesses—Interested witness. *See* 1965 All.W.R. (H.C.) 119; 1994 Cr.L.J. (N.O.C.) 178 (Ori.).

To call the witnesses supporting the case of one of the parties, against their own interest, interested witnesses will be absolutely perverse: 1965 All.Cr.R. 125: 1965 All.W.R. (H.C.) 119.

The testimony of interested witnesses need not be discarded if it is corroborated by other evidence; however, it needs more careful scrutiny: (1982) 54 Cut.L.T. 527.

Interested witnesses are not necessarily false though their personal interest or stake in the matter must put the Court on its guard; the Court must closely scrutinize their testimony, indicating the reasons for accepting or rejecting it; no evidence should be disregarded simply because it came from interested persons. [*Vide* A.I.R. 1973 S.C. 51; A.I.R. 1976 S.C. 2304; A.I.R. 1977 S.C. 1; A.I.R. 1979 S.C. 1822; A.I.R. 1981 S.C. 82; A.I.R. 1990 S.C. 1242]: A.I.R. 1992 S.C. 891: 1992 Cr.L.J. 1091; A.I.R. 1981 Pat. 103: 1981 B.L.J.R. 255.

No law provides that in the absence of an independent witness, the evidence of interested witnesses should be thrown out and should not be relied upon for convicting an accused; the law only requires that in case of interested witnesses the Court should weigh their evidence with care and caution to exclude the possibility of false implication; besides, evidence of interested witnesses is not like that of an approver, presumed to be tainted and requiring corroboration; it is as good as any other evidence; in a faction ridden village, it will really be impossible to find independent witnesses; mostly only partisan witnesses would be the natural and probable witnesses; the primary thing to be seen is whether the witnesses, despite being interested, have spoken the truth and are creditworthy; once the Court finds that there is no reason to disbelieve them, their being interested is no ground to reject the prosecution case. [1976 All.W.C. 495, Reversed]: A.I.R. 1985 S.C. 1384.

Even in case of interested witnesses, the rule of scrutiny is merely a rule of caution, not a rule of law: A.I.R. 1981 S.C. 1241: 1981 U.J. (S.C.) 270.

Mere living in the compound is no proof of interestedness: I.L.R. (1962) Cut. 726: (1963) 2 Cr.L.J. 294: A.I.R. 1963 Ori. 144.

Evidence of interested witness—Weight —Should be scrutinized with care—It is not the law that it is not entitled to any weight: (1971) 1 S.C.W.R. 34: 1970 S.C.D. 1057.

If the evidence of a witness is incredible, it need not be shown as to why he has implicated the accused; the absence of the explanation cannot stamp his evidence with truth; interested evidence is not necessarily true: 1982 Cr.L.J. 2342 (Ori.).

The testimony of an eye-witness corroborated by other evidence, *held*, cannot be discarded on the ground of his being an interested witness: A.I.R. 1985 P.&H. 71: I.L.R. (1985) 2 P.&H. 14. *See* also 1994 Cr.L.J. (N.O.C.) 245 (Ori.).

Interested evidence is not necessarily false: 178 I.C. 520: A.I.R. 1938 Sind 202. Even in case of interested persons, it is not desirable that the evidence should be at once

discarded. A Judge cannot shut out the evidence from consideration simply because it came from interested parties. No evidence is tainted simply because it comes from interested parties. No evidence is tainted simply because it comes from quarters interested in the prosecution but it has to be judged on its own merits: 1956 Cr.L.J. 1283: A.I.R. 1956 Assam 170; A.I.R. 1958 Pat. 353; A.I.R. 1959 Assam 200.

Fact that a witness has a close interest in complainant's party or is a distant relation cannot detract from value of his evidence—His evidence cannot be discarded on that ground especially when no enmity has been proved to exist between him and the accused as would induce him to give false evidence: 1970 Raj.L.W. 118: 1970 Cr.L.J. 653.

Merely because the eye-witnesses were interested in the deceased is no ground to discard their evidence or to seek its independent corroboration; but their testimony has to be viewed with caution and close scrutiny: 1981 Cr.L.J. 190. *See* also 1993 Cr.L.J. 2609 (S.C.) (It is not safe to rely on the testimony of interested witness without finding independent corroboration).

Interested evidence is not necessarily unreliable; even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. There is no invariable rule that interested evidence, unless corroborated to a material extent in material particulars by independent evidence, cannot result in conviction; but the evidence of interested witnesses should be subjected to careful scrutiny, and if found intrinsically reliable or inherently probable, it may, by itself, be sufficient to result in conviction: A.I.R. 1981 S.C. 82: (1981) 3 S.C.C. 675.

Where a party has brought on record the testimony of only the interested witnesses, this no doubt by itself does not discredit their testimony but renders their statements subject to close scrutiny, especially when it is against the admitted registered document: I.L.R. (1956) Hyd. 328: A.I.R. 1956 Hyd. 114.

Interested witnesses — Appreciation of evidence: (S) A.I.R. 1957 S.C. 199: 1957 Cr.L.J. 325.

Interested witnesses are not necessarily false witnesses; but the witness having a personal interest or stake in the case must put the Court on its guard. The evidence of such witnesses must be subjected to a closer scrutiny; indeed the Court may in a given case justifiably reject such evidence unless corroborated from an independent source; but the need for corroboration must arise out of the context and texture of evidence. Even interested witnesses may be interested in telling the truth; the Court, therefore, must assess the testimony of each important witness and indicate its reasons for accepting or rejecting it. A broad and general comment like a particular witness, being an election agent, cannot be relied upon is not a judicial assessment of evidence; evidence can be assessed only after its careful analysis: A.I.R. 1977 S.C. 1: 1976 U.J. (S.C.) 960: (1976) 4 S.C.C. 961: (1977) 2 S.C.R. 1. *See* also 1994 Cr.L.J. (N.O.C.) 238 (Madh. Pra.) [Dowry-death—Accused-husband producing witness from his vicinity—Witness cannot be relied upon being interested witness].

No law requires that in the absence of an independent witness, the interested witnesses' evidence should be thrown out; what the law requires is that if witnesses are interested, the Court should scrutinize their evidence with care and caution to exclude the possibility of false implication. The evidence of interested witnesses is not like that of an approver which is presumed to be tainted and requires corroboration; the interested witnesses' evidence is as good as any other evidence. In faction ridden villages it is really impossible to find independent witnesses; only partisan witnesses would be natural and probable witnesses there. Once the Court finds by analysis of an interested witnesses' evidence that there is no reason to disbelieve them, it should not reject the evidence. [1976 All.W.C. 495, Reversed; A.I.R. 1975 S.C. 1985, Rel. on]: 1985 Cr.L.J. 2009: (1985) 3 S.C.C. 703.

Substratum of the eye witnesses' evidence cannot be rejected either on the ground of their interestedness or partisan character or that they were not speaking the whole truth: A.I.R. 1981 S.C. 451: 1980 (Supp.) S.C.C. 641.

Interested witness—Weight to be given—Discretion — Acceptance or rejection of evidence — Interference in revision: 1958 Nag.L.J. 126.

Witness disbelieved on ground of interestedness — Finding of appellate Court — Not disturbed by High Court in second appeal: I.L.R. (1963) Cut. 901.

Eye-witness—Accused person in possession as lessees of land in management of deceased—Sole eye-witness to the occurrence interested in purchasing land—His interest in land, *held*, had no bearing upon question of his evidence in reference to murder—Some minor discrepancies in his statements not material and not affecting worth of his evidence—His evidence substantially corroborated by other items of evidence on record—Evidence of such witness was relied upon for conviction: 1969 Cr.L.J. 542 (Andh. Pra.).

Merely because a witness was known to, or intimate with, the deceased, *held*, is no ground for rejecting his testimony: A.I.R. 1994 S.C. 1459. *See* also 1994 Cr.L.J. 589 (All.); 1989 Cr.L.J. 1516 (Pat.) (Witnesses were friends).

Merely because the eye-witnesses belonged to the deceased's caste or neighbourhood is no reason to disbelieve them or to look for corroboration of their testimony: A.I.R. 1978 S.C. 1084.

Witnesses not belonging to the deceased's caste and not related to him but to his servant, *held*, are not interested witnesses: A.I.R. 1994 S.C. 846.

Where the witnesses were the deceased's family members and closest relations, *held*, it was quite natural for them to rush to the scene of occurrence on hearing the deceased's alarm; it would not, by itself, detract from their testimony: A.I.R. 1976 S.C. 2499: (1976) 4 S.C.C. 362.

Where the prosecution witnesses were not only deeply interested in the deceased but had also made improvements in their testimony and that too, in material particulars over their statements to the Police, *held*, implicit reliance could not be placed on their testimony: A.I.R. 1981 S.C. 1223: 1981 Cr.L.J. 729: 1981 S.C.C. (Cr.) 610.

Evidence of solicitor on behalf of his client—That solicitor is interested person, not enough for rejecting his evidence: A.I.R. 1960 Cal. 752.

Prosecution suffers from a serious stigma, namely, the stigma of bolstering up a false case against innocent people when certain interested witnesses utilise the opportunity, to, so to speak, rope in innocent people. Such witnesses cannot be relied upon: 1958 All.L.J. 327: 1958 All.W.R. (H.C.) 454: 1958 All. Cr.R. 302.

Defendants to suit being interested persons—Their testimony may not carry much weight: (1962) 2 S.C.J. 597: (1961) 3 S.C.R. 792: (1961) 63 Bom.L.R. 649: (1961) 2 S.C.A. 542: A.I.R. 1961 S.C. 1077. Value of evidence of interested witness. *See* 1988 Cr.L.J. 56 (Ker.); 1989 Cr.L.J. 2475 (Del.).

Where a party has brought on record the testimony of only the interested witnesses, this no doubt by itself does not discredit their testimony but renders their statements subject to close scrutiny, especially when it is against the admitted registered document: I.L.R. (1956) Hyd. 328: A.I.R. 1956 Hyd. 114. *See* Cr.P. Code 1898, S. 367; A.I.R. 1958 Madh. Pra. 380: 1958 Cr.L.J. 1402.

In a suit for recovery of money under a Burglary and House Breaking insurance policy, *held*, the accountant as well as the partner of the plaintiff's shop are most competent witnesses; their being interested persons is no ground for rejecting their evidence; however, persons assembled after the incident are not competent witnesses if they were not present at the time of incident: A.I.R. 1979 Cal. 56.

Where an accused has signed the money order slip, holding out his identity card and thereby establishing his identity obtains the money from the Postman, *held*, the Postman cannot be either an accomplice or even interested witness: A.I.R. 1972 Del. 13: 1972 Cr.L.J. 254.

In a prosecution of a Branch Manager of a bank for cheating and criminal misconduct, *held*, merely because the witnesses were the bank employees, working under the accused, their evidence could not be brushed aside: A.I.R. 1994 S.C. 1407.

Merely because all of them were departmental co-employees of the complainant would not detract from the witnesses' credibility; if their presence at the scene was natural, they could not be dubbed as interested witnesses: 1976 Cr.L.J. 132.

It may be that an employee of a Corporation had left the service of the Corporation and had made a claim for damages against the Corporation but that by itself would not disentitle the Labour Court to accept his sworn testimony in another case against the Corporation: 1981 Lab.I.C. 62.

Murder case—One prosecution witness, servant of accused at time of incident and at

time of giving evidence in Sessions Court—Relationship between witness and accused (his employer) not strained—Witness, *held* to be an independent and disinterested witness: (1969) 71 Bom.L.R. 375: I.L.R. (1969) Bom. 654: 1970 Cr.L.J. 621.

If evidence of a witness inspires confidence, merely because there was some litigation with the opposite party's brother-in-law or that he and the party producing him were employed together would not make his evidence unreliable: A.I.R. 1986 Ori. 173 (D.B.).

Witness produced by husband in support of his application for judicial separation, an elderly man of 63 years—Wife admitting that there was no enmity between herself and the witness—Witness in no way interested in applicant—Parties living in a portion of his house for about 3 years—Hence, it is natural that the witness should know about quarrels between husband and wife—There is no reason why an elderly gentleman who was in no way connected with the husband should come and depose falsely against the opposite party, against whom he had no ill-will: A.I.R. 1970 Mys. 232.

Where in a case in which the fact of adoption was in question, the testimony of a witness who though related to and produced by the defendants was not going to gain anything by the decision of the case one way or the other, *held*, could not be rejected as that of an interested witness: A.I.R. 1974 Ori. 120: (1973) 1 Cut.W.R. 809 (D.B.).

Evidence of a witness attesting to an agreement of sale, if otherwise acceptable, cannot be rejected on the ground that being a brother of the plaintiff's son-in-law, he is an interested witness: A.I.R. 1992 Ker. 49 (D.B.).

Partisan witness.—The evidence of partisan witnesses is not to be discarded or rejected mechanically; the Court should appreciate such evidence carefully and find out about its discrepancies, its genuineness and probability of its story; the Court should find out if the witness's presence at the scene is probable, whether the substratum of his version carries conviction with a prudent person; if the evidence appears to the Court to be flawless and free from suspicion, it may accept it without corroboration. [A.I.R. 1965 S.C. 902; A.I.R. 1976 S.C. 2304; A.I.R. 1981 S.C. 82; A.I.R. 1981 S.C. 942; A.I.R. 1981 S.C. 1230; A.I.R. 1981 S.C. 2073, Foll.]: (1983) 55 Cut.L.T. 472. *See* also 1993 Cr.L.J. 1857 (S.C.).

Law is now well settled that conviction can be sustained basing on the evidence of partisan witnesses. What the law requires is closer and thorough scrutiny of their evidence. Thus, where evidence of such witnesses was cogent, reliable and did not suffer from any serious infirmity, *held*, reliance could be placed on such evidence: 1995 Cr.L.J. 2998 (Ori.) (D.B.).

Where in a melee with a large number of assailants, a numerous witnesses claimed to have witnessed the occurrence from different places and at its different stages, their evidence will undoubtedly be partisan; the distinct possibility of the innocent being falsely implicated with the guilty cannot be easily ruled out; to reject the entire evidence only on such ground is to shut one's eyes to the realities of rural life; a large number of the guilty would go unpunished; the evidence must be examined with utmost care and caution: A.I.R. 1978 S.C. 1647: 1978 Cr.L.J. 1713.

There is no doubt that when a Criminal Court has to appreciate evidence given by witnesses who are partisan or interested, it has to be very careful in weighing such evidence. Whether or not there are discrepancies in the evidence, whether or not evidence strikes the Court as genuine, whether or not the story disclosed by the evidence is probable, are all matters which must be taken into account. But it would be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, Criminal Courts have to deal with evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated: (1964) 8 S.C.R. 133: (1965) 1 S.C.J. 605: I.L.R. (1964) 2 All. 694: A.I.R. 1965 S.C. 202.

Melee means a free fight wherein the combatants are mingled together; confused general fight between groups or among combatants. In case of a melee, with a large number of assailants and numerous witnesses claiming to have seen it from different places and at different stages and their evidence is

undoubtedly partisan, there is a distinct possibility of the innocent being falsely implicated with the guilty; in a faction ridden society, it is but inevitable that evidence would be of a partisan nature; to reject the entire evidence on such sole ground is to shut one's eyes to the realities of our rural life; a large number of the guilty would go unpunished. [A.I.R. 1978 S.C. 1647, Foll.]. It is usual to adopt the test that conviction should be based on the consistent account of two or three or more witnesses; such a test, though apparently mechanical, is reasonable; appraisal of evidence in such complex cases is no doubt difficult but the Criminal Courts have to do their best; it is their duty to sift the evidence carefully and decide which of its parts is reliable and should try to be assured of the role attributed to each individual offender. [(1965) 1 Cr.L.J. 202 (S.C.), Foll.]. But the prosecution witnesses being consistent, and the evidence on record not indicating a mixed free fight with such confusion that the witnesses could have traced the occurrence in so far as their near and dear ones were concerned, Court's refusal to scrutinize the specific evidence and reject the entire evidence on the ground of a melee, *held*, is not justified: 1981 Cr.L.J. 516.

Partisan witness — Corroboration — Necessity. *See* (1963) 1 Cr.L.J. 550 (Ori.).

Evidence of a partisan witness cannot be discarded on that ground alone; but his evidence has to be scrutinized with more than ordinary care; the Court must focus its attention to search for discrepancies in evidence or whether it strikes to the Court as genuine and probable; it needs cautious judicial approach: A.I.R. 1978 S.C. 1647.

In cases involving a large number of persons if in the commotion some injuries are caused to others and evidence is partisan, it is often safer for the Court to be guided by the compass of probabilities along the rock-ribbed contours and converging on the heart of the matter; once the Court goes astray from the basic features, it is apt to lose itself in the labyrinths of immaterial details, desultory discussion and vacillation resulting from unfounded suspicions: A.I.R. 1974 S.C. 902: 1974 Cr.L.J. 755: (1974) 4 S.C.C. 479.

In case of partisan witnesses, only general corroboration may be looked for; they do not need material corroboration as in the case of an accomplice's evidence: 1972 Cr.L.J. 381.

Partisanship by itself is no ground for discarding sworn testimony; interested evidence is not necessarily false evidence; in small villages divided on caste basis, the prosecution may not get a neutral witness; and even if he is there, he may be reluctant to come forward to support one or the other side; therefore, merely because eye-witnesses are associated with one faction or the other, their evidence should not be discarded; though no doubt, it should be subjected to careful scrutiny and accepted with caution: A.I.R. 1988 S.C. 1028.

A partisan witness is not necessarily untruthful; but his evidence has to be examined with greater care and caution than usual: 1984 Cr.L.J. 520.

The direct testimony of witnesses, if otherwise consistent, should not ordinarily be rejected on the ground that they are partisan witnesses, unless the surrounding circumstances discredit their version: A.I.R. 1990 S.C. 1242: 1990 Cr.L.J. 1269.

Evidence of partisan witnesses though acceptable yet should be scrutinised with care—In some cases Court as a matter of prudence will look for independent corroboration: I.L.R. (1967) Guj. 457: 8 Guj.L.R. 588: 1968 Cr.L.J. 746: A.I.R. 1968 Guj. 88.

Evidence of an interested or inimical witness, though required to be scrutinized with care, cannot be rejected as partisan evidence; if found creditworthy, it can be relied upon: 1977 Cr.L.J. 1941: 1977 S.C.C. (Cr.) 614: (1977) 4 S.C.C. 452: A.I.R. 1977 S.C. 2274; 1969 Cr.L.J. 1079 (Cal.).

There is no hard and fast rule that the evidence of a partisan witness cannot be acted upon, without corroboration. If his presence at the scene cannot be doubted and his evidence is consistent with the surrounding circumstances and the probabilities of the case and strikes to the Court as true, it can be a good foundation for conviction, more so when medical evidence also supports it: A.I.R. 1976 S.C. 59: 1975 U.J. (S.C.) 891: (1976) 1 S.C.C. 401: 1976 Cr.L.J. 6: 1976 S.C.C. (Cr.) 19: I.L.R. (1976) Karn. 410: 1976 M.L.J. (Cr.) 383; 1965 M.L.J. (Cr.) 312: A.I.R. 1965 S.C. 202; 1965 Jab.L.J. 1196: A.I.R. 1965 Madh. Pra. 107.

In matrimonial matters, it is only the near relations or close friends and associates of the parties who are expected to be

acquainted with the facts; their statements cannot be discarded merely on the ground of their being partisan witnesses; their evidence has to be considered on its normal merits and demerits: (1986) 1 Hindu L.R. 645 (Raj.).

The evidence of a partisan witness is not to be discarded as such; in a faction ridden locality, the prosecution may not find independent witnesses. But when the interested eye-witnesses did not belong to the locality and other persons, including nearby shopkeepers, belonging to the locality, independent and disinterested, were not examined, it would certainly cast serious reflection on the trial's fairness: 1985 Cr.L.J. 580.

Land dispute leading to mutual assault by rival parties resulting in deaths—Evidence—Appreciation of—Testimony of partisan eye-witnesses: (1963) 1 Cr.L.J. 700 (Ori.).

The evidence of partisan witnesses cannot be rejected altogether; but the Court should insist on independent corroboration before placing reliance upon their testimony: 1974 Cr.L.J. 234.

In cases of communal riots it would be unreasonable to contend that the evidence given by the witnesses should be discarded only on the ground that the persons who gave such evidence belong to one particular community and are as such partisan or interested witnesses. The mechanical rejection of such evidence on the sole ground that it is partisan would lead to failure of justice. When the evidence is of this nature, the Courts have to very carefully weigh such evidence with a view to ensure that taking advantage of the situation innocent persons are not falsely implicated: (1969) 35 Cut.L.T. 35: 1969 Cr.L.J. 990: A.I.R. 1969 Ori. 176.

Where inimical factions in the village, bitterly opposed to each other, had already taken toll of twelve lives, *held*, it would be idle to look for independent persons; only partisan witnesses would be available; they would, even otherwise, be natural and probable witnesses to the incident; it would not be right to reject their testimony out of hand merely on the ground that they belonged to one faction or the other: A.I.R. 1975 S.C. 1985.

Though the partisan witnesses' evidence cannot be rejected outright but where they had implicated one accused falsely, *held*, it would be highly unsafe to rely on their evidence against other accused: (1990-1) 10 Guj.L.H. 256 (S.C.).

Where interested and partisan witnesses had deliberately implicated an innocent person in a murder case, *held*, the Court should be on its guard; their evidence should be scrutinized with great care before relying upon it: 1982 Cr.L.J. 1585 (Ori.).

Evidence of partisan nature — Fact by itself does not render evidence false — But before accepting it Court should subject it to very careful scrutiny: (1962) 1 An.W.R. 396: A.I.R. 1962 Andh. Pra. 322: (1962) 2 Cr.L.J. 318: 1962 M.L.J. (Cr.) 366.

Witness having respect or loyalty to same religious institution as the victim does not make him partisan witness: (1970) 72 Bom.L.R. 405: 1970 Mah.L.J. 634: A.I.R. 1970 Bom. 438.

No rule of law lays down that a person, otherwise reliable and independent, on his being associated with a pre-arranged raid becomes an accomplice or a partisan witness; conviction on his testimony would not be untenable; every witness of a raiding party cannot be dubbed as an accomplice *per se* or even as an interested witness in the total absence of materials justifying such an inference: A.I.R. 1976 S.C. 449: (1976) 1 S.C.C. 644: (1976) 3 S.C.R. 119: 1976 Cr.L.J. 346: 1976 S.C.C. (Cr.) 135: 1976 Cr.L.R. (S.C.) 86.

Evidence of accomplice and evidence of partisan witnesses — Distinction — Former needs corrboration for conviction while no corrboration is necessary in latter case: 1968 Cr.L.J. 1505: A.I.R. 1968 S.C. 1323.

Merely because a partition suit has been filed by the accused's father against the witness, *held*, by itself does not make him a partisan or interested witness: 1984 Cr.L.J. 29.

Inimical.—Bitter animosity can be a double-edged weapon; it may lead to deliberate false implication or make the witnesses wrongly infer and strongly believe (without having actual knowledge) that the offence must have been committed by the rival group: A.I.R. 1991 S.C. 1938: (1991) 4 S.C.C. 536.

Enmity between eye-witnesses and the accused is no ground to reject their statements totally; but they should be subjected to strict scrutiny: (1981) 52 Cut.L.T. 155. However *see* 1994 Cr.L.J. 1106 (S.C.).

Merely because the witnesses are inimical to the accused by itself is not sufficient for rejecting their testimony: A.I.R. 1979 S.C. 1261:

(1979) 4 S.C.C. 641: 1980 S.C.C. (Cr.) 153: 1979 Cr.L.J. 1074.

The fact that the witnesses were inimically disposed towards the accused cannot, by itself, be a ground for total rejection of their evidence: A.I.R. 1978 S.C. 1506.

It is needless to emphasise that enmity is a double-edged sword which can cut both ways. However, the fact remains that whether the prosecution witnesses are close relatives of the deceased victim or on inimical terms with the deceased involved in the crime of murder, the witnesses are always interested to see that the real offenders of the crime are booked and they are not, in any case, expected to leave out the real culprits and rope in the innocent persons simply because of the enmity. It is, therefore, not a safe rule to reject their testimony merely on the ground that the complainant and the accused persons were on inimical terms. Similarly the evidence cannot be rejected merely on the basis of relationship of the witnesses with the deceased. In such a situation it only puts the Court with the solemn duty to make a deeper probe and scrutinize the evidence with more than ordinary care: 1995 Cr.L.J. 410: A.I.R. 1994 S.C. 2507.

Enmity is a double-edged weapon; it no doubt often provides motive for false implication but it also more often than not provides motive and incentive for making an attack. So that, merely because there subsisted enmity between the witnesses, on the one hand and the accused, on the other, is not sufficient to throw over-board the testimony of the witnesses, unless there is further material on which the testimony can be doubted. Where there is enmity between the prosecution witnesses and the accused the evidence has to be scrutinized with greater care, which means that the evidence has to be tested more fully in the crucible of probabilities: 1975 All.L.J. 857: 1958 Cr.L.J. 324: A.I.R. 1957 Madh. Pra. 153: 1957 Cr.L.J. 1138.

In order to draw an inference of false implication, hostility between witness and accused has to be grave. Mere hostility is insufficient to show that a person would make false allegation against his own brother: 1994 Cr.L.J. (N.O.C.) 348 (Ori.) (D.B.).

Witness—Tendency towards enemies—It is not uncommon for the witnesses to rope in as many of their enemies as possible in a case where relations of the parties are highly strained: (1961) 2 Cr.L.J. 396 (Punj.).

Appreciation of. *See* I.L.R. (1960) 2 All. 235; (1961) 63 Punj.L.R. 742.

Creditbility of: 1994 Cr.L.J. (N.O.C.) 178 (Ori.).

Where the parties' relations are highly strained, the chances of the prosecution witnesses implicating their adversaries cannot be ruled out; but the prosecution witnesses cannot be dubbed complete liars merely because the Court has not accepted the prosecution case; the Court's judgment in such a case may properly be construed as giving the benefit of doubt to the accused: 1972 Cr.L.J. 1387.

The inimical witnesses' testimony corroborated in material particulars with other evidence on record, *held*, cannot be rejected as partisan; it is well-settled that the Court has to scrutinize it with abundant caution to ensure that innocent persons are not roped in: 1985 M.P.L.J. 268.

The evidence of a witness on inimical terms with the accused need not be discarded *in toto;* rather, it should be scrutinized carefully with reference to materials on the record to determine if it is credible: 1983 Raj.L.W. 594 (D.B.).

In cases of group rivalries and enmities, the general tendency is to rope in as many persons as possible as participants in the assault; the Courts have, therefore, to be very careful; if on close scrutiny, a reasonable doubt arises about participation of any accused, the Court should give to them the benefit of doubt. But where evidence of the deceased's mother and sister was corroborated by medical evidence against only some of the accused, *held*, the other accused were entitled to the benefit of doubt: A.I.R. 1991 S.C. 4: 1990 Cr.L.J. 2597.

The fact that a witness is on inimical term alone is no ground to brush aside his evidence; however, it should be scrutinized with great caution and should be accepted only when it finds corroboration: A.I.R. 1981 Pat. 103: 1981 B.L.J.R. 255.

In the absence of previous enmity, the evidence of the deceased's relatives cannot be regarded as suspect requiring corroboration from independent witnesses: A.I.R. 1977 S.C. 701: (1976) 4 S.C.C. 348.

Where admittedly long-standing enmity existed between two communities and both sides suffered injuries, it is necessary to look into facts objectively proved rather than to accept oral testimony of witnesses at its face value: A.I.R. 1980 S.C. 864: 1978 U.J. (S.C.) 924.

It is unsafe to uphold a conviction of the accused which is based on the evidence of witnesses who are shown to be inimical to the accused more especially when the majority of the assessors are of opinion that the charge is not proved: 179 I.C. 929.

Merely because all eye-witnesses were to some extent interested and inimical because they belonged to the faction headed by the deceased, by itself, is no ground to reject their testimony *in toto*; but their evidence should be scrutinized with great caution: A.I.R. 1980 S.C. 443: 1979 U.J. (S.C.) 354: (1979) 4 S.C.C. 483.

Where a case arose out of an acute faction and enmity between two groups, *held*, the evidence of interested witnesses is to be scrutinized with great care and caution; it should be examined in the light of the earliest report, the medical evidence and other surrounding circumstances: A.I.R. 1992 S.C. 956: 1992 Cr.L.J. 1286.

Where father of the deceased is also inimical to the accused his testimony has to be viewed with great caution; but it cannot be rejected as partisan unless found to be untruthful because of other infirmities: A.I.R. 1978 S.C. 191: (1978) 1 S.C.C. 178.

Where both the sides carefully suppressed a material portion of the occurrence in the first information reports lodged by both, and tried to show that they were innocent victims of the murderous attack from the opposite side, and the medical evidence left no doubt that both parties exchanged murderous blows with blunt weapons in consequence of which five persons on the side of the prosecution and five persons on the side of the accused sustained fairly severe injuries and one other was killed: *Held*, that though the accused's party was also guilty of suppressing a material portion of the occurrence the prosecution could not rely on this unsatisfactory feature in the counter F.I.R. but had to prove its own case beyond reasonable doubt. The evidence of the eye-witnesses had to be scrutinized with great care, especially when admittedly almost all the eye-witnesses belonged to the informant's party and were bitter enemies of the accused persons (Accused were given benefit of doubt): (1958) 24 Cut.L.T. 23.

Where one of the two accused persons contended that since he had given evidence against the deceased in an injury case, he had been falsely implicated by the deceased's wife and the prosecution witnesses nowhere stated that accused had caused any injury with lathi to deceased and no part had been ascribed to him in so far as the crime was concerned, *held*, the possibility that the said accused might have been falsely implicated on account of the past enmity could not be ruled out. Accordingly, he was acquitted: 1995 Cr.L.J. 2119 (S.C.).

53. Stock/decoy witness.—It is difficult to define the term 'stock witness', but if it appears to the Court that a particular person is always at the beck and call of the Police and is too willing to state according to their wishes, or that he has appeared in some Court and was disbelieved or some strictures were passed against him or his prosecution was ordered for perjury, such a person could be said to be the stock witnesses of the Police and his evidence is not entitled to any weight. Therefore, neither the evidence of the non-official witnesses should be rejected only on the ground that they have appeared in some Police cases previously, nor the evidence of the official witnesses, such as Police or Excise officials, should be ignored simply because they are holding official positions in their Departments. The evidence of each witness has to be judged from the material before the Court. If the evidence of a witness suffers from infirmities or other inherent weaknesses, then it should be ignored: (1965) 67 Punj.L.R. 260: 1965 All.Cr.R. 179: 1965 All.W.R. (Supp.) 6: 1965 Cur.L.J. 189.

A person who has often been appearing in Police cases does not necessarily become a stock witness or a tool in the hands of the Police. It depends on the facts and circumstances of each case. There are persons who, on the other hand, join the investigation in order to help the Police and trace the real offender; and if they join the Police investigation and appear as witness on more than one occasion for the prosecution to help the Police in bringing the offenders to justice, it would be very improper to term or dub them as stock witness: 1968 Cr.L.J. 858 (Punj.).

Criminal trial—Stock witness—Credibility: (1965) 67 Punj.L.R. 260. *See* also (1974) Punj.L.J. (Cr.) 380. *See* also 1994 Cr.L.J. 1020 (Bom.).

Practice of Police department in producing stock witnesses condemned. *See* A.I.R. 1981 S.C. 613.

No rule of law requires corroboration of a decoy witness's testimony; his evidence if sufficient and trustworthy can sustain a conviction: 1982 M.L.J. (Cr.) 22: 1982 Mad.L.W. (Cr.) 13: 1982 Cr.L.J. 702.

Prevention of Corruption Act, 1947, S. 5(2) —Accused accepting marked currency notes from decoy witness—Credibility of decoy witness—*Held*, probability of truth of defence explanation could not be ruled out: (1967) 33 Cut.L.T. 649. *See* also S. 3, Note 53.

54. Trap witness.—A Court can act upon uncorroborated testimony of a trap witness, who appears to be a witness of truth. [1979 Cr.L.J. 329 (S.C.), Foll.]: 1982 Cr.L.J. 954 (Ori.).

Trap witness — Not an accomplice or approver—Necessity of corroboration: 1968 Cr.L.J. 925: A.I.R. 1968 Goa 63.

The trap witnesses are not to be discarded as accomplices; however, in a given case the Court can insist on independent corroboration for believing their testimony: 1979 Raj.L.W. 37.

Need for corroboration—Decoy or trap witness: 1967 Cr.L.J. 1138: A.I.R. 1967 Del. 51.

Though a trap witness is not an approver, he is certainly an interested witness in the sense that he is interested to see that the trap laid by him succeeded. He could at least be equated with a partisan witness and it would not be admissible to rely upon his evidence without corroboration. Though the Court rejects the evidence of the witness in regard to some events either because that part of the evidence is not consistent with the other parts of his evidence or with the evidence of some disinterested witnesses, the Court can accept the evidence given by the witness in regard to other events when that version is corroborated, in all material particulars by the evidence of other disinterested witnesses. The corroboration must be by independent testimony confirming in some material particulars not only that the crime was committed but also that the accused committed it. It is not necessary to have corroboration of all the circumstances of the case or every detail of crime. It would be sufficient if there was corroboration as to the material circumstances of the crime and of the identity of the accused in relation to the crime: (1962) 1 S.C.J. 231: (1962) 2 S.C.R. 195: A.I.R. 1961 S.C. 1762.

The uncorroborated testimony of a trap witness can also be acted upon, if the Court is satisfied from the facts and circumstances of the case about its truth: A.I.R. 1979 S.C. 400.

Where trap witnesses were cross-examined in a scrappy and jumpy manner and their evidence was without contradictions and inner variations between their respective statements were confined to omissions of trivial details, *held*, their testimony could not be dubbed as unreliable: 1983 Cr.L.J. 1: A.I.R. 1982 S.C. 1511.

A trap witness in bribery case is really not an accomplice because he is not a willing party to the giving of a bribe. He is, however, a highly partisan witness and therefore, his evidence must be scrutinised with very considerable care and caution. Further, as a matter of substantive law there would seem to be no rule which stands in the way of a conviction being founded on the evidence of such witness in a proper case, but the Courts as a matter of prudence should normally and ordinarily look for material corroboration of his evidence from independent sources though it seems that perhaps it would be open to a Court to depart from this course for valid reasons to be stated by it in an exceptional case. Again, in seeking corroboration of the evidence of such a witness the Courts need not look for corroboration of every part or detail of the prosecution story, and it would be sufficient if corroboration is forthcoming as to the material circumstance of the crime and the identity of the accused in relation thereto: I.L.R. (1966) 16 Raj. 436: 1967 Cr.L.J. 121: A.I.R. 1967 Raj. 10.

Merely because trap witnesses in a bribery case are petty clerks, their evidence cannot be rejected as wholly unreliable, more so when they satisfy the test of being independent; in a country where renunciation is worshipped and grandeur and wild display of wealth frowned upon, it would be the travesty of truth to disbelieve witnesses of humble origin or belonging to officewise and wealthwise, lower strata of society as solely on that ground; the converse, unfortunately,

appears to be true. [(1965) 1 Del.L.T. 362 (Punj.), Overruled; A.I.R. 1976 S.C. 91, Dist.]: 1983 Cr.L.J. 1: A.I.R. 1982 S.C. 1511.

Where witnesses are members of raiding party responsible for making trap to catch accused with the object of detecting an offence relating to prohibition, the evidence of such witnesses are not necessarily to be discarded in absence of any independent corroboration. If any witness is a partisan or an interested person and is concerned in the success of the trial his evidence must be tested in the same way as any other interested witness: 28 Cut.L.T. 47.

55. Chance witness.—A chance witness is a witness who should not normally be where and when he professes to have been. From that point of view one may be a chance witness even at one's house if, for instance, one should at that hour have been in one's office, and even a nomad in the desolation of Sahara may not be a chance witness if his being there and then was on his itineary. *Held*, that considering that the incident took place in the grand trunk road, only passers-by could have been natural witnesses of the same: 1957 Cr.L.J. 1378: A.I.R. 1957 All. 809. *See* also 1989 Cr.L.J. (N.O.C.) 209 (Ori.). However *see* 1993 Cr.L.J. 2954 (All.).

Though a chance witness whose evidence so commonly discloses a meeting with the very person whose admission is required and details how the admission was volunteered in the course of conversation, is not necessarily a false witness, it is proverbially rash to rely upon such evidence: 1941 O.W.N. 565: A.I.R. 1941 P.C. 11 (P.C.).

If by coincidence or chance a person was at the place of occurrence at the time, he will be a chance witness; if he happens to be the victim's relative or friend or inimically disposed towards the accused, his being a chance witness is viewed with suspicion; his evidence is not necessarily rendered incredible or unbelievable; it, however, does require cautious and close scrutiny: A.I.R. 1976 S.C. 2032: 1976 Cr.L.J. 1568: (1976) 3 S.C.C. 564.

The evidence of a witness cannot be brushed aside or viewed with suspicion by calling him a 'chance witness', that is, one who happened to be at the place of occurrence at the time by coincidence or chance. (*See* A.I.R. 1976 S.C. 2032). If a witness is free from bias for or against the prosecution, and has no personal interest in the trial's outcome (*See* (1991) 2 Ker.L.T. 217), his statement in the Court would fall within the juristic concept of 'oral evidence' under S. 3; the credibility of his evidence has to be evaluated just as any other 'oral evidence' available without pre-conceived notions: (1992) 2 Ker.L.J. 529 (D.B.).

Evidence of independent witnesses cannot be viewed with suspicion merely because they are chance witnesses: 1983 Cr.L.J. 1272: (1983) 3 S.C.C. 327: 1983 S.C.C. (Cr.) 601: A.I.R. 1983 S.C. 680; A.I.R. 1967 Ori. 118: 1967 Cr.L.J. 1155.

Evidence of a chance witness is not to be outrightly rejected though it should be accepted after close scrutiny: 1981 Cr.L.J. 530.

The occasion for the presence of particularly an occurrence witness has to be examined with due regard to the time and scene of the occurrence; if his presence was usual, his failure to recapitulate a photographic reproduction of each and every injury and the places it was inflicted would not detract from his trustworthiness: (1993) 1 Ker.L.J. 76 (D.B.).

A chance witness is not necessarily a false witness; if his presence at the scene is proved clearly, he cannot be held a chance witness: 1976 Kash.L.J. 253: 1976 Cr.L.J. 1310 (D.B.).

The evidence of a chance witness is not necessarily incredible, it only requires cautious approach and scrutiny when he is a partisan witness: (1982-83) 87 Cal.W.N. 102; A.I.R. 1983 S.C. 680; (1989-2) 37 B.L.J.R. 458 (D.B.).

A witness figured as eye-witness in the F.I.R. and whose evidence received corroboration from another eye-witness, *held*, cannot be categorised as a chance witness: A.I.R. 1988 S.C. 1998: 1989 Cr.L.J. 88. *See* also (1991-2) 39 B.L.J.R. 1313 (D.B.); 1977 Raj.L.W. 100 (D.B.); 1976 Cr.L.J. 1310: 1976 Kash.L.J. 253 (D.B.); 1975 Cr.L.J. 1630 (Punj.); A.I.R. 1994 S.C.1029 [It is a common knowledge that the villagers do come to a town and when they belong to same village they move together and thus, three such witnesses witnessing a crime in the town could not be said to be chance witnesses].

It is very risky to attach credence to the evidence of tutored or chance witnesses: A.I.R. 1974 Cal. 61: 77 Cal.W.N. 944 (S.B.).

Evidence of a chance witness cannot be considered to be worthy of credence: A.I.R. 1961 J. & K. 42.

A mere chance witness, though not necessarily false, is proverbially unsafe; if his evidence is full of improbabilities no implicit reliance should be placed on it: 1978 Cr.L.J. (N.O.C.) 34 (Punj.) (D.B.).

The testimony of a chance witness, though not necessarily false, is proverbially unsafe: A.I.R. 1974 S.C. 276.

Chance witnesses—Their evidence would necessarily require corroboration by independent evidence: (1966-67) 71 Cal.W.N. 781. *See* also S. 3, Note 55, *supra*.

Where an eye-witness, injured in the incident, had satisfactorily explained his presence at the scene, his name was mentioned in the F.I.R. recorded soon after, and his evidence was consistent and conformed with the F.I.R., *held*, his evidence cannot be thrown over board because he was a 'chance' witness: A.I.R. 1989 S.C. 1822.

In case of a road being constructed through the petitioner's property in violation of the Court's injunction, neighbours and pedestrains were natural witnesses; thus, the disinterested neighbours' evidence in the petitioner's favour could not be discredited because they were chance witnesses and their evidence had some small discrepancies: A.I.R. 1990 N.O.C. 48 (Ker.).

A person attending the chamber of the Advocate who had advised the testator in the matter of preparation of the will, *held*, is not a mere 'chance' witness; his evidence cannot be brushed aside: A.I.R. 1981 Cal. 599.

Where the sole eye-witness, and a chance witness at that, was inimical towards the accused his version was highly doubtful, *held*, a conviction based on his sole testimony was not justified: A.I.R. 1994 S.C. 1250. *See* also A.I.R. 1994 S.C. 1251.

Charge under S. 323, I.P.Code — Allegation that accused had assaulted some *harijans*—Evidence of prosecution witnesses numbering about seven rejected merely on ground that six of them were victims and the seventh a non-*harijan* was a chance witness—*Held*, that evidence could not be rejected only on the ground that witness was chance witness: (1968) 10 Ori.J.D. 163: 34 Cut.L.T. 1332. Chance witness: 1968 Cr.L.J. 205: A.I.R. 1968 Ori. 26.

56. Child witness.—(*See* also Notes under S. 118). Appreciation of child witness's evidence: (1964) 66 Punj.L.R. 1230: (1965) 2 Cr.L.J. 127: A.I.R. 1965 Punj. 291.

In the case of an unsworn testimony of a young child, that evidence is admissible. S. 13 of the Oaths Act provides for cases in which the provisions of Ss. 5 and 6 of that Act have not been carried out: A.I.R. 1938 Mad. 490: (1938) 1 M.L.J. 289.

A child witness below the age of 12 is competent witness and though oath should be administered to such witness, *held*, simply because oath cannot be administered, his examination cannot be refused: 1982 Cr.L.J. 1702 (Ker.).

Tender age and old age are, of course, factors capable in law of affecting the testimonial capacity of a person; but merely because a witness is of tender or old age is hardly sufficient to negative his testimonial competence; all the same, Courts have cautioned from early times that it is only a sound rule in practice not to act on the uncorroborated evidence of a child witness, whether he was administered oath or not: (1993) 1 Ker.L.J. 359 (D.B.).

The competence of a child witness depends not so much on its years but its ability to understand the importance of taking an oath and the consequences of making a false statement; there is no precise age to determine competence of a witness; it depends on its capacity and intelligence to differentiate between the truth and falsehood as also the duty to speak the truth as assessed by the trial Judge; some of these methods cannot be photographed into the record: 1979 W.L.N. (U.C.) 252 (D.B.); 1981 Raj.Cr.C. 345.

The tender age of the child witness coupled with other circumstances like its demeanour, unlikelihood of its being tutored and so forth, may render corroboration unnecessary; it would be a question of fact in each case. Corroboration is not a rule of practice but of caution: 1983 Raj.L.W. 80.

All that is required in considering the evidence of a child witness is scanning it carefully and if after doing so it is found that there are no flaws or infirmities in the evidence of a child witness there is no impediment in the way of accepting the evidence of a child. Children are pliable and their evidence could easily be shaped and moulded. It is for this reason that a Court should

see if there are any signs or indications of tutoring. Normally a Court should look for corroboration in such cases but that is more by way of caution and prudence and not as a rule of law. If after carefully scrutinizing the evidence the Court comes to the conclusion that there is an impress of truth in it there is no obstacle in the way of accepting the evidence of such a child: (1957) 1 An.W.R. 115: 1957 M.L.J. (Cr.) 43: A.I.R. 1957 Andh. Pra. 343. *See* also 1994 Cr.L.J. (N.O.C.) 197 (Gau.); 1995 Cr.L.J. 1432 (Bom.) (D.B.).

Children are a most untrustworthy class of witnesses, for when of a tender age they often mistake dreams for reality glibly as of their own knowledge what they have heard from others and are greatly influenced by fear of punishment by hope of reward and by desire of notoriety: (1932) 34 Punj.L.R. 536: A.I.R. 1933 Lah. 667. *See* also (1945) 2 M.L.J. 493 (P.C.).

Evidence substantially true not infrequently assumes too perfect a form and witnesses, such as children, not infrequently get a story by heart which is nonetheless a true story. The real tests are how consistent the story is with itself, how it stands the test of cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case: A.I.R. 1951 Punj. 399: 52 Cr.L.J. 917.

The proper tests to be applied with reference to the evidence of a child witness are how consistent the story is with itself, how it stands the test of cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case: 1941 O.W.N. 1246: I.L.R. 17 Luck. 376: A.I.R. 1942 Oudh 193.

The evidence of witnesses of tender age has to be accepted with very great caution. Witnesses of this type are somewhat dangerous. It is so easy to make them repeat a story which the prosecution or the defence may desire them to put forward and there is no guarantee that they really understand the enormity of the offence which they are committing by making a statement which may not be true: 43 P.L.R. J.&K. 37.

The Court should not lightly rely upon uncorroborated evidence of a child witness; it should scrutinize the same with "extreme care and caution" when it is the only eyewitness: 1983 Raj.L.W. 80.

As per A.I.R. 1971 S.C. 1064 even if there are no infirmities in a young boy's evidence, it is desirable to seek its corroboration because of his tender age: 1975 Raj.L.W. 415 (D.B.).

The precautions which have to be taken in the case of a witness below twelve years are not necessary where the girl who had been kidnapped is above the age of twelve years at the time of her examination in Court. When in such a case the Court has in fact taken these precautions, namely, has satisfied itself that she realised the value of speaking the truth and the significance of the oath, and has appended the required certificate also, the girl's evidence becomes admissible even if she is taken to be a child witness. Such evidence if believed would be, even without corroboration, sufficient to maintain the conviction of the accused for the offence of kidnapping. The rule that the statement of the prosecutrix must be corroborated in material particulars by some other evidence, should be restricted to cases of rape only and should not be extended to other cases of sexual nature: 1957 Cr.L.J. 688: 1957 Raj.L.W. 345.

A boy of about seven years is not likely to distinguish between things heard by him and those which he has seen; and when there is a clear indication of inconsistent statements in his evidence not much importance can be attached to it. It is not illegal to examine a witness of tender years; but it is important that the Judge should, as a precaution, ascertain in the first instance by means of a few simple questions whether the intelligence of the child is such that it is capable of giving credible evidence; it is also desirable that the record of evidence should show that such a test has been in fact made. When it does not appear that any such attempt was made to test the capacity of the child witness to give his testimony, it is not safe to rely on the evidence of such a witness: 15 Pat.L.T. 586: A.I.R. 1934 Pat. 651. *See* also I.L.R. 20 Pat. 893: A.I.R. 1942 Pat. 150; 1957 M.L.J. (Cr.) 418: A.I.R. 1957 Ker. 153.

There is neither any immutable rule of law or of procedure which makes it mandatory for a Court to record the evidence of a child witness in question and answer form. It is only where the answers given by a child witness are either dubious or ambiguous or confusing that the non-recording of the evidence of a child witness in question and answer form may result in rendering the

evidence unworthy of acceptance. Thus, where child witness's answers were very clear and they clearly suggested the questions in reply to which they had been given, *held*, the omission to record evidence of child witness in question and answer form would not render her evidence unworthy of acceptance: 1995 Cr.L.J. 1432 (Bom.) (D.B.).

When the prosecution case is solely resting on the evidence of a child witness of tender age and it is tainted with infirmities of description, on the point of proper identification and when there is evidence to show that she was tutored, it is very unsafe to base conviction on such evidence in a murder case: 1995 Cr.L.J. 595 (Madh. Pra.) (D.B.).

Where the only eye-witness was a teenager girl, *held*, her evidence has to be scrutinized with care and caution: A.I.R. 1973 S.C. 55: (1973) 3 S.C.C. 219: (1973) 2 S.C.J. 303.

A child, three and a half years old at the time of her examination, *held*, is not competent witness being unable to understand questions and give rational replies thereto: 1982 Raj.L.W. 469.

Where testimony of child witness, aged 9 years, who had witnessed murder of her mother was assailed on the ground that it was extremely improbable that seeing the accused armed with an axe (tikav), she did not run away, *held*, when the medical evidence showed that only one blow with a tikav was inflicted on deceased and thus, by the time the child witness would have thought of running away, the incident must have been over and the accused himself would have run away. Therefore, said contention was devoid of any merit: 1995 Cr.L.J. 1432 (Bom.) (D.B.).

Where the prosecution case depended entirely on a single child eye-witness and the accused's oral extra-judicial confession, *held*, circumstances in the case throw a serious doubt about the child's being an eye-witness and also destroy the veracity of the extra-judicial confession, there was no ground for conviction: A.I.R. 1980 S.C. 1621.

Where evidence of child witness was contrary to her earlier statement to the Police that her mother had committed suicide by pouring kerosene oil upon her body and igniting it, which supports the defence, *held*, her oral evidence could not be relied on to convict the accused for murder: (1991) 4 Bom.C.R. 618 (D.B.).

Where a child witness deposed that her uncle had killed her mother and the manner of assault as deposed by her was corroborated by medical evidence and there was no opportunity to tutor the child and further there was no reason why she would falsely implicate her uncle, *held*, the evidence of child witness inspired confidence: 1995 Cr.L.J. 1432 (Bom.) (D.B.).

Where evidence of a child witness who had witnessed murder of his brother and had also sustained injuries appeared to be truthful and unpolluted from external influences, *held*, it could be relied upon for convicting the accused: 1995 Cr.L.J. 1160 (Raj.) (D.B.).

Where minor son of one of deceased persons described the manner and the place where the deceased persons received injuries and no material infirmity was found in his evidence and it was also corroborated by medical evidence, *held*, evidence of child witness could be relied upon. [1976 Cr.L.J. 1031 (S.C.); 1973 Cr.L.J. 159 (S.C.), Rel. on]: 1994 Cr.L.J. (N.O.C.) 407 (P.&H.) (D.B.).

Where an offence was committed during night and the entire case rested on a child witness who stated that she saw the accused in the lantern's light but fact of the lantern burning was not stated nor the accused were named to the Police and there were also other contradictions in her evidence, *held*, the accused could not be convicted on her evidence: A.I.R. 1992 S.C. 1131: 1992 Cr.L.J. 1426: 1993 S.C.C. (Cr.) 289.

Child witness—Observations of Sessions Judge—Value of: 1969 Cr.L.J. 1282 (Del.).

Evidence of child witnesses should be closely scrutinised—Nobody mentioned as murderer in F.I.R.—Accused who is alleged to be on illicit intimacy with deceased's wife, mentioned as suspicious in F.I.R.—Prosecution evidence making its entire story fantastic—Contradictions in statements of child witnesses — Suspicion however grave or might be can hardly be accepted as a substitute for proof of the guilt of accused: 1966 Raj.L.W. 382.

Where an eye-witness, aged 7 years, had improved upon his earlier statement before the Police, *held*, his evidence could not be relied upon: 1975 Raj.L.W. 415 (D.B.). Where in the site-plan, the places from where other witnesses had seen the occurrence had been marked but the place from where a child

witness of 11 years had seen the occurrence had not been marked, though the site-plan was alleged to have been prepared at his instance, *held*, this omission was very significant and had a great bearing on the veracity of his statement: 1975 Raj.L.W. 435 (D.B.).

Murder—Child witness, the only eye-witness—Victim of tutoring—Two different versions, one before committing Court and another before Sessions Judge—No corroborating evidence to connect accused with murder—No reliance can be placed on such evidence—Conviction cannot stand—Court of fact can examine both versions—But when two conflicting versions are given and on evidence witness stands as condemned liar—Court needs corroboration in support of statement on which conviction is to be sustained: I.L.R. (1968) Cut. 748: 1970 Cr.L.J. 637.

Where evidence of child witness was not found to be reliable. *See* A.I.R. 1994 S.C. 454; 1983 Raj.L.W. 80; A.I.R. 1977 S.C. 135; 1995 Cr.L.J. 3187 (Andh. Pra.) (D.B.).

Where the statement of the child witness had not been promptly recorded by the Investigating Officer and possibility of her being tutored to give any statement could not be completely ruled out and further her statement was not truthful as she had made vital improvements in her statement given in the Court from what she stated to the Police, *held*, it would not be safe to place any implicit reliance on her testimony unless there is some corroboration from any other independant evidence: 1995 Cr.L.J. 3028 (Del.) (D.B.).

The accused was convicted entirely on the evidence of three witnesses out of whom one was a child witness. It was found that the other two witnesses had been changing their versions from time to time to suit the exigencies of the prosecution because they were interested in exculpating one of themselves from the offence for which he was standing his trial at the same time in a counter case. So far as the child witness, whose evidence was relied upon to corroborate the evidence of those two witnesses, was concerned he was speaking of the occurrence which took place at a time when he was 8 or 9 years old and after 6 years thereafter so that it was difficult to place reliance on his recollections of the occurrence. Further, there were some discrepancies also in his testimony.

Held, that in those circumstances it was quite unsafe to confirm the conviction of the accused which was entirely based on the evidence of those witnesses: 1957 Ker.L.T. 526: 1957 M.L.J. (Cr.) 418: A.I.R. 1957 Ker. 153: 1957 Cr.L.J. 1132.

Where a young boy of 13 to 14 years admits of having been tutored by the Police, *held*, no reliance could be put on his evidence: 1975 Cr.L.J. 78 (Him. Pra.) (D.B.). *See* also A.I.R. 1994 S.C. 454: 1994 Cr.L.J. 56.

A rural youth of 13 years, found by the Court to be of mature understanding, *held*, cannot be treated as a child witness: A.I.R. 1979 S.C. 1347.

Where the presence of a child witness, a 16 year old son of the deceased, at the place of occurrence was established and he deposed that the accused, two of them armed with *pharsas* and two others with *ballams*, surrounded his father, pulled his legs from behind and his father fell down on the ground with his face downwards and described the incident in detail, and crying aloud and running away from the spot, and it was upon his information that another witness lodged the first information report at the Police Station, *held*, mere discrepancies regarding the number of blows and the side of the weapons used when the medical evidence was not in entire conflict with the child's oral testimony would not detract from its veracity; nor should it be taken that merely because the child was taken by the Police for producing him as a witness does not mean that he had been tutored; the accused could be convicted on his testimony, the other eye-witness having been declared hostile: A.I.R. 1995 S.C. 959: 1995 Cr.L.J. 1461.

Where version of the incident by a child witness was truthful, *held*, the Court is justified in relying on his evidence: 1979 Cr.L.J. 700: 1979 Cr.L.R. (S.C.) 81: 1979 U.J. (S.C.) 334: (1979) 4 S.C.C. 332: 1979 S.C.C. (Cr.) 968: A.I.R. 1979 S.C. 1173. *See* also 1994 Cr.L.J. (N.O.C.) 109 (Ori.).

Where testimony of a child witness was found to be natural and straight-forward, *held*, in absence of any material showing that he was tutored or influenced by any person, his testimony should be accepted: (1982) 54 Cut.L.T. 527. *See* also 1993 Cr.L.J. 772 (Pat.).

Evidence of a child witness aged only 6 years is to be approached with great caution; where serious infirmities and contradictions were found in his evidence, *held*, it could not be relied on: A.I.R. 1977 S.C. 135: (1977) 1 S.C.C. 707.

See also (1977) 2 Karn.L.J. 341; 1977 Raj.Cr.C. 273; 1976 Cr.L.J. 452 (Punj.); (1977) 79 Bom.L.R. 132 (D.B.); 1972 Cr.L.J. 1407 (Pat.) (D.B.).

Evidence of a child witness who had immediately disclosed the occurrence and was corroborated by medical evidence, *held*, can be relied on: 1985 Cr.L.J. 1876.

Murder case — Child eye-witnesses unsophisticated school boys not shown to be inspired by feeling of enmity towards accused—Minor discrepancies in testimony held discrepancies of truth rather than badge of falsehood: (1964) 66 Punj.L.R. 1230: (1965) 2 Cr.L.J. 127: A.I.R. 1965 Punj. 291.

Where evidence of child witness was found to be acceptable and reliable: A.I.R. 1993 S.C. 2275: 1993 Cr.L.J. 2605; 1988 Cr.L.J. 1301 (Cal.).

A plea that a boy was major when the Urban Land (Ceiling and Regulation) Act came into force is liable to be rejected when there was a prior admission that his age was 14 years though he had at the relevant time indeed attained majority: (1983) 55 Cut.L.T. (B.R.D.) 38.

The precautions which have to be taken in the case of a witness below twelve years are not necessary where the girl who had been kidnapped is above the age of twelve years at the time of her examination in Court. When in such a case the Court has in fact taken these precautions, namely, has satisfied itself that she realised the value of speaking the truth and the significance of the oath, and has appended the required certificate also, the girl's evidence becomes admissible even if she is taken to be a child witness.

All that is required in considering the evidence of a child witness is scanning it carefully and if after doing so it is found that there are no flaws or infirmities in the evidence of a child witness there is no impediment in the way of accepting the evidence of a child. Children are pliable and their evidence could easily be shaped and moulded. It is for this reason that a Court should see if there are any signs or indications of tutoring. Normally, a Court should look for corroboration in such cases but that is more by way of caution and prudence and not as a rule of law. If after carefully scrutinizing the evidence the Court comes to the conclusion that there is an impress of truth in it there is no obstacle in the way of accepting the evidence of such a child: (1957) 1 An.W.R. 115: 1957 M.L.J. (Cr.) 43: A.I.R. 1957 Andh. Pra. 343.

57. Panch witness.—The evidence of the *Panch* witness in a trap case assumes considerable importance; it is high time that the officers of the Anti Corruption Department should be on special caution to ensure to have independent and respectable *Panchas* as witnesses; they must realise that they are dealing with the public servants' life and the liberty and they also have a presumption of innocence in their favour; before the Court can act on the complainant's testimony in a trap case, it must get independent corroboration on all material particulars from the *Pancha's* evidence or other independent sources; the evidence of the Police Inspector in a trap case cannot be used to corroborate the complainant's testimony: (1979) 20 Guj.L.R. 329 (D.B.).

It cannot be said that the evidence of every panch witness who takes part in the laying of a trap in cases of bribery can be regarded as evidence of partisan witness. Whether or not a panch witness in a criminal case is a partisan witness would always depend upon the circumstances of each case. If a panch witness occupying a respectable and disinterested position voluntarily helps the investigation by acting as a panch and his evidence appears to the Court to be wholly satisfactory, it may not perhaps be open for the accused to contend that the said evidence must necessarily and as a matter of law be regarded as that of a partisan witness: 1956 Cr.L.J. 725: A.I.R. 1956 Bom. 426.

58. Hostile witness.—(*See* also S. 154). A witness who states the truth cannot be dubbed as 'hostile' just because his statement does not suit the party producing him: A.I.R. 1956 Him. Pra. 58. *See* also 1984 Cr.L.J. (N.O.C.) 197 (Gau.). The evidence of a hostile witness is evidence in the same manner and to the same extent as that of any other

witness, whether called by prosecution or defence: 38 Cr.L.J. 271: A.I.R. 1937 Pat. 34.

Witness called by party giving answers adverse to his case—Appreciation of evidence—Duty of Court—Witness if can be treated as hostile: (1961) 1 Cr.L.J. 403: A.I.R. 1961 Mys. 74.

Merely because a witness is declared hostile his evidence cannot be rejected on that ground alone; however, once a prosecution witness is declared hostile, the prosecution's clear intention is not to rely on his evidence; the version of the hostile witness cannot be the version of the prosecution itself: A.I.R. 1978 S.C. 1096: (1978) 2 S.C.R. 788: 1978 U.J. (S.C.) 208: (1978) 2 S.C.C. 407. *See* also 1994 Cr.L.J. 596: A.I.R. 1994 S.C. 56.

Even if declared hostile, neither the entire evidence of a witness gets excluded nor is it rendered unworthy of consideration: A.I.R. 1989 S.C. 1543: 1989 Cr.L.J. 1785. However *see* 1989 Cr.L.J. 2050 (Mad.).

Evidence of hostile witness cannot be rejected altogether: 1967 Cr.L.J. 1023: A.I.R. 1967 Manipur 11.

The evidence of a prosecution witness cannot be rejected wholesale, merely on the ground that the prosecution had dubbed him 'hostile' and cross-examined him when his testimony was not shaken on material points: A.I.R. 1979 S.C. 1848: (1980) 1 S.C.C. 30: I.L.R. (1979) 2 Karn. 2055: (1980) 1 S.C.R. 95.

The evidence of a witness, declared hostile, is not wholly effaced from the record; that part of his evidence which is otherwise acceptable can be acted upon: A.I.R. 1991 S.C. 1853; (1976) 42 Cut.L.T. 667 (D.B.).

After having been declared hostile the statement of a witness does not cease to remain a part of the record and it can be judged by the Court upon its own value and can be relied upon if it has any worth: 1981 All.L.J. 871.

Merely because prosecution witnesses had turned hostile is not sufficient to discredit their testimony, such of its parts which tally with other evidence may well be taken into consideration: 1985 Cr.L.J. 1373.

Some witnesses do turn hostile but that by itself would not prevent a Court from finding an accused guilty if there is otherwise acceptable evidence to support the prosecution: A.I.R. 1983 S.C. 911: (1983) 4 S.C.C.10.

Even if a witness is declared hostile, *held*, the Court can validly consider his evidence: 1981 M.P.L.J. 786: 1982 Cr.L.J. 254.

Neither law nor practice enjoins rejection *in toto* of the testimony of a hostile witness; his evidence needs to be carefully considered and properly sifted in the context of other evidence and circumstances of the case, the part found to be truthful can certainly be relied upon: 1982 Cr.L.J. 173 (Ker.).

The evidence of hostile witnesses cannot corroborate the evidence of the partisan witnesses: A.I.R. 1975 S.C. 236: (1975) 3 S.C.C. 343.

Permitting the prosecutor to ask leading questions does not amount to an adjudication of the witness's veracity; naturally his entire testimony cannot be thrown out. [1975 Mah.L.J. 776 (D.B.) held overruled in view of A.I.R. 1976 S.C. 294]: (1985) 2 Bom.C.R. 234 (D.B.).

Where a witness declared hostile had deposed that on hearing the alarm, he went to the deceased's house following another eye-witness who scaled over the wall and opened the front door from within and on going inside they saw the accused fleeing to their house by jumping over the partition wall, and the only reason of his being declared hostile was that he had failed to say that he had also seen them attacking the deceased, *held*, from its very nature, he could not have seen the actual attack; but for this, his evidence was in line with the evidence of the other eye-witness in all aspects; the High Court could not have brushed aside his entire evidence merely because he had been declared hostile: A.I.R. 1989 S.C. 1543: 1989 Cr.L.J. 1785.

Where in a case of murder of his step-brother by the accused, independent witnesses had turned hostile, the evidence of their uncle and aunt, in the absence of the proof of strong enmity or motive, cannot be discarded if otherwise reliable: 1984 All.Cr.C. 318: 1985 All.Cr.R. 81: 1985 Cr.L.J. (N.O.C.) 17.

Where immediately after the murderous assault, the injured was taken to the Police

Station where the Head Constable recorded the report of the injured's son, first dictated orally and later on submitted in writing by him but when it came to trial on the injured's death for murder, the version given by the prosecution witnesses including the deceased's aforesaid son in the Court, because of major changes about the origin and site of the occurrence became diametrically opposed to the first information recorded by the Head Constable with whom no enmity or want of cordial relations was shown and the prosecution had also failed to explain the injuries on the accused's person, *held*, the Head Constable's statement in the Court about his recording the first information provided no warrant to the trial Court to declare him hostile and permit the prosecution to cross-examine him. Merely because the Head Constable while recording the information had not appended the usual certificate at the foot of the recorded statement that it had been recorded as narrated and that it had been read over to the witness, was of no consequence whatsoever: 1995 Cr.L.J. 1991 (Mad.) (D.B.).

Person engaged in illicit distillation apprehended on spot—Mahazar witnesses turning hostile—Evidence of officer who conducted raid—Conviction, *held*, not bad: 1964 M.L.J. (Cr.) 664.

Where the witness had resiled from the version given during the course of investigation, and consequently, the prosecution treated him hostile wholesale, *held*, the net result was that though the prosecution elicited, what all he had stated during the course of investigation and brought on record, utilising the provisions of S. 145, the evidentiary value to be attached to such a testimony was practically negligible or, so to say 'nil': (1995) 1 An.L.T. (Cr.) 271 (Mad.) (D.B.).

Where the prosecution was unable to unfold the beginning and the end of occurrence, as most of its witnesses had turned hostile for some reason or the other and the remaining one or two prosecution witnesses had only supported it but in a very half-hearted and incredible fashion, *held*, the accused is entitled to the benefit of doubt: (1984-85) 89 Cal.W.N. 320 (D.B.).

59. Defence witness.—(*See* also Ss. 101-104). Defence witnesses are entitled to equal treatment with those of the prosecution; the Courts ought to overcome their traditional, instinctive disbelief in defence witnesses. True, quite often, they do tell lies but so do the prosecution witnesses: A.I.R. 1981 S.C. 911: (1981) 2 S.C.C. 166.

Defence witnesses are often untrustworthy; that is no reason to assume that they always lie or that the prosecution witnesses are always trustworthy: A.I.R. 1974 S.C. 329: 1974 Cr.L.J. 358: (1974) 3 S.C.C. 649.

Testimony of a witness cannot be discarded simply because he appears for the defence; the Courts have to give cogent reasons for discarding sworn testimony whether it is for the prosecution or defence: 1983 All.L.J. 1316.

Merely because evidence of one party is found not worthy of credence, his adversary's evidence is not necessarily true: A.I.R. 1984 N.O.C. 131 (Del.).

60. Police officer/Government servant.—As recently observed in (1988) 4 S.C.C. 302, the testimony of an Investigating Officer should not be rejected merely on the ground that he is, as such, interested in the prosecution's success; as public servant, he must be presumed to be acting honestly and conscientiously; his evidence should be assessed on its instrinsic worth: (1989) 1 Karn.L.J. 454.

Presumption that persons act honestly applies also to them as in the case of other persons—Mere fact that they are Police officers and hence interested in seeing the success of the case is not sufficient to treat their evidence with suspicion: (1965) 1 Cr.L.J. 76: A.I.R. 1965 Punj. 27.

The testimony of a Police Officer, if otherwise trustworthy, cannot be rejected merely because he is interested in the success of the case: 1981 Cr.L.J. 1244 (Raj.).

Where the injuries on the person of an accused clearly indicate a merciless beating and where they are not consistent with those alleged to have been caused at the time of arrest of an accused on his resistance to surrender and where medical evidence shows that they were caused much earlier, the whole investigation becomes suspect and no reliance can be placed on the words of the Investigating Officer who stoops to such methods for attaining his purpose or on the statement of

the witnesses who support his version: 1968 Cr.L.J. 1028: A.I.R. 1968 All. 290.

Credibility of witness—Police witness—Value of—Same standards to be applied as in case of other witnesses: (1966) 2 Cr.L.J. 829: (1965) 1 Mys.L.J. 485: (1965) 2 Law Rep. 442.

Non-examination of the investigation officer is not necessarily fatal; the Court has to see whether his evidence is essential and if on finding that no prejudice will be caused to the defence, it may pronounce judgment without examining him: (1987) 35 B.L.J.R. 335 (D.B.); (1988) 36 B.L.J.R. 156 (D.B.). Where non-examination of the Investigating Officer resulted in acquittal of the accused in a dacoity case, whereby the informant suffered the loss of reward, *held*, the best way was to impose the cost of Rs. 20,000 on the State Government to compensate the informant for the loss occasioned to him only due to the Investigating Officer's default, leaving the State Government to proceed against the Investigating Officer and realise from him the costs and compensate itself: (1988) 36 B.L.J.R. 156 (D.B.).

Police Officer should not be disbelieved simply because he figures as witness, provided his evidence is reliable and credible: 1970 Cr.L.J. 69: A.I.R. 1970 Tripura 1.

Presumption that a person acts honestly applies as much in favour of a Police Officer and it is not judicial approach to suspect him without good grounds therefor: (1966) 2 An.W.R. 338.

The evidence of a Police Officer cannot be under-estimated merely because of his being a Police Officer: A.I.R. 1987 S.C. 98: (1986) 4 S.C.C. 439: (1986) 2 U.J. (S.C.) 728; 1957 Cr.L.J. 237 (Raj.); A.I.R. 1968 All. 290.

Evidence of Police Officers cannot be discarded only for their being Police Officers unless it is shown that they were hostile to the accused: A.I.R. 1973 S.C. 2783; A.I.R. 1965 Mys. 264: (1965) 2 Cr.L.J. 517; 1994 Cr.L.J. 3623 (All.).

The law, no where says that the testimony of a Police or Excise Officer should necessarily be discarded, unless it is corroborated by that of a non-official: 1956 Cr.L.J. 747: A.I.R. 1956 Him. Pra 26. *See* also 1989 Cr.L.J. 2038 (Ker.).

Where certain quantity of illicit liquor was seized and Sub-Inspector, Excise found that seized liquor was illicit distilled liquor and said finding was based upon certain tests and the plea that said official had grudge against the accused was found not substantiated, *held*, even though finding of said official was not corroborated by unofficial witnesses it was not sufficient to discredit otherwise credible witness. [1978 Cr.L.J. 1960 (S.C.); (1990) 70 Cut.L.T. 743, Foll.]: 1994 Cr.L.J. (N.O.C.) 439 (Ori.).

Where in order to prove that accused was found to be in possession of opium, the prosecution produced police constables, who were not authorised to seize opium, as witnesses but their evidence was not corroborated by independent witnesses, *held*, said witnesses could not be relied upon. Conviction of accused was unsustainable: 1994 Cr.L.J. (N.O.C.) 337 (Madh. Pra.).

The evidence of an agent provacateur is looked upon with suspicion and should be seldom relied upon in support of a conviction: 30 Cr.L.J. 941: A.I.R. 1929 Lah. 436. Any suspicion entertained by the Police Officer cannot be treated as evidence against the accused: 138 I.C. 704: 33 Cr.L.J. 677. There is no reason for discarding the evidence of a witness simply because he is a Police Officer who was charged with the investigation of the case. Police Officers are not worse than ordinary human beings and it cannot be said that all of them are liars, just as it cannot be said that all of them are entirely truthful. The evidence of a witness is to be examined on its merits and if it is improbable or absurd, it would be difficult to believe that evidence from whatever quarter it might come. If it is natural, consistent and bears the ring of truth, there is no reason to disbelieve it simply because the witness is lowly placed or belongs to a particular department of the Government: 1958 Raj.L.W. 527. A policeman's testimony like that of every other witness must be judged on its own merits and should be accepted or rejected according to the circumstances disclosed in each particular case: (1929) 31 Punj.L.R. 688: A.I.R. 1930 Lah. 892; 1993 Cr.L.J. 1622 (Statement of a Police Officer is entitled to same weight as that of a member of public). So also as to the testimony of Zaildars and Safaidposhes: 110 I.C. 674: 29 Cr.L.J. 738. *See* also (1934) 36 Punj.L.R. 174: A.I.R. 1934 Lah. 870.

Evidence of Police Officer of rank of Assistant Sub-Inspector cannot be lightly brushed aside: 1969 Cur.L.J. 957.

Conviction of a public servant on the testimony of the arresting officer having doubtful antecedents, *held*, cannot be sustained: 1981 All.L.J. 1203.

The human impulse is to speak the truth; that applies as much in favour of a Police Officer as of other persons; it is not the judicial approach to distrust and suspect a Police officer without good grounds therefor; thus, even if a Police Officer can be said to be interested in the success of the case, but where his statement is otherwise trustworthy, it should be acceptable to the Court: 1981 Raj.L.W. 370 (D.B.). *See* also 1981 Chand. Cr.C. 261 (Punj.); (1973) 1 Chand. L.R. (Cr.) 93; 1976 Cr.L.J. 274 (All.) (F.B.).

There is no rule of prudence as such or which has crystallized into a rule of law requiring that evidence of the Police Officer who had laid the trap should be treated as evidence of an accomplice requiring corroboration; in a particular case, the Court may be disinclined to act upon his evidence without corroboration; but, equally, in another appropriate case, the Court may unhesitatingly accept evidence of such an Officer. It is all a matter of appreciation; there can be no hard and fast rule nor any precedented guidance: A.I.R. 1980 S.C. 873: (1980) 2 S.C.C. 390: (1980) 2 S.C.J. 319: (1980) 2 S.C.W.R. 161.

A Police Officer cannot be disbelieved merely because he has no proper knowledge about the location of the villages falling within the territorial jurisdiction of the Police Station to which he is attached: (1981) 8 Cr.L.T. 312 (Punj.) (D.B.).

Conviction under S. 3 of the Railway Property (Unlawful Possession) Act, 1966, can be based on the sole testimony of a Sub-Inspector of Railway Protection Force: 1983 Mad.L.W. (Cr.) 59: 1983 Cr.L.J. (N.O.C.) 178.

A home guard is not under the Police; he cannot be said to be not an independent witness: (1989) 1 Bom.C.R. 388 (D.B.); (1987) 2 Crimes 909 (Bom.) (D.B.).

The testimony of a village ramoshi cannot be discarded on the ground of his being under Police influence: A.I.R. 1973 S.C. 55: (1973) 3 S.C.C. 219.

Where in a proceeding under S. 109 of Cr. P. Code, a witness is a Gorkha watchman employed by some private agencies, the mere fact that he performs duties as night watchman can hardly be a sufficient reason for reaching the conclusion that he would be 'at the mercy' of the Police and would, therefore, be willing to give false evidence just to oblige them: (1965) 2 Cr.L.J. 517: A.I.R. 1965 Mys. 264.

Where a village *panch*, who had to perform public duties in many spheres, had appeared as a Police witness in previous prosecutions but had no *animus* against the accused, *held*, that *per se* is no ground to doubt his veracity: (1981) 83 Punj.L.R. 426: (1981) 8 Cr.L.T. 127: I.L.R. (1981) 2 Punj. 407: 1982 Cr.L.J. 29.

The evidence of each witness is to be appraised without prejudice; merely because the *panch* witness is a Government servant, his evidence cannot be dubbed as that of an interested person unless he had shown excessive zeal in the conduct and success of the prosecution: (1987-2) 28 Guj.L.R. 878: 1988 Cr.L.J. (N.O.C.) 20 (D.B.).

In a bribery case, the evidence of the *panch* cannot be discarded merely because of his being a Government servant when there was nothing to show that he was interested in either of the parties or was in any way connected with the Investigation Officer. [A.I.R. 1985 S.C. 1092, Rel. on]: (1990-1) 10 Guj.L.H. 47 (D.B.).

Merely because a *panch* witness is a Government servant, it cannot be contended that he would be a privity to a false *panchnama* to entrap an innocent person: 1981 Cr.L.J. 527 (Guj.).

It is true that official witnesses are not to be disbelieved simply because they happen to be officials, but it depends on the facts of each case. The law is well set that while going for raids and recoveries at least two respectable non-officials are to be joined with the party. Where the prosecution case was that the accused was found carrying opium on a bicycle and the evidence disclosed that before the accused was stopped and search of tins alleged to contain opium was made, the Excise Officers had prior information and therefore, sufficient time to join in respectable non-official witnesses, which, however, they did not do and the case rested only on evidence of official witnesses and the accused also pleaded enmity against the Excise Sub-Inspector, *held* that the accused was entitled to the benefit of doubt: 1967 Cur.L.J. 212.

No rule of law requires that an accused of an offence under S. 7(1) read with S. 16(1)(*a*)(*i*) of the Prevention of Food Adulteration Act, 1954, cannot be convicted on the sole testimony of a Food Inspector; it is only out of a sense of caution that the Courts insist that such sole testimony should be corroborated by some independent witness because the Food Inspector may in a sense be regarded as an interested witness; this caution is a rule of prudence, not of law; were it otherwise, every guilty person could escape punishment by bribing the *panch* witnesses: A.I.R. 1977 S.C. 56: (1977) 1 S.C.C. 173: (1977) 1 S.C.R. 592.

Case under Prevention of Food Adulteration Act—Seizure of sample by Food Inspector—Food Inspector deposing during trial that he had seized sample in presence of two witnesses as required by S. 10(7) of that Act—One of two witnesses who alone was examined denying his presence at the time of seizure and stating that he signed the seizure memo later on—Denial by witness is not by itself sufficient to hold that provisions of S. 10(7) were not complied with—Court can rely on evidence of Food Inspector alone and hold that seizure was made as required by that Act if it comes to the conclusion that it could be accepted in preference to the evidence of the attesting witnesses—There is no rule in law that evidence of Food Inspector alone cannot be believed or accepted: I.L.R. (1964) 1 Ker. 589: (1964) 2 Cr.L.J. 417: A.I.R. 1964 Ker. 261.

Duty of Court—Doing one's duty is not a reason by itself for a Court to reject one's evidence—Deputy Superintendent, Central Excise is entitled to check smuggling of gold and is interested in booking cases against smugglers—That is not enough reason to reject his evidence: 1969 Cr.L.J. 1022: A.I.R. 1969 Andh. Pra. 278. Duty of Court: 1969 Cr.L.J. 502: A.I.R. 1969 Ori. 73.

All public servants entrusted with duty to prevent crime have to perform unpleasant tasks against the suspects; but that is no reason to affect their evidentiary value unless there be something specific against them: 1976 Cr.L.J. 274: 1976 All.L.J. 100.

In appreciating oral evidence, it is to be assessed whether the witness is truthful or there is anything to doubt his veracity in any particular matter; where he is found to be untruthful on material facts, the matter ends. Where he is only partly truthful, the Court may take the precaution of seeking some corroboration, adequate and reasonable, but a Court is not entitled to reject the evidence of a witness merely because he is a government servant and might be under the influence of the investigating officers; if his association with the investigating agencies is unusual, frequent or designed, their evidence may be viewed with suspicion. Even in cases where Officers who, in the course of their duties, generally assist the investigating agencies, there is no need to view their evidence with suspicion as an invariable rule: A.I.R. 1985 S.C. 1092.

Courts of law should judge evidence by applying the well recognised test of basic human probabilities; the observation that the evidence of officers constituting the inspecting party is highly interested because they want the accused to be convicted runs counter to the well recognised principle that *prima facie* public servants must be presumed to act honestly and conscientiously; their evidence has to be assessed on its intrinsic worth; it cannot be discarded merely on the ground that being public servants they are interested in the success of their case: A.I.R. 1978 S.C. 1571: (1978) 4 S.C.C. 65: 1978 U.J. (S.C.) 701.

Prosecution under Prevention of Food Adulteration Act—Food Inspector and Sanitary Inspector cannot be treated as interested witnesses—Being concerned with investigation and prosecution of offenders, which are their essential duties, does not exclude them from category of competent witnesses: 1967 Cr.L.J. 154: (1966) 1 An.L.T. 279: A.I.R. 1967 Andh. Pra. 49.

Where intrinsic corroboration exists but has not been placed before the Court, *held*, testimony of the Customs Officers could not be accepted: (1988) 3 Bom.C.R. 614 (D.B.).

61. Private detective agency.—The private detective agencies are employed for substantial reward; they are understandably interested in the success of their investigation; their clients expect positive results from them; the Court, therefore, must view their evidence with utmost caution: (1988) 1 Bom.C.R. 464: (1983) 2 Hindu L.R. 517 (D.B.); A.I.R. 1975 Cal. 243.

62. Villagers'/labourers' evidence regarding time.—Labourers, masons and artisans,

working on daily wages for fixed hours, have an accute sense of time; a labourer boy's version about the time of recording his statement cannot be rejected: A.I.R. 1979 S.C. 135.

Time is hardly of any importance in a villager's life; even the urban folk make mistakes about time when there is no particular reason to remember it; a discrepancy of time regarding the accused's arrest is of no consequence: 1977 Raj.L.W. 241 (D.B.).

Where a villager mentions an event having taken place at a certain time, it need not be taken as a statement of exactitude; an hour or so this way or that may safely be assumed; the sluggish chronometric sense of the country-side people is notorious; time is hardly of the essence of their slow life; even the urbanites make mistakes about time in the absence of any particular reason to observe and remember the hour of a minor event like taking a morning meal: A.I.R. 1973 S.C. 2622.

Rustics have no sense of time; they give out approximate time which could be an hour or two on either side; wrong time mentioned by a rustic witness regarding an incident does not necessarily discredit her evidence: 1979 Jab.L.J. 117: 1979 M.P.L.J. 317: 1979 Cr.L.J. (N.O.C.) 66 (D.B.).

Witnesses from the village are usually ignorant about dates and months. The mere fact, therefore, that they have said that the occurrence took place in Baisakh cannot discredit the prosecution case that it took place in Jeth on the 18th May, 1958: 1960 B.L.J.R. 275: 1960 Cr.L.J. 1485: A.I.R. 1960 Pat. 518.

63. 'Proved', 'disproved', 'not proved'.— It is apparent from definitions of the words 'proved', 'disproved' and 'not proved' given in S. 3 of the Evidence Act that it applies the same standard of proof in all civil cases. It makes no difference between cases in which charges of a fraudulent or criminal character are made and cases in which such charges are not made. But this is not to say that the Court will not, while striking the balance of probability, keep in mind the presumption of honesty or innocence or the nature of the crime or fraud charged. It is wrong to insist that such charges must be proved clearly and beyond reasonable doubt: A.I.R. 1966 S.C. 1734.

S. 3, while explaining the meaning of 'proved', 'disproved' and 'not proved', lays down the standard of proof about the existence or non-existence of circumstances from a prudent man's point of view; it indicates two conditions of mind: (*1*) when a man feels absolutely certain of a fact and 'believes it to exist'; and (2) though not absolutely certain, yet he feels the fact to be so extremely probable that a prudent man would act on the assumption of its existence by adopting the requirement of the prudent man's standard as a measure of proof. The Act simultaneously contemplates giving full effect to the circumstances or conditions of probability or improbability. A fact is said to be disproved when the Court finds that it does not exist or considers its non-existence probable in the prudent man's eye; the third stage comes where in the prudent man's eyes the fact is not proved, that is neither proved nor disproved. It is something different from a moral conviction as well as from a suspicion; it is the result of a process of keen examination of the entire material on record by 'a prudent man': A.I.R. 1990 S.C. 1459.

A distinction has to be drawn for the purposes of awarding compensation costs on the basis of falsity of pleas taken by the defendant between the 'facts not proved' and 'facts proved or disproved'. The failure to prove one's plea necessarily does not mean that the fact sought to be proved does not really exists. The distinction is clear from the definition of the term 'proved', 'disproved' and 'not proved' under S. 3 of the Evidence Act. While the terms 'proved' and 'disproved' denote the certainty with which mind believes the fact definitely to exist or not to exit, the term 'not proved' indicates the stage between two states of minds when one is unable to decide how the matter precisely stands. Where a person on whom burden lies to prove the fact alleged by him to exist fails to prove its existence and Court records a finding that the fact is not proved, it cannot be treated equal to a fact proved to be non-existent: A.I.R. 1994 N.O.C. 331 (Raj.).

The Act draws a clear distinction between the words 'disproved' and 'not proved'; a fact is disproved if from the materials on record, the Court believes that it did not exist or considers its non-existence so probable that a prudent man ought to, in the circumstances, act upon the supposition that it did not exist. On the other hand, a fact is said to be 'not proved' when it is neither proved nor disproved; merely because the plaintiff's

statement about the presence of two witnesses at the time of payment is not corroborated by their statements, it does not show that his case regarding payment of consideration had been disproved: A.I.R. 1974 Raj. 96.

The word 'proved' seems properly to mean anything which serves either immediately or mediately to convince the mind of the truth or falsehood of a fact or proposition and the proof of matters of fact in general or other senses, the testimony of witnesses, documents and the like. The expression 'proved' postulates two conditions of mind, first that in which a man feels absolutely certain of a fact, in other words, 'believes it to exist,' and secondly that in which though he may not feel absolutely certain of a fact, he thinks it so extremely probable that a prudent man would under the circumstances act on the assumption of its existence: 1975 Raj.L.W. 346; (1971) 1 An.W.R. 65; (1946) 48 Bom.L.R. 746: A.I.R. 1947 Bom. 38 (S.B.). *See* also 1965 All.L.J. 182: (1965) 2 Cr.L.J. 581: A.I.R. 1965 All. 525; (1965) 6 Guj.L.R. 878: (1965) 2 Cr.L.J. 638: A.I.R. 1965 Guj. 281.

The evidence of identification must satisfy the test of being 'proved' as contained in S. 3; if the accompanying statement made at the time of identification renders the accused's recognition at the occurrence improbable, it cannot be excluded from the process of assessing his guilt; the purpose of such evidence is to indicate the witness's state of mind; the statement will be in issue or relevant for a reason quite apart from its truth or falsity: 1980 All.Cr.R. 313: 1980 All.L.J. 674 (D.B.).

The word 'proved' as defined, *held*, does not take in matters, including statements statutorily excluded: A.I.R. 1980 S.C. 873: (1980) 2 S.C.C. 390: (1980) 2 S.C.J. 319: (1980) 2 S.C.W.R. 161.

In judging whether a fact is or is not proved, the Court is entitled to take into consideration not only the statements of witnesses but also surrounding circumstances and the probabilities of the case. Even if the statements of the witnesses, standing by themselves, are open to criticism, a fact may be held established on such evidence read in the light of the surrounding circumstances: 1950 All.L.J. 596.

A Court, when it has to consider whether a fact is proved or not must not expect evidence which cannot be produced. Furthermore, a Court must consider all the evidence before it and this not merely as a number of independent bits of evidence. The whole of the evidence must be considered together and the cumulative effect of it must be weighed: I.L.R. 15 Luck. 191: A.I.R. 1940 Oudh 35. *See* also 1988 Cr.L.J. (N.O.C.) 3 (Cal.).

'Proved'—Railways Act (1890) (as it stood before amendments of 1949 and 1961), S. 72 — Loss of many consignments on account of looting of wagons—Wagon containing appellant's consignment not proved as looted—*Held*, railway administration was liable for non-delivery of appellant's consignment: 1965 S.C.D. 831: (1965) 2 S.C.W.R. 599: A.I.R. 1965 S.C. 1666.

Legal proof is nothing more nor less than what is indicated in definition of word 'proved'—When once evidence comes before Court and stands test of severe legal scrutiny that evidence constitutes legal proof: 1966 Ker.L.J. 868.

'Proved'—Appreciation of Evidence. *See* A.I.R. 1968 All. 42. *See* also 1968 Cal.L.J. 848.

'Proved'—Concept of—Its importance. *See* A.I.R. 1970 All. 51 (F.B.). *See* also A.I.R. 1970 S.C. 1477.

'Proved'—Criminal trial—Proof of charge: (1968) 1 An.W.R. 178. *See* also 1968 Cr.L.J. 344: A.I.R. 1968 Guj. 77; A.I.R. 1968 J.&K. 59; 1968 Cr.L.J. 329: A.I.R. 1968 Mad. 113.

A fact must be proved by best evidence—Fact that certain goods exported to port *S* and were transhipped to Port *K*—No witness on the fact examined—That issue of commission or letter of request to examine witnesses in foreign country would have been so expensive that such course could not have been adopted, not proved—Fact alleged cannot be held as proved: (1968-69) 73 Cal.W.N. 279.

'Proved'—Plea of *D* that *P* has transferred to him only tenancy and not goodwill of business—When business run by *P* and *D* is same and premises are located in business locality, conclusion is that goodwill must have necessarily passed: A.I.R. 1968 Raj. 278.

'Proved'—Salesman of licensed excise vendor found in unauthorised possession of excisable articles—Question if salesmen were acting on behalf of vendor to make him vicariously liable under S. 59—Salesmen

found sitting in shop for purpose of selling goods when unauthorised goods were seized—Salesmen must be held to have been acting on behalf of vendor: 31 Cut.L.T. 221.

'Proved'—Part of prosecution story disbelieved—Evidence as to other part—Credibility—Evidence Act (1872), S. 3, Proved: 1963 B.L.J.R. 332.

A Magistrate recording a confession under S. 164 of the Code of Criminal Procedure or holding an identification parade does so as a matter of duty and discretion; he does not act as a Court; and where the identification memo prepared by the Magistrate had been lost and identification was sought to be proved by its copy prepared by the Investigating Officer, *held*, it could not be so proved; it had to be proved by the Magistrate from the original: 1974 Raj.L.W. 192.

'Disproved'—*P* challenging *M*'s appointment under R. 7(7), M.P. Tendu Patta (Vyapar Viniyaman) Adhiniyam, 1964, as purchaser of Tendu leaves—Plea that without considering tender submitted by him *M* was appointed—*P* shown to have made fresh offer for purchase of Tendu leaves—*Held*, *P* could not have made fresh offer if his earlier tender had been pending and that making of fresh offer showed that earlier tender had been rejected to *P*'s knowledge: 1966 M.P.L.J. 625: 1966 Jab.L.J. 1180.

'Not Proved'—Proof in civil and criminal cases—The evidence in criminal cases must be such as to exclude any reasonable doubt of guilt; if there be any such doubt the accused is entitled to be acquitted: I.L.R. 22 Cal. 313. Benefit of doubt—Duty of Court: A.I.R. 1958 Mad. 127: (1958) 1 M.L.J. 6: 1957 M.L.J. (Cr.) 707. Evidence—Dishonest intention not proved — Accused entitled to benefit of doubt: A.I.R. 1956 Ori. 212. *See* also A.I.R. 1957 Assam 74.

Case of exaggerated version and false implication—It is not possible to eliminate innocent persons from actual assailants—None of accused can be legally convicted: 1969 All.Cr.R. 57: 1969 All.W.R. (H.C.) 94.

Telegraphic message—No presumption can be made as to the person by whom such message was sent—No evidence to show that it was sent by the person by whom it was purported to be sent—On the other hand he is specifically denying it—Message *held* to be not proved: 1954 S.C.J. 395: 1954 S.C.R. 919: A.I.R. 1954 S.C. 316.

64. 'Matters before it'.—The term 'matters before it' include matters which do not fall within the definition of 'evidence': A.I.R. 1924 Nag. 385: 79 I.C. 609. Inference from fact—Every one of facts need not by itself be sufficient to establish guilt—All that is required is material whereon the Court can reasonably act upon supposition that a fact exists: 1953 All.L.J. 173: A.I.R. 1953 All. 493.

65. Proof—Generally.—(*See* also Notes under Ss. 101-105). Meaning of. *See* A.I.R. 1928 All. 303: 107 I.C. 564. Also (1929) 31 Bom.L.R. 515; A.I.R. 1934 All. 390: 154 I.C. 405.

What degree of probability amounts to 'proof' is to be determined in each case; probability amounting to 'proof' depends upon inter-dependence of evidence and confirmation of one piece of evidence by another; the concept of probability or its degrees cannot obviously be expressed in terms of mathematically enumerated units; unmistakably there is a subjective element in evaluation of the degrees of probability and the quantum of proof: A.I.R. 1988 S.C. 2154. *See* also 1994 M.P.L.J. 57 (D.B.)

Probabilities have no place in arriving at a conclusion as to a person's guilt: I.L.R. (1956) Andh. 538; A.I.R. 1979 S.C. 1382: 1979 S.C.C. (Cr.) 526: 1979 Cr.L.J. 1057: (1979) 3 S.C.C. 318.

Proof—Suspicion, however strong, cannot take place of positive proof: I.L.R. (1965) 1 Punj. 677: (1965) 67 Punj.L.R. 359. *See* also (1981) 51 Cut.L.T. 343; I.L.R. (1980) 1 Karn. 381; 1979 Raj.Cr.C. 225 (D.B.); A.I.R. 1979 S.C. 1537; A.I.R. 1975 S.C. 258; A.I.R. 1971 S.C. 1898; 1971 Cr.L.J. 1364 (All.); 1971 Cr.L.J. 1263 (Assam) (D.B.); 1955 An.W.R. 933: A.I.R. 1956 Andhra 65 (F.B.); 1958 Raj.L.W. 353: A.I.R. 1958 Raj. 338.

Court cannot convict accused on suspicion: 1963 Cur.L.J. 542: (1964) 66 Punj.L.R. 530: (1964) 2 Cr.L.J. 335: A.I.R. 1964 Punj. 397; 1965 All.W.R. (H.C.) 841; 1966 Cr.L.J. 221: (1966) 1 M.L.J. 282: 1966 M.L.J. (Cr.) 238; (1965) 67 Punj.L.R. 1020; 1966 All.Cr.R. 41: 1966 All.W.R. (Supp.) 9.

Charge of conspiracy—Has to be proved by legal evidence—Suspicion alone cannot take place of legal proof—'In prosecution of

common object'—Applicability: 1968 Cr.L.J. 584: A.I.R. 1968 All. 170.

'In pursuance of the common object'—Applicability: 1968 Cr.L.J. 584: A.I.R. 1968 All. 170.

Per *Desai, J.*—Unless it is explained how and where to draw the line between proof and suspicion no useful purpose is served, and no guidance whatsoever is given to lower Courts, by the remark that suspicion is not proof. One test for judging whether the circumstantial evidence creates suspicion only or proved the guilt is whether it is reasonably consistent with his innocence or not. If it is, it only creates a suspicion against him: A.I.R. 1955 All. 443: 1955 All.L.J. 468.

A suggestion or suspicion put forth by the defence cannot alone discredit the eye-witnesses: A.I.R. 1992 S.C. 1579; 1982 Cr.L.R. 381 (Guj.).

Where there was only suspicion but no irresistible and only conclusion of guilt, *held*, the accused was entitled to the benefit of doubt; mere suspicion, however strong, is no substitute of legal evidence: (1981) 51 Cut.L.T. 343.

Where the death found to be due to forcible administration of poison but there was only suspicion and no direct evidence against the accused, *held*, the accused's guilt was not decisively established; suspicion did not amount to legal proof: A.I.R. 1990 S.C. 79.

On the prosecution failing to satisfactorily establish the accused's guilt beyond all reasonable doubt, *held*, their conviction under S. 302 read with S. 34 of the Indian Penal Code was liable to be set aside: A.I.R. 1992 S.C. 49.

A moral conviction about guilt has no place in criminal jurisprudence; a Court arrives at the truth from legal evidence adduced by either side; it is not to be guided by moral conviction or the crime's gravity; moral conviction does not lead to legal conviction; surmises and suppositions cannot take the place of legal proof; suspicion, however grave, cannot sustain a criminal charge: 1984 Cr.L.J. 1215: 57 Cut.L.T. 505; 1981 Raj.Cr.C. 345.

The line between 'legal proof' and moral conviction must be kept clear in considering the nature and quantum of proof. But once the evidence comes before Court and stands the test of severe legal scrutiny, that evidence constitutes legal proof. Then the dividing line vanishes. 'Legal proof' is neither more nor less than what is indicated by the definition of the words 'proved' in S. 3. While the Court is entitled to insist that the best possible evidence should be produced, no hard and fast rule as to the quantum of evidence required for the proof of a particular fact can be laid down as this must necessarily vary with the circumstances of each case: 1944 All.L.J. 87: A.I.R. 1944 All. 94.

Belief based on hearsay cannot take place of proof: (1965) 2 M.L.J. 181: 1965 M.L.J. (Cr.) 619.

Conclusive proof—Nature and scope of conclusiveness: 1965 All.L.J. 428.

Detection of liquor by mere smell—Cannot be a basis for conviction of accused: (1966) 68 Bom.L.R. 389.

Where the petitioner is required to prove negative facts, the same has to be generally proved by placing the relevant circumstances before the Court and leaving it to the Court to draw the necessary inference from the proved facts as it may not ordinarily be possible to prove those facts by evidence *aliunde*: A.I.R. 1965 Mys. 102.

A criminal case, unlike a civil case, is not tied down to a particular version; there is abundance of explicable inaccuracy, often intermingled with imagination and exaggeration, that the Courts dealing with criminal cases cannot throw the whole case overboard simply because parts of it are improbable but not sufficient to disbelieve entirely or to dub it as false; may be, facts are sometimes stranger than fiction. Prudence, however, compels the Courts to test the version advanced in the light of what one may reasonably expect from the ordinary or usual norms of human conduct and the common course of natural events so as to infer what may have actually happened. A conviction must rest on proof so strong that the Court must be convinced that what it concludes must necessarily have happened and it is not reasonably explicable in any other way: A.I.R. 1974 S.C. 985: 1974 Cr.L.J. 784: (1974) 4 S.C.C. 84.

The degree of proof required is stricter in a criminal trial than in a civil proceeding; in a criminal trial, however intriguing be the facts and circumstances, the charges against the accused must be proved beyond all reasonable doubts; the proof should not be based

on surmises and conjectures. Such requirement of proof beyond reasonable doubt continues even after insertion of S. 498-A in the Indian Penal Code and S. 113-A in the Indian Evidence Act; besides, it should be borne in mind that there is no absolute standard of proof in a criminal trial; whether the charges made against the accused have been proved beyond all reasonable doubts must depend upon the facts and circumstances of each case and the quality of evidences adduced and materials placed on record: A.I.R. 1994 S.C. 1418.

The degree of proof to justify conviction in a criminal case is no doubt that which a prudent man will employ in reaching a conclusion beyond reasonable doubt; however, an accused need not prove his case to the same degree; the standards employed in judging each version are those of a reasonable and prudent man; that is, what is natural to expect; what accords with the commonsense and ordinary experience; and not what is extra-ordinary and unexpected: A.I.R. 1973 S.C. 460: 1972 Cr.L.J. 1286: (1972) 3 S.C.C. 418: (1972) 3 S.C.R. 978.

It is sufficient for an accused to prove his case by preponderance of probabilities as envisaged by S. 3; he succeeds not by proving his case to the hilt but by throwing doubt on the prosecution case by the probability of his version. Once an accused offers a reasonable and probable explanation, it is then for the prosecution to prove the offence affirmatively. [A.I.R. 1977 S.C. 1970, Foll.]: (1981) 52 Cut.L.T. 56: 1981 Cr.L.J. 1458.

The question of burden of proof ceases to be a matter of any particular importance after adduction of evidence on both sides; and the Court is entitled to accept the case of one of the parties as proved; not merely on the positive evidence adduced by him but also on the discrepancies and *lacuna* in the evidence of the other side. A Court can base its conclusion not merely on the effect of the evidence taken as a whole but it may also draw an adverse inference against a party who being in a position to adduce better evidence deliberately abstains from doing so: A.I.R. 1949 Mad. 689: (1949) 1 M.L.J. 434. *See* also 80 Cal.L.J. 297; S. 114, *Illus.* (*g*).

Like a prudent man, the Court faced with conflicting probabilities about a fact will act on the supposition that the fact exists if preponderance is in favour of its existence; the first step in this process is to fix the probabilities and the second to weigh them, but the two may often intermingle; the impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities, the Court has often a difficult choice which ultimately determines where the preponderance lies; and important issues affecting the parties' status demand a closer scrutiny: A.I.R. 1975 S.C. 1534: (1975) 2 S.C.C. 326.

When it is shown that a particular consignment received by the railway servants was kept in the shed which was subsequently looted by the rioters, the only reasonable inference would be that the consignment was looted by the rioters who attacked the shed; it is not necessary for the railway servants to prove by direct evidence that the particular consignment was looted by the rioters: A.I.R. 1945 Cal. 267.

Too much importance need not be attached to statements which might have been made from ulterior motives and were more or less in one's own interest: A.I.R. 1958 Madh. Pra. 246.

There are occasions when the Court is compelled to draw inference which naturally and inevitably arise from such evidence as there is on the record. The mere paucity of evidence should not relieve the Court of its obligation to come to a conclusion on necessary and material issues. Thus, where the certificate of the police surgeon establishes that the giddiness and the collapse of a workman while working in a mill on a hot day was not due to any disease which was capable of being discovered by clinical examination and that very day the workmen dies at about mid-night, then it is a natural inference to draw that when a man suddenly collapses and dies very soon after and the doctor is not in a position to suggest any reason for this sudden collapse and the death ensuing, that he was suffering from heart trouble which cannot be discovered on a mere clinical examination: A.I.R. 1956 Bom. 424.

Standard of proof in civil cases—Money suit—Plaintiff bank producing copy of the books of account showing amounts which were borrowed on different occasions by defendant and which were admissible under S. 4, Banker's Books Evidence Act—Two witnesses of whom one was the manager of the Bank produced books to prove the amount due—*Held*, this was sufficient compliance

with law and the Bank had proved the amount of debt which was due to it: (1957) 59 Punj.L.R. 117: A.I.R. 1957 Punj. 310.

The Court's judgment is the best proof for the contentions raised before it: 1979 All.L.J. (N.O.C.) 116.

Grievance of petitioner, a Government servant, that departmental enquiry against him by superior authority was engineered by subordinate authority and hence his transfer order after enquiry by superior authority was made *mala fide*—Since it is difficult to understand as to how a subordinate can influence his superior officer in giving findings and in making transfer, alleged *mala fides* cannot be held proved by petitioner: A.I.R. 1967 Punj. 76.

Mere allegation that order of detention is *mala fide* is not enough—Person alleging it has to prove it like any other fact in issue: 1968 Cr.L.J. 177: A.I.R. 1968 Mad. 54.

Evidence against estate of a deceased though uncorroborated can be acted upon, with proper scrutiny: (1965-66) 70 Cal.W.N. 114: A.I.R. 1966 Cal. 181.

Applicability. *See* (1965) 2 Cr.L.J. 771: A.I.R. 1965 J.&K. 126.

Negligence—Whether fire was caused by negligence is a question of fact—There is no question of the applicability of any legal principle in drawing the inference from some basis of facts. [A.I.R. 1957 S.C. 49, Rel. on]. So also whether the plaintiff has discharged the *prima facie* burden of proof or whether the defendant has rebutted the evidence are also questions of fact: 1962 M.P.C. 60: 1961 Jab.L.J. 1516.

True, where the cause of fire is equally consistent with the defendant's being or not being negligent, neither the doctrine of *res ipsa loquitur* nor the principles underlying Ss. 3 and 114 of the Act are attracted and the Court cannot hold that the defendant's negligence stands proved; however, if the circumstances are not equivocal and in all probability the fire would not have taken place, but for some negligence of the defendant or his employees, *held*, doctrine is attracted: A.I.R. 1979 All. 35 (D.B.).

Merely because damages are difficult to estimate or assess with certainty or precision does not relieve the wrongdoer of his duty to pay damages for not abiding by his principal's instructions; lack of evidence in such cases would not be sufficient for burdening him only with nominal damages; the other party should be accorded the benefit of every reasonable presumption for the loss suffered; the Court may form its own conclusions on a reasonable basis about reasonable compensation for the loss inflicted; the Court should try to place the principal in such a position in which he would have been but for the breach of his instructions by the agent: 1981 Raj.L.W. 199.

Acceptance of gratification — Presumption—Nature and scope of—Rebuttal of presumption—Burden of proof must be discharged by proof in accordance with S. 3, Evidence Act: I.L.R. (1963) Guj. 837: (1964) 2 Cr.L.J. 291: A.I.R. 1964 Guj. 206.

A mere averment that a person was a *de facto* guardian is not adequate. There must be evidence to show that he in fact intermeddled with the estate of the minor or acted as a guardian previously. In absence of such pleading or evidence, he cannot but be regarded as a self-appointed guardian: A.I.R. 1958 Pat. 79.

Partnership Act, 1932, Ss. 4, 59—Registration under the Act is no conclusive proof of the real existence of a partnership—Element as to carrying on business must be present: (1966) 59 I.T.R. 457 (Cal.).

It is very difficult to assume that for treatment of epilepsy which affected a person with fits 'off and on' he was treated as inpatient in the mental hospital for a year and more. The inference can only be that he was insane in the concerned period: 1963 Ker.L.J. 39: I.L.R. (1963) 1 Ker. 76.

Merely because a deed is scribed on a stamp-paper by a regular petition writer, *held*, does not mean that it cannot be forged: 1989 Punj.L.J. 123.

Where in a suit for partition the defendant claimed that the family was spending money every year for doing *guru pooja* and *utsavam* and if the plaintiffs are allotted separate one-third share, a charge should be created over them to secure the performance of the *guru pooja* and *utsavam*, *held*, the burden lay on the defendant to establish his claim; in the absence of any evidence to show that the family as such was performing either *guru pooja* or *utsavam*, no charge made: (1974) 87 Mad.L.W. 397 (D.B.).

Where the defendant had forfeited the advance received by him from the plaintiff alleging breach of contract and claiming compensation for the loss suffered by entering into another transaction with a third party, *held*, to prove such loss the defendant must have produced that third party as his witness for the loss: A.I.R. 1987 Karn. 173: (1987) 1 Karn.L.J. 16 (D.B.).

Where a garnishee filed a self serving statement of account showing no amount was due to the judgment-debtor without producing account books kept in the regular course of business or affidavits, *held*, it did not constitute clinching or specific evidence; the statement is not proved in the manner known to law by corroborative evidence: (1979) 92 Mad.L.W. 209: I.L.R. (1979) 3 Mad. 77.

Where a written agreement was pleaded to have been orally cancelled, *held*, the oral agreement as well as cancellation should be proved positively; it cannot be decided on mere presumptions or probabilities; the test of what a prudent man would have done in such circumstances is not attracted; no acceptable explanation having been offered as to why cancellation was not evidenced in writing, oral agreement was not proved: (1989-2) 104 Mad.L.W. 151 (D.B.).

Where Court had compared the copies of the documents with originals and marked that as 'found correct' and in addition there were affidavits by the parties in support of those documents, *held*, those documents were properly proved: A.I.R. 1971 Manipur 1.

Where a candidate was not admitted in the Medical College in the quota reserved for the Scheduled Tribes though his father's service record showed that he belonged to a backward caste, *held*, the Scheduled Tribes are one of the recognised species of the genus 'backward classes'; the entry in the service record, the genuineness whereof was not challenged, could not be disregarded: (1987) 3 Bom.C.R. 615 (D.B.).

Right of privacy—Nature of—Proof. *See* A.I.R. 1969 Raj. 31.

Recital in deed of lease regarding earlier deed of surrender of lease property in favour of lessor—Recital is no proof of surrender—Surrender has to be proved by independent evidence: I.L.R. (1964) Cut. 854: A.I.R. 1965 Ori. 168.

Where a land holder claimed land for his minor daughters under the U.P. Imposition of Ceiling on Land Holdings Act, 1961, and the State did not rebut his evidence that they were unmarried, *held*, his claim could not be rejected merely because early marriages were not uncommon amongst villagers: A.I.R. 1980 All. 173.

Land Acquisition Act, 1894, S. 23—Grove land—Method of valuation by ascertaining annual value of produce not adequate—Firstly because owner may not have put property to its best use and secondly grove may not have yet started giving maximum yield—Such method should be resorted to only when no other alternative method is available—*Held*, that evidence of witnesses who have made offer to purchase grove was not only relevant but also acceptable and valuation arrived at on basis of offer rested on better footing and ought to be accepted: A.I.R. 1967 S.C. 465.

Where the Land Acquisition Officer, while awarding compensation, relied upon a statement of a person about the price of comparable sites without examining either the vendors or the vendees or the persons attesting the sale deeds, *held*, the statement was not admissible; he could not have relied upon it: A.I.R. 1979 S.C. 472.

Where the question was as to whether the Mahant of a Math was coerced into appointing the plaintiff as his successor Mahant, *held*, the presence of the Police at the installation ceremony, far from advancing the defendant's case, destroys his case that the Mahant had acted under coercion: A.I.R. 1979 S.C. 845: (1979) 3 S.C.C. 221: (1979) 2 S.C.R. 1012.

A very heavy burden lies on the plaintiff to prove that it was a religious institution, clothed with juristic personality and capable of holding and disposing of property; and he must also show at least some degree of antiquity of the existence of the *smadhi* and at least some long usage of its worship: 1978 Rev.L.R. 492.

Where Sikhs as a body sought a declaration under S. 7(1) of the Sikh Gurdwara Act, 1925, of a certain institution being a Sikh Gurdwara, and the witnesses deposing the existence of *smadhis* though not declared hostile were nevertheless sought to be discredited as being communists, *held*, they would

not thereby become unreliable; rather, not belonging, to either of the parties, they lend credit to their testimony of being impartial: A.I.R. 1984 S.C. 858: 1984 U.J. (S.C.) 490: (1984) 2 S.C.C. 600.

In order to prove that a Muslim graveyard was dedicated to the public, the evidence should show that a large number of Muslims had buried their corpses from time to time in the graveyard; the Court will then presume it to be a public graveyard; its mention as a public graveyard in revenue or historical papers would be conclusive proof. Where land was given to Muslims as licensees with permission to use it as a burial ground but its usufruct proprietary rights were retained by the proprietors, and abundant documentary evidence in the form of Jamabandis showed that on its ceasing to be used as a graveyard, the land subsequently reverted to the proprietors and a part of it was allotted to the refugees from Pakistan and the rest was shown under cultivation of different persons, *held*, the essential ingredients for a public graveyard were not established. [A.I.R. 1969 P.&H. 144; A.I.R. 1971 P.&H. 482, Foll.; A.I.R. 1976 S.C. 1569, Disting.; 1986 Punj.L.J. 455, Not followed in view of A.I.R. 1971 P.&H. 482; 1982 Punj.L.J. 202, Applied]: A.I.R. 1991 P.&H. 89.

There are two modes to prove that a person has adopted the life of a sanyasi: (*i*) he has actually relinquished and abandoned all wordly possession and all desire for them; (*ii*) observance of ceremonies indicating severance from his natural family and secular life. However, in case of an orthodox sanyasi, it has also to be proved that necessary ceremonies like as '*Pindadana*' or '*Birajahoma*' or '*Prajapathiyesthi*', without which renunciation is not complete, were performed: A.I.R. 1985 All. 104: (1985) 1 Cur.C.C. 515.

Where some tampering was done in a passport after it had been issued but there was no evidence as to who did it, *held*, the accused could not be said to have secured a fake passport: A.I.R. 1992 S.C. 2100: 1992 Cr.L.J. 3454.

When was the F.I.R. sent to the Superintendent of Police and the Ilaqa Magistrate is not a matter of which the Court can take judicial notice; it has to be proved like any other fact: A.I.R. 1978 S.C. 59: (1977) 4 S.C.C. 420.

Joint deliberation—Absence of—Must be pleaded and proved—Some deposition not signed by some arbitrators—Fact not sufficient to prove that non-signing arbitrators did not take part in proceedings: I.L.R. (1964) Cut. 685: A.I.R. 1965 Ori. 17.

Bombay Prevention of Gambling Act (4 of 1887), Ss. 7 and 4—Presumption under S. 7 does not extend to S. 4—Mere fact that accused was in possession of house does not make him guilty under S. 4: (1967) 3 Guj.L.R. 145.

Prostitution — Nature of evidence required to prove offence: 1967 Cr.L.J. 1140: A.I.R. 1967 Guj. 211.

Medical evidence—Hairs—Use of as an identification evidence: (1963) 2 S.C.J. 364: 1963 M.L.J. (Cr.) 465: 1966 Cr.L.J. 605: A.I.R. 1966 S.C. 821.

Where offence is highly anti-social and revolting and likely to rouse emotional prejudice in mind of Court, greater care in scrutiny of evidence is called for: 1966 Ker.L.T. 788: 1966 M.L.J. (Cr.) 773: A.I.R. 1967 Ker. 192.

Statement made before Court of law being on solemn affirmation, must rank higher than allegations made in complaint: 1967 Cr.L.J. 1304: A.I.R. 1967 Goa 121.

Adulteration charge—Prosecution under Ss. 10 (7), 16 and 17 (1) of the Prevention of Food Adulteration Act, 1954—Evidence and proof: 1969 Cr.L.J. 347: A.I.R. 1969 All. 109.

Witnesses in same village or neighbouring village—Witnesses who can depose about good or bad character of a person are witnesses who live in same village or in neighbouring village and their statement cannot be discarded merely because they live in same village or in neighbouring village: 1966 All.Cr.R. 455: 1966 All.W.R. (H.C.) 729.

Benefit of doubt—Hindu marriage—No evidence that second marriage was solemnised according to Hindu rites—Accused (Husband) is entitled to benefit of doubt: 1970 M.L.J. (Cr.) 224: 1970 Cr.L.J. 1116: A.I.R. 1970 Mys. 201.

Infringement of copyright — Complaint by another that certain books are translations of his books—Proof—Duty of Court: (1967) 2 Cr.L.J. 1517: A.I.R. 1967 Ker. 234.

Complaint for infringement of copyright —S. 63 of Copyright Act postulates knowledge of accused: (1967) 2 Cr.L.J. 1517: A.I.R. 1967 Ker. 234.

Proof of posting.—(*See* also S. 114, Notes 45 and 47). A mere claim of having sent a communication to the addressee under a certificate of posting, *held*, is no proof either of its having been sent or received by the addressee; such a certificate of posting can be had for mere asking: (1994-1) 106 Punj.L.R. 375.

It is not at all difficult to obtain postal seal marks on post-cards with wrong dates. (Post-cards, *held*, were fabricated documents): (1961) 1 Cr.L.J. 544: 1961 B.L.J.R. 633.

A notice when sent by post and put in transmission goes out of the sender's power; whatever is written or mentioned therein is incapable of being altered; thus, where in a suit for specific performance of a contract, the closed undelivered registered envelopes containing the plaintiffs notices returned undelivered and opened in the Court, *held*, the contents of the notices are the best index of the plaintiffs intention about his being or not being ready and willing to perform his part of the contract, notwithstanding the fact that the notice had not been delivered: A.I.R. 1992 All. 174.

The contention that the endorsement of refusal on the notices is not admissible without examining the Postman is untenable; having been made by a public servant in the discharge of his duties, the endorsement is admissible *per se* without any further proof: (1987-2) 92 Punj.L.R. 239.

Service of summons by post—Proof—Defendant illiterate *pardanashin* lady—Acknowledgement bearing thumb-impression—Identity of thumb-impression not proved—Postal peon not examined—Fact that she did not categorically deny that it was her thumb-impression is not sufficient to hold that there was tender of registered letter to her especially when she had categorically denied that the letter was ever tendered to her or that she had accepted it: I.L.R. (1960) Cut. 522.

66. Adoption — Proof of.—(*See* also Ss. 101-104). Neither the principle that the factum of adoption and the authority to adopt may be proved by circumstantial evidence alone, *i.e.*, by conduct, repute and recognition, etc., nor the consideration that evidence naturally gets lost with the lapse of time would justify acceptance of oral testimony, inherently improbable or instrinsically defective. Scanty direct evidence may, in a fit case, be supplemented by convincing circumstantial evidence; but if direct evidence does not inspire confidence but also appears to be definitely untrue, it cannot be accepted on consideration that no better evidence remained available for lapse of time; it is the paucity and not falsity of direct evidence that may be supplemented by circumstantial evidence; an inference as to the existence of the authority to adopt may be drawn from a long course of conduct which must be uniform and consistent: A.I.R. 1971 All. 29 (D.B.).

Adoption—Oral evidence—Reliability of witnesses: A.I.R. 1968 Mys. 309.

A witness cannot be disbelieved merely for not keeping note of the Tithi or date of adoption; one relation is not expected to note down the date of adoption of another relation: (1973) 1 Cut.W.R. 809: A.I.R. 1974 Ori. 120 (D.B.).

The omission of corroborative evidence of the mother of the adopted son and of the priest who officiated at the ceremonies, is not fatal to the plaintiff's case of adoption when the evidence of other witnesses is unchallenged: 1956 Madh.B.L.J. 779: A.I.R. 1957 Madh. Bh. 179.

Adoption, not being natural, is given wide publicity to make it known to relations and others; adoptions are normally ceremonious occasions when relations, neighbourers and castemen, both men and women, congregate; physical giving and taking of the son by the natural and adoptive fathers, respectively, is its essential feature and under the Hindu Adoptions and Maintenance Act, 1956, a statutory requirement. Where a pleading supporting adoption is silent or vague or no evidence is adduced about consultations between the natural and adoptive fathers or ceremonies of adoption, *held*, the adoption becomes doubtful; suppression of material evidence attracts adverse inference: A.I.R. 1994 N.O.C. 42 (Ori.).

Where the adoption had taken place long prior to the dispute in question, strict proof of every part of the ceremony would not be insisted upon. Thus, where not only the deed of adoption but also the power of attorney wherein the status of the defendant as the adopted son was acknowledged by the widow of the adoptive father, were

produced, *held*, adoption of defendant was proved: (1987) 100 Mad.L.W. 71.

The fact of adoption must be proved like any other fact; but where a long period has lapsed between the adoption and its being questioned, every allowance for absence of evidence to prove adoption must be favourably entertained as direct evidence may not be available. But it is equally well settled, if direct evidence is available despite lapse of time, such relaxation is not permissible; thus, where all those present at the adoption were not dead and were available to be examined, *held*, the examination of only one witness claiming to have witnessed the adoption ceremony and whose evidence did not satisfy the requirements of Ss. 50 and 60 was not sufficient to prove adoption: A.I.R. 1985 Ori. 22 (D.B.).

Minor discrepancies and contradictions in oral proof of adoption, *held*, result from time-gap: (1988) 1 Hindu L.R. 342 (P.&H.).

Where an adoption had taken place several years ago and there was direct evidence of the adopter himself having accepted the adoption and treated adoptee as his son, non-production of any account of receipt of *shogun*, *held*, is not sufficient to discard the testimony recorded: (1994-1) 106 Punj.L.R. 95 (D.B.).

Where the question was as to whether the executant of a registered adoption deed had an authority from her husband to adopt and the only evidence of authority to adopt was her own statement contained in that deed, *held*, since the executant was dead when the question of adoption was challenged and thus, the Courts did not also have the advantage of her cross-examination on that point, such statement in that deed which though admissible in evidence could not be taken on its face value: A.I.R. 1981 All. 274.

Ancient adoption—Absence of evidence of giving and taking—Alleged adopted son treated by adoptive father and other relation including plaintiff who challenges adoption as son of adoptive father—Adoption, *held*, proved: A.I.R. 1970 S.C. 1286.

R's claim that he was adopted son of *S*—Question whether tying turban ceremony was done on *R*—Claim of opponents that 'thikana' record should have been produced—Practice of noting down in 'thikana' name of person, on whose head turban is tied not shown—Adverse inference is not justified: I.L.R. (1965) 15 Raj. 529: 1965 Raj.L.W. 168.

In a case where the fact under dispute was whether or not the plaintiff was adopted son of one *G*, *held*, deposition of a farm servant that he worked as sankhuna in the adoption ceremony and that the plaintiff called *G* as his father and *G*'s wife as his mother, was admissible under S. 50: A.I.R. 1974 Ori. 120: (1973) 1 Cut.W.R. 809 (D.B.).

Where the Director of a Co-operative Building Society corroborated the natural father's evidence about adoption, *held*, merely because on supercession of the Society's management the natural father was its Special Officer, the corroborative evidence of the Director does not become unbelievable; the Court cannot infer that the Director was in any manner obliged to the natural father, particularly, when the husband of one of the defendants was also an officer in the Co-operative Department and all the witnesses testifying having witnessed the adoption had, in some way or the other, dealings with the Co-operative Department: A.I.R. 1994 Andh. Pra. 102.

67. Proof in case of fraud/undue influence.—(*See* also Ss. 101-104). Onus is on, party who advances plea of fraud to prove it by cogent evidence: 33 Cut.L.T. 621; A.I.R. 1965 Ker. 189.

Charge of fraud, whether made in civil or criminal proceedings, should be proved beyond reasonable doubt: 1975 M.P.L.J. 556.

There is no ritualistic formula nor a cut and dried test to prove the charge of undue influence; if all the circumstances taken together lead to the irresistible inference that the voters were pressurized, threatened or assaulted at the instance of the candidate or his supporters or agents, that should be sufficient to vitiate the election; while insisting on standard of strict proof, the Court should not stretch it to such an extreme extent as to make it almost impossible to prove a corrupt practice; that would defeat and frustrate the very laudable and sacrosanct object of maintaining purity of the electoral process. By and large, the Court while appreciating or analysing the evidence must be guided by the following considerations: (*1*) the nature, character, respectability and credibility of evidence; (*2*) the surrounding circumstances

and the improbabilities appearing in the case; (3) the slowness of the appellate Court to disturb a finding of fact arrived at by the trial Court which had the initial advantage of observing the behaviour, character and demeanour of the witnesses; and (4) the totality of the effect of the entire evidence which leaves a lasting impression regarding the corrupt practices: A.I.R. 1984 S.C. 24: (1984) 4 S.C.C. 649: 1985 B.L.J.R. 19: (1985) 1 S.C.R. 1089.

By its very nature of things, a fraud is secret in its origin; means adopted for its success cannot always be proved to the very hilt; they have to be inferred from the circumstances. Each circumstance by itself may not mean much, but taking all of them together, they may reveal a fraudulent or dishonest plan. Undoubtedly, burden of proving fraud lies heavy upon the person alleging it; suspicions and surmises are poor substitutes for its proof; but that does not mean that every puzzling artifice or contrivance resorted to by the parties to the fraud must necessarily be completely exposed; if this was so, many a clever and dexterous knave would escape from the consequences of fraud: (1991) 4 Bom.C.R. 556 (D.B.).

In case of serious enough charges like that of a spouse's mental disorder and of fraud, from mere statements in an affidavit, which may in a given case deserve acceptance, the factum of mental disorder cannot be found out; evidence of medical treatment and of other persons who had ordinarily occasions to be in the company of the spouse should ordinarily be insisted upon: 1983 Hindu L.R. 692 (Bom.).

If a victim of fraud is in a position, by due diligence, to discover the truth, *held*, fraud is not proved; it cannot be a case of *suggestio falsi or suppressio veri*: A.I.R. 1976 S.C. 376: 1976 U.J. (S.C.) 15: (1976) 2 S.C.R. 722: (1976) 1 S.C.C. 311: I.L.R. (1976) Karn. 1051.

Once an executant admits his signatures on the agreement of sale, the onus shifts to him to prove that the agreement was got executed from him by deception or fraud: (1991-2) 100 Punj.L.R. 92.

The striking general similarity between admitted signatures and the signature on the disputed document is a very telling test in deciding whether the signature on the disputed document is genuine. If a document is a forged one, one would expect that such a document would try to avoid alterations as much as possible and it would also try to avoid initialling as much as possible in as much as the more there is initialiing the more is the risk of detection of the forgery. So the fact that there are alterations and those purport to bear initials of the party indicates that the document is genuine: 64 Cal.W.N. 1067: 1960 Cal.L.J. 190: A.I.R. 1961 Cal. 300. *See* also S. 67.

Where in an action for recovery of compensation on an insurance contract the charge of fraud is levelled, *held*, the Court has to be careful in assessing the charge; if it is dispelled *prima facie*, it is not permissible to expect the exonerated party to remove every vestige of suspicion by evidence right up to its hilt; a preponderance of probabilities remains the measuring rod, albeit with a slightly heavier onus on the seemingly guilty party: A.I.R. 1992 Bom. 341.

68. Will—Proof of.—(*See* also S. 68, Note 9 and Ss. 101-104, Note 107). A Will has to be proved like any other document; the proof need not amount to mathematical certainty but it is suffice if there is the satisfaction of a prudent mind; one of the attesting witnesses must be examined if he is alive and subject to the Court process; allegations of fraud, undue influence, coercion, etc., have to be proved by persons alleging them. However, despite absence of such pleas, the Will may well be shrouded by mystery or circumstances creating doubt about its execution, in which case it is for the beneficiary to remove the doubts and clear the judicial conscience by suitable evidence; the *onus probandi* to prove the Will lies upon him who propounds it; it has to be proved that the Will is the last Will of a free person, having a sound disposing mind and memory, and competent to make it: (1989) 1 Hindu L.R. 125 (P.&H.).

From various judicial verdicts the position which emerges for holding proper execution of the Will is that:— (*a*) the testator must have a disposing mind free from all extraneous influences with sound mental state; (*b*) the testator is presumed to be sane having a mental capacity to make a valid Will until contrary is proved; (*c*) the Will should be executed in accordance with the provisions of the Act as incorporated in S. 63 of the Succession Act, 1925 read with S. 67 and S. 68 of the Evidence Act. In other words, the testator should have signed or affixed his

mark to the Will in the presence of the two witnesses who are required to see the testator signing or affixing his mark on the Will and each of the witnesses should sign the Will in the presence of the testator; (*d*) the onus of proof of the Will is on the propounder or beneficiary of the Will; (*e*) the existence of suspicious circumstances make the onus of proof very heavy and such circumstances are required to be removed by the propounder before the document is accepted as a last Will of the testator; (*f*) the mode of proving the Will does not ordinarily differ from that of proving any other document except the special circumstances as incorporated in S. 63 of the 1925 Act; and in order to ascertain the free disposing mind free from extraneous considerations, the whole of the attending circumstances in a particular case are required to be taken note of: A.I.R. 1995 P.&H. 201 (D.B.).

The onus to prove a Will lies on its propounder; in the absence of suspicious circumstances surrounding its execution, the proof of the testator's testamentary capacity and signatures as required by law, *held*, is sufficient discharge of the onus; but in case of suspicious circumstances, the propounder is further required to explain them to the Court's satisfaction before the Will can be accepted as genuine; but the onus to prove undue influence, fraud or coercion would lie on the person alleging it; however, if there were circumstances giving rise to doubts, the propounder will have to satisfy the Court's conscience by clearing them: (1978) 91 Mad. L.W. 210.

Improbabilities in the Will—Testimony as to execution of documents cannot be considered independently of the attendant circumstances: (1967) 12 Law Rep. 92 (Mys.). *See* also S. 3, Note 68, *supra*.

Attestation of Will—Proof required—There is no requirement that attesting witnesses should identify each other: I.L.R. (1965) 1 All. 483: A.I.R. 1966 All. 570.

The deposition of an attestor of a Will that he saw the testator signing the Will when he himself, other attestors, the testator and the scribe were present at the time of the Will's execution and that he also signed the Will as an attestor, *held*, a mere omission on his part to say that the testator saw him attesting the Will is not fatal to the Will's proof: (1990) 1 Hindu L.R. 68 (Mad.).

When attestors to the Will were deposing in the Court four years after the attestation, *held*, minor discrepancies in their evidence are not unusual; they will not really affect their credibility: A.I.R. 1982 Cal. 599 (D.B.).

Where there were two varying signatures on the Will with different pens and inks, not satisfactorily explained, and the handwriting expert's opinion was also not consistent, *held*, the Will could not be said to have been proved as genuine: A.I.R. 1991 Ori. 289.

69. Residence—Proof of.—Residence at a certain place is a state of thing; to prove its existence, presumption by itself signifies very little. A tribunal of fact requires a degree of probability commensurate with the occasion. The question of residence or non-residence is a question of fact, not of inference but of positive proof. The landlord cannot prove the negative only by his statement; the tenant is required to prove the positive; the burden at once shifts to the tenant to show where he was residing during the relevant period: A.I.R. 1980 Del. 110: 1980 Rajdhani L.R. 423.

An electoral roll is a stronger piece of evidence for proving residence: (1984) 2 Bom.C.R. 671.

70. Religion—Proof of.—As held in 40 Mad.L.W. 502: 67 M.L.J. 389, an entry in a death register is no evidence to prove the religion of the deceased: (1987) 100 Mad. L.W. 895.

To determine the religion of a person, the assessment of his near relatives about the religion he practised is an important factor; thus, where in an election petition the petitioner's maternal uncle deposed about the petitioner's religion, *held*, his evidence could not be discarded as that of an interested witness; but it would be reasonable to consider it with great caution while seeking its corroboration from independent sources: A.I.R. 1986 Ori. 255.

71. Proof in matrimonial matters.—(*See* also Ss. 101-104). The standard of proof required in divorce cases under the Divorce Act, 1869, is that "the Judge should be satisfied beyond any reasonable doubt as to the commission of the matrimonial offence": 1984 Hindu L.R. 552: A.I.R. 1985 P.&H. 111 (F.B.).

But the burden of proof in proceedings under the Divorce Act, 1869, is as in a civil,

and not in a criminal case; it should be proved by preponderance of probability, not beyond reasonable doubt; besides, graver the charge, the greater should be the degree of proof required to satisfy the Court: I.L.R. (1980) 2 Karn. 1444 (D.B.).

Matrimonial case—Principles: A.I.R. 1969 Mad. 235.

In a matrimonial dispute when the relations between the spouses have become bitter there is bound to be some exaggeration in their respective versions by the spouses. Therefore, the matrimonial offence must be established to the satisfaction of the Court beyond reasonable doubt, and, though not as a matter of law, as a rule of prudence, independent corroboration of the version of the parties is sought. Such corroboration, however, need not be of direct testimony; it may be obtained from the conduct of the parties and the surrounding circumstances: (1959) 61 Bom.L.R. 1549: I.L.R. (1960) Bom. 365: A.I.R. 1960 Bom. 418.

Matters of civil nature are decided on preponderance of probabilities; the burden of proof is not discharged as conclusively as in a criminal trial. To seek corroboration to a fact alleged by a spouse about healthy or unhealthy character of their intimate marital relations, known only to the spouses themselves and not to any other soul, would amount to shutting one's eyes to the reality: A.I.R. 1985 Guj. 121: 1984 Guj.L.H. 939: (1985-1) 26 Guj.L.R. 119.

Spouses only witnesses in action for restitution of conjugal rights—Corroborative evidence of general character having probative value is evidence: (1967) 2 Mys.L.J. 185: 11 Law Rep. 486: A.I.R. 1968 Mys. 115.

Matrimonial causes are in the nature of a civil dispute; the petitioner, thus, need not prove the allegations beyond reasonable doubt and its decision should depend on the preponderance of probability; a criminal trial involves liberty of the subject which cannot be taken away on mere preponderance of probabilities: (1990) 1 Hindu L.R. 373 (Ker.) (D.B.); 1982 Hindu L.R. 413 (Karn.) (D.B.).

Divorce case—Standard of proof should be such that applicant must satisfy Court beyond reasonable doubt as to commission of matrimonial offence: 1969 Pat.L.J.R. 278.

The burden of proving matrimonial offences is no higher than in civil proceedings; a fact can be established by preponderance of probability: 1978 Mah.L.J. 598; 1978 Hindu L.R. 304 (Del.); 1980 Hindu L.R. 441 (Bom.). Grave allegations of cruel treatment, desertion and sodomy in the petition, it is settled law, cannot be directed to be proved by an affidavit: (1987) 2 Hindu L.R. 670 (Karn.) (D.B.).

The principle of pleadings and proof do apply to matrimonial causes; evidence of the witnesses recorded in such causes cannot be subjected to unnatural and surmisic dissection: (1986) 2 Hindu L.R. 213 (Madh. Pra.).

Bigamy—Proof of second marriage—Evidence, *held*, not enough: 1969 Cr.L.J. 858: A.I.R. 1969 Assam 90.

Divorce—Adultery—Standard of proof—Law in England and India—Burden of proof—Post-suit adultery—Evidentiary value of: A.I.R. 1970 Cal. 38.

In a case like dissolution of marriage under Divorce Act, 1869, on the grave charge of adultery, the Court must record the evidence as contemplated under O. 18, R. 5 of the Code of Civil Procedure; it should not render its judgment merely on proof by affidavit; a decree of divorce based on such evidence is illegal: A.I.R. 1985 Karn. 135: I.L.R. (1984) 2 Karn. 1101: (1987) 2 Hindu L.R. 658 (S.B.).

The standard of proof required in matrimonial offences like adultery or cruelty, *held*, is not the proof beyond reasonable doubt but by balance of probabilities: 1979 Hindu L.R. 570 (Del.) (D.B.).

Direct evidence on an act of adultery is very rarely available or, in other words, so extremely difficult to obtain, that insistence of it by Courts, may amount to a denial of legitimate protection of marital rights. In fact, proof by ocular evidence would normally be required to be corroborated by circumstantial evidence. To lay down in general rules or to attempt to define what circumstance would be sufficient for inferring the fact of adultery, is well-nigh impossible and each case must depend on its own peculiar and particular facts and circumstances. But one thing is certain that evidence must travel beyond establishing mere suspicion and the possibility to commit adultery and evidence must be such, as to satisfy the conscience of the Court, that adultery must have taken place. If the factum of adultery is sought to be proved by circumstantial evidence, the

evidence should be such as would be incompatible with innocence of the party charged: (1986) 2 Hindu L.R. 412 (Cal.) (D.B.); 1981 Hindu L.R. 371: A.I.R. 1980 Cal. 374 (D.B.) [A.I.R. 1974 Cal. 61 and A.I.R. 1970 Cal. 38 held no longer good law in view of A.I.R. 1975 S.C. 1534].

Adultery can very rarely, if ever, be proved by direct evidence of witnesses who saw parties in *flagrante delicto*—In most cases evidence must be circumstantial—Unrelated person found alone with young wife after midnight in her bed room, in actual physical juxtaposition—Unless there is some explanation for this which is compatible with innocent interpretation, only interpretation must be that two were committing act of adultery together: A.I.R. 1967 Mad. 85.

Adultery—Proof of—Evidence required must satisfy definition of 'proved' in the section: 32 Cut.L.T. 827.

The fundamental rule in which evidence of adultery or unchastity is to be viewed is that it need not be proved by direct evidence; not in one case out of a hundred that the parties are surprised and caught at the act; almost in every case the offence is fairly inferred from the proven circumstances; this is the only mode to protect marital rights: (1972) 1 Cut.W.R. 237.

The standard of proof of adultery in a petition for divorce is not as strict as in criminal cases; the proof beyond reasonable doubt is not necessary: 1982 B.L.J.R. 372: A.I.R. 1982 Pat. 213.

Charge of unchastity—Nature of proof: A.I.R. 1964 Assam 106.

The allegation of adultery must be reasonably proved, which means reasonable proof, or to borrow from S. 3, such proof which a prudent man ought to accept: A.I.R. 1989 Cal. 128: (1988) 2 Hindu L.R. 760: (1988) 2 Cal.H.N. 241: (1989) 1 Hindu L.R. 456: (1988) 93 Cal.W.N. 165: (1989) 1 D.M.C. 322: (1988) 2 Cal.L.J. 294 (S.B.); A.I.R. 1959 J.&K. 72.

To prove adultery in a divorce case under the Indian Divorce Act, 1869, it is necessary to establish all the necessary requirements to connect the erring spouse having illicit connection with the opposite sex; suspicion, howsoever strong, is no evidence; the party concerned has to lead cogent evidence to prove the matrimonial offence: (1989) 1 Hindu L.R. 575: (1989) 1 D.M.C. 277 (Madh. Pra.).

In the ordinary social circumstances, a man would not like to make statements against his wife of prolonged desertion and continued illicit intimacy with another man if they had no basis or foundation in truth; such allegations of the husband do not necessarily need corroboration (case under Hindu Marriage Act): (1986) 1 Hindu L.R. 591 (Del.).

Merely because a woman had gone away with another man to another town and was away from her parental and matrimonial house does not necessarily and conclusively establish an adulterous relationship between them; something more is required to show that their relationship had reached a point where adultery could be safely inferred (case under Hindu Marriage Act): (1986) 1 Hindu L.R. 93 (Guj.).

In a case for divorce for adultery under the Hindu Marriage Act, 1955, the testimony of a disinterested witness that he had seen the respondents sleeping together during night times is sufficient to prove adultery: A.I.R. 1981 Andh. Pra. 269: (1981) 1 An.L.T. 510: (1981) 2 A.P.L.J. 134 (D.B.).

Husband's petition for dissolution of marriage—Grounds of wife's adultery and desertion—Both respondents remaining *ex parte*—Petitioner examining himself alone—No corroboration—His evidence *held* sufficient for relief sought for: A.I.R. 1970 Mad. 91.

Accusation of adultery—Establishment of —Evidence by spouse—Corroboration necessary—Statements of adulteress recorded in Government Maternity Home and Rescue Home registers can be used for corroboration: (1964) 2 Cr.L.J. 686: A.I.R. 1964 Mys. 280.

Hindu Marriage Act, 1955, S. 17(1)(*i*)—Adultery—Proof—Mere fact that some male relation writes improper letters to a married woman, does not necessarily prove that there was illicit relationship between writer of the letters and the married woman who received them: A.I.R. 1967 S.C. 581.

Adultery—Wife leading an adulterous life—given birth to an illegitimate child consequent to her illicit connection—*held*, decree for divorce to be maintained: (1986) 1 Hindu L.R. 382 (Madh. Pra.); (1987) 1 Hindu L.R. 311 (P.&H.).

Simply because a man and a married woman were found talking with each other in the Arhar field, no inference can be drawn that they had developed an illicit connection among themselves. In villages men and women of the agricultural class do visit fields covered by Arhar and talk with each other. Unless, therefore, some definite talk of theirs showing amorous relations is indicated in the evidence it would be futile to draw an inference of an illicit connection: 1967 All.W.R. (H.C.) 352: 1967 All.Cr.R. 252.

Where the slide taken by the Medical Officer containing a smear of the discharge from the penis of the person accused of adultery was shown to have contained spermatazoa and it was also proved that there was a whitish discharge known as leucorrhoea from the vagina of the woman, *held*, that the evidence was not conclusive proof that the two were caught *'in flagranti delicto'* in the very act of coitus: I.L.R. 8 Luck. 301: A.I.R. 1933 Oudh 148.

Neither S. 10 of the Hindu Marriage Act, 1955, which enumerates the grounds for judicial separation nor S. 23 which governs the Court's jurisdiction to pass the decree require the petitioner to prove his case beyond a reasonable doubt; S. 23 empowers the Court to pass the decree if it is 'satisfied' on matters mentioned therein; matrimonial proceedings being essentially of a civil nature, the word 'satisfied' must mean 'satisfied on a preponderance of probabilities' and not 'satisfied beyond a reasonable doubt'; S. 23 does not alter the standard of proof in civil cases: the charge of cruelty, thus, need not be proved 'beyond reasonable doubt': A.I.R. 1975 S.C. 1534: (1975) 2 S.C.C. 326.

It is not always possible in matrimonial matters to get absolute corroborating or contradicting evidence in affairs concerning family members; they are to be decided on the basis of preponderance of evidence; thus, where divorce was claimed for mental cruelty, the Court should weigh the entire evidence: (1991) 1 Hindu L.R. 231 (Him. Pra.) (D.B.).

It is always difficult for a female to adduce evidence of ill-treatment at her husband's residence, particularly when it is far away from her parents' residence; her husband's neighbours would naturally not come forward to depose in her favour; thus, rather than discard her evidence for want of corroboration from an independent source, the Court should consider it in the light of surrounding circumstances; and if consistent therewith it may safely be relied upon: 1984 Hindu L.R. 728 (Bom.).

Raw social realities and not fine spun legal niceties make the law. It is, therefore, necessary to lift the veil and look at the conspectus of factors governing matrimonial relations in order to discern the naked truth; ill-treatment due to not bringing sufficient dowry is not an unusual practice: A.I.R. 1984 N.O.C. 131 (Del.).

The standard of proof of cruelty as a matrimonial offence is not one of beyond reasonable doubt; a slight corroboration is sufficient to uphold the testimony of the wife or husband: (1986) 1 Hindu L.R. 686 (Cal.).

The test for proof of cruelty is preponderance of evidence on conflicting probabilities; nevertheless, evidence has to be led: (1987) 1 Hindu L.R. 69 (P.&H.).

Cruelty may be inferred from the totality of facts, the parties' matrimonial relations and interactions in their daily life as disclosed in the evidence: (1987) 1 Hindu L.R. 264 (Cal.) (D.B.).

Where the point to be determined was whether the wife had a just ground to refuse to live with the husband contemplated under S. 125 of the Code of Criminal Procedure, *held*, the evidence of cruelty propounded by the wife as a just ground is not required to be proved beyond all reasonable doubt: (1986) 1 Hindu L.R. 645 (Raj.).

The Hindu Marriage Act, 1955—Petition for divorce on ground of cruelty—*held*, a witness to the many incidents of quarrelling cannot be disbelieved merely because he had not witnessed personally one of such incidents: (1986) 2 Hindu L.R. 282 (Madh. Pra.).

Petition for restitution of conjugal rights —On settlement the wife went to her husband's house but two days thereafter she again complained of maltreatment and asked for decision of the petition—the husband also alleging that the wife was not prepared to live with him—with out recording the parties' evidence in support of their respective applications, the trial Court dismissed the husband's main petition for restitution, *held*, the trial Court should have allowed the parties to lead evidence; in its absence, it could not be held that the wife

was not treated properly during her two days' stay at her husband's house—case remanded: (1987) 2 Hindu L.R. 244 (P.&H.).

When the husband deposed that the spouses had lived together only for a month, *held*, the instances of cruelty pleaded and deposed to by him did not, in the particular case, warrant the finding of cruelty of such nature as to measure up to the requisite standard to justify divorce: (1986) 1 Hindu L.R. 89 (P.&H.).

In a case under S. 13(1)(*ia*) of the Hindu Marriage Act, 1955, the wife's evidence that her husband used to beat her and had committed theft from her parents' house, *held*, could not be disbelieved merely because she had not lodged any report with Police: A.I.R. 1984 N.O.C. 187 (Del.).

Where in a divorce case on the ground of cruelty under the Hindu Marriage Act, 1955 (*1*) the husband's father, old and respectable, deposed about the incident wherein the wife had accused the husband of having illicit relations with his brother's wife, *held*, he would not have so deposed in open Court disgracing his family unless it was true; his statement deserved to be believed; (2) the husband's colleague corroborated the husband's version that one day, at dinner, the wife in the presence of the witness had accused the husband of having illicit relations with his brother's wife, *held*, the evidence could not be discarded for want of pleadings on the incident even when the wife had denied having known or met the witness: A.I.R. 1989 P.&H. 310: (1989) 95 Punj.L.R. 553 (D.B.).

Where in a divorce case on the ground of cruelty under S. 13 of the Hindu Marriage Act, 1955, the wife in her written statement had admitted that she had lodged a report with the Police and a constable appeared as a witness with the original report and having testified that it was made by the wife, produced its copy but was not at all cross-examined nor any objection was raised to its admissibility, *held*, the report was admissible: 1982 Hindu L.R. 30 (P.&H.) (D.B.).

Where cruelty under the Hindu Marriage Act was *held* to have not been proved: (1986) 1 Hindu L.R. 356 (P.&H.); where cruelty proved: 1984 Hindu L.R. 524 (P.&H.).

Where desertion under the Hindu Marriage Act was *held* to have not been proved: (1986) 1 Hindu L.R. 340 (Madh. Pra.); (1986) 1 Hindu L.R. 356 (P.&H.); (1986) 1 Hindu L.R. 485 (Madh. Pra.); 1983 Hindu L.R. 522 (P.&H.); 1980 Hindu L.R. 45 (P.&H.).

Where desertion was proved: (1987) 1 Hindu L.R. 156 (P.&H.); 1984 Hindu L.R. 524 (P.&H.).

72. Proof of marriage.—(*See* also Ss. 101-104). Entries in the electoral rolls do not conclusively prove that a couple residing in the same house is legally wedded: 1979 Bom. C.R. 110: (1980) 2 Mah.L.R. 242.

Where there is no clear documentary evidence whatsoever of a marriage (a second marriage in this case), the oral evidence recorded should not be viewed disjointedly; the effort should be to search for agreement in material details from a combined reading of the evidence: (1987) 2 Hindu L.R. 557 (Karn.) (D.B.).

Normally, when a person sets up a marriage between him and another, it would necessarily connote that he is pleading the existence of a valid marriage. Therefore, every circumstance which would render it other than valid will have to be shown not to exist. This may appear to be a rigid rule though it is often a fairly workable rule. Even if one does not go to this extent, it is safe to hold that only in a case where evidence goes to show that a marriage has in fact taken place but a party challenges that marriage on the ground of some alleged infirmity attaching to it that he can be called upon to establish his imputation of infirmity. But this rule surely cannot apply to a case where even the first step, namely, the proof of the factum of marriage is not satisfied. In the instant case, the parties are Indian Christians and are governed in matters of matrimony by the provisions of the Indian Christian Marriage Act. This Act requires a marriage to be performed in particular form and a register of marriages to be maintained, etc. The first defendant in her evidence stated that the marriage between her and the deceased took place in a Church of which she could not mention the name and that some thing was written down in some register. But no such register was called to support this version. The lower appellate Court was, therefore, right in holding that the factum of marriage was not established: (1964) 2 An.W.R. 136.

Marriage alleged to have been celebrated according to Hindu rites — Proof of ceremonies: A.I.R. 1970 Tripura 30.

Marriage—Proof—Evidence of relations: A.I.R. 1957 Pat. 285.

See also 1977 Cur.L.J. (Civ.) 228; A.I.R. 1973 Ker. 250.

73. Proof of legitimacy of child.—(*See* also S. 112). A child born during lawful wedlock attracts the initial presumption of legitimacy; this rule of law is, however, rebuttable by showing non-access between the parties at any time when the child could have been conceived. But once access is proved, no evidence can be allowed to show that the child is not the husband's child; it is immaterial how soon after marriage the child is born, and even though the ordinary period of gestation is 280 days. The section is based on the maxim *pater est quem nuptiae demonstrant* (father is he whom the nuptials indicate). If, however, non-access is established, as in the present case where the wife conceded: "I have no physical relation of husband and wife with the petitioner before my marriage", the presumption of legitimacy is rebutted: (1987) 1 Hindu L.R. 384 (Del.).

Where the spouses' respective place were nearby and the fact in issue was whether the child born to the wife was illegitimate, *held*, the decision does not depend on whether the parties had in fact met at the time when the child could have been begotten but whether the parties had no access to each other at any such time; it is for the husband to prove non-access; otherwise the presumption is that the child was their legitimate child: 1983 Hindu L.R. 605 (All.); (1989) 2 Hindu L.R. 157 (All.).

Where the husband had made out that he had neither the opportunity nor access to his wife to be the father of the child born to her, *held*, she had a voluntary sexual intercourse with a man other than her husband: 1983 Hindu L.R. 536 (Madh. Pra.).

It is settled that the Muslim Law of acknowledgment of parentage with its legitimatising effect is not attracted to cases where a child's illegitimacy has been proved and established by reason of the marriage of his parents having been disproved; the doctrine applies only to such cases where the marriage itself or the exact time of its occurrence with reference to the legitimacy of the acknowledged child is not proved as distinguished from disproved; the doctrine, thus, applies only to cases of uncertainty as to legitimacy: (1992-2) 110 Mad.L.W. 81 (D.B.).

Where in a petition under S. 12 of the Hindu Marriage Act, 1955, for the wife being pregnant from a third person at the time of marriage and the birth of the child at her parents' place 6 months after the marriage and the child's death on the 8th day of its birth there, with the wife alleging the child to be premature and the husband saying it was full grown, *held*, the condition of the child was within the wife's special knowledge; she failed to discharge the burden to show that the child was premature as both her pleading as well as her examination-in-chief did not contain even a whisper about the child's condition; the child's death for want of medical help and mother's milk together with the child's burial in the house itself was a telltale; the husband's case against the wife stood established: (1982) 2 Bom.C.R. 202.

To determine a child's paternity, its mother is the best witness: (1985) 60 Cut.L.T. 414.

While the blood grouping test may not be a positive test to establish a child's paternity, but it can certainly show that the child is not of that particular person: 1978 W.L.N. (U.C.) 71 (Raj.).

Determination of paternity between parties—Party refusing to give blood—Adverse inference cannot be drawn: A.I.R. 1968 Bom. 388.

Where legitimacy of the child was proved: (1987) 1 Hindu L.R. 226 (P.&H.).

74. Genuineness/proof of sale.—(*See* also Ss. 101-104). Non-payment of consideration and non-transfer of possession, *held*, by itself is not relevant for deciding about the genuineness of the sale of land: 1978 All.L.J. 291.

Where the landlord in his petition had specifically averred that he had purchased the property by a registered sale deed and the respondent had become his tenant by operation of law and this was specifically denied by the respondent, *held*, it was not necessary for him to prove the sale deed: (1994-1) 106 Punj.L.R. 347.

Where the purchaser had produced the letter of revocation as also the certificate of its posting, but not the acknowledgement receipt and the seller denied having received the letter of revocation, *held*, the contract of sale subsisted; it did not stand revoked: A.I.R. 1985 Ker. 262.

4. "May presume."—Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

"Shall presume."—Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

"Conclusive proof."—When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

---

75. Miscellaneous.—There is no presumption in law that the space between two properties is a common property of both the parties: (1991-1) 107 Mad.L.W. 371.

Though the practice of keeping a 'Log-Book' in the form of loose sheets stapled together requires improvement, *held*, it does not mean the sheets produced are not genuine: A.I.R. 1989 S.C. 364: (1989) 1 S.C.C. 374: 1989 Cr.L.J. 991.

Claim for non-delivery of consignment not disputed but claim contested—Evidence properly weighed and rejected—Reasonable damages also could not be given: A.I.R. 1965 Pat. 367.

The expression 'unless the contrary is proved' in S. 118 of the Negotiable Instruments Act, 1881, contemplates looking into the preponderance of probabilities as also the entire 'circumstances of the particular case'; whether the contrary, that is the absence of consideration, has been proved by the defendant depends upon not only whether the Court believes that the consideration does not exist, but also whether it considers the non-existence of consideration so probable that a reasonable man ought, under the circumstances, to act upon the supposition that the consideration does not exist. [A.I.R. 1949 Bom. 257; A.I.R. 1973 Ker. 210; A.I.R. 1935 All. 509; A.I.R. 1936 Nag. 130; A.I.R. 1936 Pat. 498 and (1911) 21 M.L.J. 1031, Dissent. from; A.I.R. 1973 Andh. Pra. 103, Overruled]: A.I.R. 1987 Andh. Pra. 139: (1987) 1 An.L.T. 1 (F.B.).

Section 4—Notes.

[*See* also notes under Ss. 112-114.]

The rules of presumption are deduced from enlightened human knowledge and experience; they are drawn from the connection, relation and coincidence of facts and circumstances: A.I.R. 1986 S.C. 1099: (1986) 2 S.C.C. 486.

The general rule under the Act is that the burden of proving negligence in a case of accident lies on the party who alleges it but that party is certainly entitled to take advantage of presumptions to lighten that burden. Such presumptions as laid down in S. 4 are of three types: (*i*) permissive presumptions or presumptions of fact; (*ii*) compelling presumptions or presumptions of law (rebuttable); and (*iii*) irrebuttable presumptions of law or 'conclusive proof'. Cls. (*i*), (*ii*) and (*iii*) are indicated in Cls. (1), (2) and (3), respectively. 'Presumptions of facts' are inferences of certain set patterns drawn from common experience and observation, constitution of human mind, springs of human action, usages and habits of society and ordinary course of human affairs. S. 114, a general section, deals with presumptions of this kind. The Court is not bound to draw a presumption of facts; it has to exercise its discretion in each case. Thus, even in an action in torts, if the defendant adduces no rebutting evidence but offers reasonable explanation, equally consistent with the presence as well as absence of negligence, the presumptions or inferences based on *res ipsa loquitur* will cease to exist; the burden of proving the affirmative, will still lie with the plaintiff; and it will be for the Court to determine at the time of judgment whether the proven or undisputed facts, as a whole, disclosed negligence: A.I.R. 1979 S.C. 1848.

May presume—Meanings. *See* A.I.R. 1967 Bom. 382.

The import of expression 'may presume' is that the Court may either regard the fact in question as proved, unless and until it is disproved, or may call for proof of it: 1995 Cr.L.J. 2472 (Ori.).

The presumptions under the Act are only inferences which a logical and reasonable

mind normally draws; the facts and circumstances leading to different inferences are indicated in Ss. 79 to 90-A. Whenever the law permits a presumption, the Court may by reason of S. 4 raise it for the proof of the fact; a presumption may be raised if permissible under one provision and not under another; thus, if a presumption is not available under S. 90-A(1) but available under S. 90-A(2) or any other provision, the Court may draw it. Similarly, a presumption available under S. 90 may be raised by the Court even after coming to the conclusion that it is not available under S. 90-A: A.I.R. 1980 All. 385 (F.B.).

A presumption in itself is no evidence; it only makes out a *prima facie* case for the party concerned; it is a rule concerning evidence; it indicates the person on whom the burden of proof lies. If the presumption is conclusive, it obviates the production of any other evidence, whether in support or in opposition. In case of a rebuttable presumption, the other party may produce evidence, fairly and reasonably tending to show that the real fact is not as presumed; the purpose of presumption is then over; then only the evidence of the parties will determine the true nature of the presumed fact: A.I.R. 1986 S.C. 1099: (1986) 2 S.C.C. 486.

Presumptive and conclusive proofs are basically different; while conclusive proof raises a conclusive presumption, presumptive proof raises a conditional rebuttable presumption. If a fact is deemed to be proved irrespective of the existence or non-existence of other facts possessing probative force in the contrary direction raises a conclusive presumption, the law accepts the fact as conclusively proved. Presumptive or conditional proof, on the other hand, is acceptance of certain facts which on all probabilities the law assumed to have taken place; it is only conditional proof accepted so long as there exist no other facts amounting to its disproof; that is called rebuttable presumption: (1989) 1 Hindu L.R. 558 (Ker.).

The expression 'may presume' in S. 4 implies vesting of discretion in the Court to presume or refuse to presume a fact; if the Court finds that it is a fit case for raising the presumption, the presumed fact stands proved unless and until disproved by the other side; but if the Court refuses to exercise its discretion, it may call upon the parties to prove the fact by leading evidence. But the expression 'shall presume' leaves no discretion with the Court; it is a legislative command to the Court to raise the presumption and regard the fact as proved unless and until it is disproved; the parties need not formally prove the fact (a document in this case): A.I.R. 1993 Pat. 129: (1993) 2 Pat.L.J.R. 28: (1993) 2 B.L.J. 289: 1993 B.B.C.J. 355 (D.B.).

Once a document has been exhibited without any objection, it cannot be objected to at a later stage. Thus, where documents, 80 and 73 years old respectively, were exhibited without objection in the trial Court but the lower appellate Court rejected them in absence of the proof of their execution and attestation, *held*, in view of the fact that the two documents were registered and signed or thumb-impressed by the vendors and the witnesses, the lower appellate Court erred in holding that presumption of their due execution or genuineness by virtue of Ss. 90 and 90-A could not be raised. S. 90 is a solution to the difficulty in proving documents more than 20 years old by witnesses; bringing necessary evidence of their execution and attestation was impossible; besides raising presumption under S. 90 is discretionary; even if the Court could not raise the presumption under S. 90, it could do so under Ss. 4 and 14; S. 60 of the Registration Act also provides for raising the presumption of execution and correctness of the contents of a duly registered document: A.I.R. 1988 All. 57: (1988) 14 All.L.R. 174.

Under S. 4, it is open to a Court in India upon proof of a marriage either to regard as proved the subsistence of that marriage on a later date, unless and until it should be disproved, or else to call for proof of it, using the discretion entrusted to the Court by the first clause of S. 4 in a judicial manner according to the circumstances of the case: A.I.R. 1941 P.C. 11; I.L.R. (1942) 2 Cal. 299: (1941-42) 46 Cal.W.N. 729: A.I.R. 1943 Cal. 76.

In cases for restitution of conjugal rights, once celebration of the marriage is proved, the Court shall presume everything necessary, including the performance of essential ceremonies, to validate the marriage. The positive proof of essential ceremonies required in criminal prosecutions as laid down in A.I.R. 1965 S.C. 1564; A.I.R. 1966 S.C. 614 and A.I.R. 1971 S.C. 1153 cannot be imported in a civil proceeding for restitution of conjugal rights unless their performance is

specifically denied either in pleadings or in evidence: A.I.R. 1987 Cal. 213: (1986) 2 Cal.H.N. 386: (1987) 2 D.M.C. 442: (1986-87) 91 Cal.W.N. 456 (D.B.).

A presumption of fact is a rule that a fact otherwise doubtful may be inferred from a fact which is proved. Such a presumption is not an irrebuttable one and in each particular case it will have to be examined whether it should be raised and whether there is anything in rebuttal of the same: I.L.R. (1958) Punj. 800.

Prevention of Corruption Act—Scope of the section and applicability: A.I.R. 1958 S.C. 61—Presumption: A.I.R. 1959 Mad. 166: 1959 Cr.L.J. 484—Hindu Joint family—Self acquisition—Proof: A.I.R. 1958 Pat. 115.

In case of homicide, the initial burden is on the prosecution to prove the guilt beyond doubt and the accused would be presumed to be innocent. But if the accused takes the plea of insanity he has to prove existence of such circumstances to bring the case within exception because Court will presume absence of such circumstances under S. 105 read with the definition of 'shall presume' in S. 4. [A.I.R. 1956 Nag. 187, Overruled]: A.I.R. 1964 S.C. 1563: (1964) 2 Cr.L.J. 472.

Entries in record of rights—S. 65 creating only rebuttable presumption—Section overriding heading portion or preamble, if in conflict with it—Interpretation harmonious with meaning of S. 20—Determination of questions of title—Compensation Commissioner competent to hold enquiries under S. 20: I.L.R. (1960) 10 Raj. 930.

Presumption — Maintenance of unmarried daughter—No presumption from age and health of daughter about capacity to earn and to maintain: A.I.R. 1969 Punj. 285.

Where in a suit for recovery of price for the goods supplied, the defendant contended that he had received the goods not from the plaintiff but from another firm, *held*, if defendant's plea was correct, his account books must contain the supporting entries; his non-production of books and production of only stray letters and a bill amounted to his failure to produce the best evidence; the Court raised the presumption that if that evidence had been produced, it would have gone against the defendant: A.I.R. 1981 S.C. 977: (1980) 3 S.C.R. 22: 1980 (Supp.) S.C.C. 1.

In a case, even when an advocate who came into the witness-box, to prove the notice sent through him, the postal envelope which had been returned unserved had already been opened and a portion of the notice was found torn. The folding did not appear to be deeper and in the size it was folded, it could not be put into the envelope. Further, the envelope was found opened with the help of a knife so that the notice could not have been torn while opening the envelope. A copy of the notice was also not filed into Court. Under these circumstances, it was *held* that the notice actually sent by post must have been different from the one produced before Court and that the real one must have contained some matter detrimental to the party seeking to prove the same: 1969 B.L.J.R. 593: 1969 Pat.L.J.R. 156.

Under S. 105, read with the term 'shall presume' as defined in S. 4, the Court shall regard the absence of circumstances which bring the accused within exceptions as proved unless, after considering the materials on record, it believes that the circumstances existed or their existence was so probable that a prudent man ought, under the circumstances, to act upon the supposition that they did exist: A.I.R. 1980 S.C. 660: 1980 Cr.L.J. 459: (1980) 2 S.C.C. 218.

The use of the expression 'shall presume' indicates a presumption in law: (1971) 1 Cut.W.R. 784.

The very expression 'shall presume' used in S. 4 carries the irresistible implications that the presumption is liable to be rebutted by evidence; thus, notwithstanding the presumption, the Competent Authority under the Urban Land (Ceiling and Regulation) Act, 1976, can proceed even in respect of land recorded in the revenue or land records as agricultural so as to satisfy itself whether revenue records still represent the land's true character on the appointed day to warrant its exclusion from the Act's operation; the Competent Authority can enquire as to whether there are materials to rebut the presumption: A.I.R. 1988 Cal. 8: (1987) 2 Cal.H.N. 461: (1987-88) 92 Cal.W.N. 492 (D.B.).

For the purpose of the words 'unless the contrary is proved', in S. 118 of the Negotiable Instruments Act, 1881, it is permissible to look into the preponderance of probabilities and the entire 'circumstances of the particular case'. The Court, in view of Ss. 3, 4,

101 to 104 of the Evidence Act while deciding whether the contrary, namely, the absence of consideration, has been proved by the defendant, shall have to consider not only whether the Court believes that there was no consideration but also whether the non-existence of consideration is so probable that a reasonable man ought, under the circumstances, to act upon the supposition that there is no consideration. [A.I.R. 1949 Bom. 257; A.I.R. 1973 Ker. 210; A.I.R. 1935 All. 509; A.I.R. 1936 Nag. 130; A.I.R. 1936 Pat. 498 and (1911) 21 M.L.J. 1013, Dissent. from; A.I.R. 1973 Andh. Pra. 103, Overruled]: A.I.R. 1987 Andh. Pra. 139: (1987) 1 An.L.T. 1 (F.B.); A.I.R. 1959 Raj. 1 (F.B.).

The words 'conclusive evidence' are not defined but the definition of 'evidence' in S. 3, and 'conclusive proof' in S. 4 of the Evidence Act show that by declaring certain facts to be conclusive proof of another, an artificial probative effect is given by the law to certain facts and no evidence is allowed to be produced with a view to combating that effect. These cases generally occur when it is again the policy of Government or the interests of society that a matter may be further open to dispute. Illustrations of it can be had from various enactments: 1956 All.L.J. 276: A.I.R. 1956 All. 520.

Admission — Conclusive proof: A.I.R. 1970 Bom. 312.

'Conclusive proof' and 'conclusive evidence'—No difference between two expressions: A.I.R. 1963 S.C. 151.

The statement in an order of the Court is conclusive of what happened before the Presiding Officer of that Court: 1961 M.P.L.J. 769: 1961 Jab.L.J. 158: A.I.R. 1961 Madh. Pra. 108.

It is a general thought not a conclusive presumption that a document is executed on the date it bears: A.I.R. 1916 P.C. 238.

A certificate issued by the Director, Central Food Laboratory under the Prevention of Food Adulteration Act, 1954 is final and conclusive proof of the facts stated therein. Under S. 4 of the Evidence Act, Court cannot allow evidence to be given for disproving anything which is declared by the statute as conclusive. [1988 Cr.L.J. 898: (1987) 2 Ker.L.T. 867 (F.B.); (1991) 2 Ker.L.T. 23, Rel. on]: 1994 Cr.L.J. 3421 (Ker.) (D.B.).

The Registrar's endorsement that the document was signed by the executant after fully understanding it, *held*, cannot be a conclusive proof of its execution if circumstances of its execution are suspicious. [A.I.R. 1918 Oudh 120, Rel. on]: A.I.R. 1985 All. 160: 1985 All.C.J. 345.

S. 112 lays down that a child born during the continuance of a valid marriage is conclusive proof of his being legitimate "unless it can be shown that the parties to the marriage had no access to each other at any time when" the child could have been begotten; as laid down in para 3 of S. 4, "the Court shall, on proof of the one fact, regard the other as proved and shall not allow evidence to be given for the purpose of disproving it". The Court, thus, could not have admitted evidence to show that the child born on 2-8-1980 was not his legitimate child because the couple in fact had no sexual intercourse on the night in between the 28/29-12-1979; the very fact that the husband and the wife stayed together in the matrimonial home for about 15 years, were still young, and there was nothing to prevent the sexual intercourse on that wintry night when they were meeting after many months; that is enough to have access and opportunity for marital intercourse: A.I.R. 1984 All. 129: (1983) 9 All.L.R. 675: 1984 Hindu L.R. 199. *See* also S. 3, Note 73, *supra*.

Land unfit for actual enjoyment in usual mode—Presumption may be made that plaintiff's previous possession continued until contrary is proved—This, being presumption of fact, is by no means conclusive—Whether it should be applied or not depends upon facts of each case: A.I.R. 1941 P.C. 11.

Where in a suit on a promissory note, the plaintiff contended to save limitation that she *bona fide* believed that the defendant was entitled to the moratorium under the T.N. Indebted Agriculturists (Temporary Relief) Acts of 1975 as well as of 1976, *held*, the defendant was an agriculturist under those Acts but for assessment of agricultural income-tax leads to the conclusive presumption that the plaintiff's plea for refraining from instituting the suit was sufficient to make her sue within time: (1988-1) 101 Mad.L.W. 269.

CHAPTER II

OF THE RELEVANCY OF FACTS

5. Evidence may be given of facts in issue and relevant facts.—Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

Explanation.—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to civil procedure[1].

---

1. *See* now the Code of Civil Procedure, 1908 (5 of 1908).

Section 5—Notes.

Facts include the *factum probandum* or the principal fact to be proved and the *factum probans* or the evidentiary fact from which the principal fact follows immediately or by inference. Facts may be either facts in issue which are the principal matters in dispute or relevant facts which are evidentiary and which directly or by inference prove or disprove the 'facts in issue': A.I.R. 1957 Andhra 130 (F.B.) [Overruled on another point in A.I.R. 1960 S.C. 990]. Act does not lay down rules as to the weight of evidence; it only deals with admissibility (Field, 6th Ed., 64). In determining the relevancy or otherwise of any evidence, the Court cannot consider matters beyond the purview of the Evidence Act: 12 All.L.J. 285: 15 Cr.L.J. 429.

'Facts'—Meaning of—'Facts' which were not before it—Include evidentiary facts: A.I.R. 1957 Andhra 130 (F.B.) [Overruled on another point in A.I.R. 1960 S.C. 990].

Suit for profits against son of lambardar—Evidence as to the difficulty of collecting rent and difficulty in finding other lambardar on the death of the original lambardar is admissible: A.I.R. 1928 All. 166: 107 I.C. 702.

Ss. 5, 16 *and* 34.—A bank used to keep at the end of each day its cash box in sealed condition in the Police station house. One morning the box was found missing and on investigation was found in a field with its hasp broken and contents removed. In a suit by the bank against Government for recovery of Rs. 46, 946-7-0, the Government did not admit that the box contained that amount and pleaded that the contents were not verified by the Police. The bank tendered in evidence its cash book and the detailed books of accounts showing what the amounts on hand from day to day were. The evidence on the part of the plaintiff established that this amount was put into the box, as was the usual custom for a long time, and the box was sent to the police thana with a clerk and a peon of the bank. *Held*, the evidence was admissible and there was no difficulty in holding that the amount was in fact in the box: 1958 M.P.L.J. 694: A.I.R. 1959 Madh. Pra. 77.

Where findings have been arrived on irrelevant evidence, *held*, same ought not to be allowed to stand: A.I.R. 1957 Cal. 660.

The application bearing the signature of the plaintiff stating the fact that the partnership between the plaintiff and the defendant was dissolved in a certain year could be used by the defendant as evidence against the plaintiff but the order passed on that application by the Income-tax Officer could not be so used: (1958) 60 Bom.L.R. 203: A.I.R. 1959 Bom. 528.

Where no objection was taken to the admissibility of a document either before the arbitrator or before the High Court in the proceedings taken to set aside the award, *held*, no objection to the admissibility could be allowed to be raised in the appeal before the Supreme Court: A.I.R. 1959 S.C. 488: 1959 S.C.A. 477: (1959) 1 S.C.R. (Supp.) 922.

Case decided—Decision of questions under Evidence Act—Decision on admissibility—Not a case decided and hence, not open to revision: (1963) 4 Guj.L.R. 1032: A.I.R. 1963 Guj. 241.

Admissibility of a document is one thing and its probative value quite another—these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and the weight of its probative value may be nil. However, in the case of a document prepared under a statute which requires certain conditions to be

Illustrations

(*a*) *A* is tried for the murder of *B* by beating him with a club with the intention of causing his death.

At *A*'s trial the following facts are in issue:—

A's beating *B* with the club;

A's causing *B*'s death by such beating;

A's intention to cause *B*'s death.

(*b*) A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure[1].

---

1. *See* now the Code of Civil Procedure, 1908 (5 of 1908).

---

fulfilled, as where a report is given by a responsible officer, based on evidence of witnesses and documents and has a statutory flavour in that it is given not merely by an administrative officer but under the authority of a statute, its probative value would indeed be very high so as to be entitled to great weight: A.I.R. 1983 S.C. 684: (1983) 3 S.C.C. 118.

Report of Court of Enquiry appointed under R. 75 of Indian Aircraft Rules—S. 35 of Evidence Act not applicable—Report admissible under Ss. 5, 7 and 9—Proof of report: A.I.R. 1965 Cal. 252.

Tape-recordings — Not inadmissible on ground of their being tampered with: A.I.R. 1964 S.C. 72. *See* also S. 3, Note 11, *supra* and S. 7.

Insufficiently stamped promissory note is inadmissible for any purpose: I.L.R. (1964) 16 Assam 54: A.I.R. 1964 Assam 138.

Plaintiff challenging existence, genuineness and validity of arbitration agreement—As regards *quid probandum* plaintiff has right to prove above fact in issue and facts relevant to it: A.I.R. 1968 Madh. Pra. 33.

Partnership deed for extracting mica from mines ought to be registered—Deed registered outside the district where mines are situated — Not admissible in evidence — Terms in such deed incorporated in a subsequent deed properly registered can be looked into: I.L.R. (1963) 13 Raj. 943: A.I.R. 1963 Raj. 241.

The Evidence Act prohibits the employment of any kind of evidence not specifically authorised by the Act itself. It is, therefore, unsound and not correct to say that the principle of exclusion adopted by the Evidence Act shall not be applied so as to exclude matters which may be essential for the ascertainment of truth: 1962 B.L.J.R. 323: A.I.R. 1962 Pat. 420.

An acknowledgment of a registered letter generally contains two postal seals—one the postal seal of the Post Office from which the letter was despatched and the other the postal seal of the post office which delivered the letter. Where the document contains only one seal, the document cannot be held to be genuine: 25 Cut.L.T. 169.

Where the fact in issue is the particular time when an appointee filled up a particular post, *held*, that person's evidence thereon would be direct evidence within the meaning of S. 60; on that evidence being challenged, he would have to produce other evidence like the order of his appointment, if in writing; if he does not do that, it would be for the Court to determine on appreciation of evidence whether he should be believed; but his oral evidence is undeniably relevant and admissible: A.I.R. 1971 Ker. 193: 1971 Ker.L.T. 19: 1971 Ker.L.J. 177: 1971 M.L.J. (Cr.) 89.

Relevant facts—Facts known to Judge—Court cannot import into case any fact which is observed by itself as that would be introducing evidence not tested by cross-examination: (1968-69) 73 Cal.W.N. 32.

Evidence—Personal knowledge of Judge: (1968) 1 M.L.J. 9

Information gathered as a result of illegal search and seizure—Admissibility in evidence: A.I.R. 1969 Del. 91. *See* also S. 3, Note 14.

Alienation by father—Recital in sale deed that property was the self-acquisition of vendor—Lower Courts finding that the

property was joint family property and father alienated it for consideration and for legal necessity and antecedent debts—Conclusion that he transferred the same as *karta* of family held not contrary to law—It was open to Courts of facts to examine entire evidence on record and come to a conclusion whether it was joint family property despite recital to the contrary in sale deed: 34 Cut.L.T. 1305: I.L.R. (1968) Cut. 802: A.I.R. 1969 Ori. 134. *See* also S. 3, Note 49, *supra*.

It is true that in judging the acceptability of an evidence the absence of contrary evidence is also a factor to be taken into consideration, but the falsity of even an unrebutted evidence may be so patent or the evidence may be so unworthy of credence or so unsatisfactory that the Court cannot regard the fact which is sought to be proved by such evidence as having been proved. An evidence may be destroyed or, it may be said, sufficiently rebutted by its inconsistencies, its improbabilities and its inherent defects and thus ceased to be a fit basis for a finding. For the rejection of such evidence no evidence in opposition is necessary: I.L.R. (1965) 1 All. 483: A.I.R. 1965 All. 570.

Evidence of conversion of a member of scheduled caste to Buddhism may be corroborated by evidence of his conduct subsequent to conversion. Thus, the signing by such member alongwith others a declaration to the effect that he had embraced Buddhism and that he, therefore, ceased to be a member of scheduled caste, the issuing of a wedding invitation of his daughter on which the picture of Lord Buddha is inscribed, and the installation of image of Buddha by him in Shiva temple situate near his house would be strong pieces of corroborative evidence of the fact that he ceased to be Hindu and was converted to Buddhism: A.I.R. 1965 S.C. 1179.

In considering evidence in a case of right of easement of light and air, the Court can take notice of well known facts (without insisting upon evidence) such as, the breeze comes from the west and the blocking of a window in that direction would substantively reduce the amount of air in the room and that doors have to be kept closed for consideration of privacy: 1958 M.P.L.J. (Notes) 31.

There must be specific provision in the Evidence Act before facts can be treated as relevant and facts must also be proved as laid down in the Evidence Act. Facts which are not properly proved cannot be considered by the Judge and cannot form the basis of a judgment. It is only those facts which are declared to be relevant and duly proved, which can be the basis of a judgment as provided by S. 165 of the Evidence Act: (1962) 3 Guj.L.R. 107: (1962) 2 Cr.L.J. 55: A.I.R. 1962 Guj. 214.

Murder by poisoning—Facts to be established by prosecution—Facts are not invariable criteria of proof by direct evidence: (1965) 1 Cr.L.J. 321: A.I.R. 1965 Ori. 38.

A cross-complaint made by the accused before the Police is nothing but a former statement of the accused and can be used to corroborate or contradict the accused only if the accused gives evidence in Court. It may also be used as an admission of the accused but not by the accused in his favour in view of S. 21, Evidence Act. Hence, where an uncertified copy of such a cross-complaint is produced by the accused himself through a defence witness and the accused has not given any evidence in Court, the document is inadmissible in evidence under the provisions of Ss. 21, 145 and 157. If the complaint is treated as a public document then under S. 65(*f*) an uncertified copy would not be admissible but if it is not a public document, the original being available secondary evidence would not be admissible under S. 62. It is the duty of the Court to disallow the evidence which is not relevant under the provisions of the Evidence Act: (1963) 1 Cr.L.J. 355: (1963) 4 Guj.L.R. 448.

Accused having injuries when produced before Police immediately after occurrence—Medical evidence showing that they were not self-inflicted—Failure of prosecution to offer any explanation regarding those injuries—Version of accused that they sustained injuries at time of occurrence *held* highly probable—Further, as prosecution evidence itself indicated that accused could not have used the revolver alleged to have been used by him, case against him *held* stood falsified: 1968 Cr.L.J. 1479: A.I.R. 1968 S.C. 1281.

Charge under S. 302, Penal Code (1860)—Failure on part of prosecution to give explanation about injuries on accused, thereby part of occurrence remaining shrouded in mystery—Accused is entitled to acquittal: (1968) 34 Cut.L.T. 187.

The motive for the commission of the offence, however strong, by itself is not sufficient to establish the guilt of the accused. It is only one of the links in the chain of circumstances and if the other circumstances connecting the accused with the commission of the offence are proved, then the existence of motive assumes importance: (1969) 18 Law Rep. 412 (Mys.). *See* also S. 8, Note 2, *infra*.

Criminal trial — Motive — Proof of, is not always necessary: A.I.R. 1969 Tripura 53.

Criminal trial — Motive — Positive evidence against accused clear, cogent and reliable—Question of motive has no importance: 1968 Cr.L.J. 811 (All.).

The exchange of abuses, generally speaking, does not appear to be a rare occurrence, but it is not uncommon for the class of people like Jats to commit offences like murder for such or similar motives: 1961 All.Cr.R. 323: (1961) 63 Punj.L.R. 632.

Evidence of witnesses not convincing—It is fruitless task to search for motives which might have actuated them to come forward and give such evidence: 1959 An.L.T. 884: (1961) 1 Cr.L.J. 218: A.I.R. 1961 Andh. Pra. 70.

The motive on the part of the appellant, his absconding from the village for four days, his extra judicial confession and recoveries including the blood-stained Gundasa borrowed by him a couple of days before the occurrence alongwith the medical evidence constitute sufficient evidence to compel the inference of the accused being responsible for the murder of his wife: 1969 Cr.L.J. 1186 (Punj.)

Where the positive evidence against the accused is clear, cogent and reliable, the question of motive is of no importance: 1956 Cr.L.J. 827: (S.) A.I.R. 1956 S.C. 460.

Evidence of motive. *See* 1958 M.L.J. (Cr.) 412: 1958 Ker.L.J. 181.

Absence of motive for committing murder—Inference: 1963 All.L.J. 977.

Though direct positive evidence of consent will be very satisfactory, that does not mean the Court is to totally put aside the inference flowing from probabilities and the normal course of conduct and actings of parties for a long period. The contention that proof of knowledge is not proof of consent is not, therefore, acceptable: (1968) 2 M.L.J. 233: (1968) 81 Mad.L.W. 531.

Assessment proceeding under Income-tax Act—Assessees failure to establish that certain credits in name of others did not constitute concealed income—Penalty proceeding against assessee for concealment of income—Failure of assessee to establish his claim in assessment proceeding does not mean that department on which onus lies in penalty proceeding has established the concealment: A.I.R. 1970 Ori. 38.

Suit by mother on behalf of minor son claiming a share in property of a Sudra Joint family—Claim made on the basis that the minor son was the illegitimate són of the deceased member—Woman deposing that she was concubine of the deceased in his continuous and exclusive keeping at the time of birth of her son—Testimony of the woman alone without corroboration is not sufficient for holding that she was such a concubine: A.I.R. 1964 Pat. 353.

Where the question was whether the letting of certain premises was for the immoral purpose of carrying on prostitution and running a brothel, the facts: (1) that the lessor herself was a woman of the town, (2) that the defendant (lessee) was also a woman of the town and a prostitute, (3) that the general reputation of the particular house was one of ill-fame and a brothel, and finally (4) that the locality where the premises were situate was the notorious quarters of the City where it was said in evidence that all the houses in the street were brothels, were all relevant and compelling facts and cogent circumstances leading to the only possible conclusion that the letting was for immoral purposes of prostitution and for keeping a brothel. The evidence of a family physician on a point which turns on the reputation of the locality and of the persons concerned is of great weight and cannot be lightly dismissed. Knowing the inmates of a brothel by name is not necessarily the only qualification to speak on the fact whether a particular house is a brothel or not. The evidence of reputation of a house by a person who resides in a part of the very same house as a shop-keeper saying what type of people visits such house is not only admissible but cogent and relevant. His incapacity to name the prostitutes or their paramours does not discredit the testimony of such a witness. An independent and responsible witness, who lived in the vicinity of the premises ever since his boyhood, is entitled

to speak of the reputation of the premises as quarters for prostitution and brothel keeping. His evidence cannot be considered as unsatisfactory merely because it was only once he actually went inside the house: A.I.R. 1958 Cal. 713: (1957-58) 62 Cal.W.N. 258.

Entries in account books regularly kept in the course of business—Entry in *A*'s account books of certain payment made to *B*—Relevancy and value of—Absence of corresponding entry in *B*'s account books regarding receipt of such payment—Non existence of such entry though not relevant under S. 34 is relevant under Ss. 5 and 11 and can be proved by *B*'s account books: (1964) 3 S.C.R. 297: A.I.R. 1963 S.C. 1850.

Habitual offender or dangerous character—Proof—Mere suspicion cannot amount to proof—In case of evidence of general repute prosecution-evidence despite defence-evidence in rebuttal may be accepted if defence-evidence is not fit to be acted upon or if prosecution-evidence is supported by evidence of specific instances of commission of offences or by evidence of previous convictions: 1966 All.W.R. (H.C) 729.

Liability of *karta* to back accounting—Specific allegation has to be made and proved before accounts can be reopened: A.I.R. 1967 Andh. Pra. 247.

Joint family breaking of—Division of property for convenience—If proof of severance of joint status: A.I.R. 1967 Ori. 139.

Under Proviso 6 any fact is probable which shows in what manner language of document is related to fact existing at the time of executing it: (1965-66) 70 Cal.W.N. 982.

Where the distinct charge in the evidence of reputation from the witness-box was: (1) that the defendant was a prostitute and carried on prostitution; and (2) that she took the house on rent to run a brothel there that is the *prima facie* case. Where she does not come herself nor calls any witness to deny those serious allegations of fact, whether the judge should believe one witness or another or one case or another in such a context of facts is not then a question of *prima facie* case. It is then a question of the weight of evidence and its credibility. The very fact that the defendant neither came to the box herself nor called any witness to contradict evidence given on oath against her shows that these facts cannot be denied. What was *prima facie* against her became conclusive proof by her failure to deny: A.I.R. 1958 Cal. 713: (1957-58) 62 Cal.W.N. 258.

The opinion of the Legal Remembrancer given to the Government would be inadmissible in evidence. Nor can it constitute proof on the facts stated therein: A.I.R. 1958 Manipur 7.

It is not open to a Court on a Tribunal determining a matter judicially to insist on a particular mode of proving that matter and to exclude all other modes of proof, unless there is a law requiring it to do so. It may certainly draw such inference from the non-production of a particular kind of proof as the circumstances justify but it cannot say that no other kind of proof, whatever its probative value may be, will be entertained by it. This will particularly be so when it is not within the power of the person concerned to obtain the proof that he is directed to produce: 1969 All.L.J. 652.

Land acquisition proceedings—Market value of land—Reference by appellate Court after conclusion of arguments to documents which are not part of record is not permissible—They should be admitted as fresh evidence and parties given opportunity to rebut them: (1969) 1 S.C.J. 344: A.I.R. 1969 S.C. 255.

There has to be legal evidence for hearing a finding of fact. At least the witness must say that he has personal knowledge about the facts about which he is giving evidence. If the witness has no personal knowledge or any means of such knowledge about the facts deposed to by him, his testimony would not be evidence under any principle of law: (1969) 71 Punj.L.R. 68: 1969 Ren.C.R. 682.

Where in application for temporary injunction the question was whether a director of a company was removed, a bare allegation in an affidavit that he was so removed, was not sufficient to prove the fact of removal especially when there was no allegation of service of a notice of a resolution for removal. Notice of a resolution to remove a director is necessary under S. 284 of the Companies Act: (1968) 1 Comp.L.J. 311: 39 Comp. Cas. 223: (1965-66) 70 Cal.W.N. 805.

Best judgment assessment—Quantum of escaped turnover—Proof of. *See* A.I.R. 1969 Madh. Pra. 134.

6. Relevancy of facts forming part of same transaction.—Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Illustrations

(*a*) *A* is accused of the murder of *B* by beating him. Whatever was said or done by *A* or *B* or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(*b*) *A* is accused of waging war against the [1][Government of India] by taking part in an armed insurrection in which property is destroyed, troops are attacked and goals are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though *A* may not have been present at all of them.

(*c*) *A* sues *B* for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(*d*) The question is, whether certain goods ordered from *B* were delivered to *A*. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

---

1. Substituted for "Queen", by A.L.O. 1950.

Section 6—Notes.

Principles of sections relating to relevancy of facts are mere rules of logic: 1914 M.W.N. 931. The evidence about the fact which is also connected with the same transaction, cannot be said to be inadmissible or irrelevant. There is no provision of law which lays down that evidence can be led only in respect of that matter which is the subject-matter of the charge and of no other matter, even though it is relevant to substantiate the charge: 1957 All.W.R. (H.C.) 293: 1957 All.L.J. 141.

The word 'transaction' referred in S. 6 has not been defined but it can be equated to a crime so far as a criminal case is concerned. Each essential ingredient of that crime will be a fact in issue and those facts which are connected with the fact in issue forming part of the same transaction would be relevant as *res gestae*: 1989 Cr.L.J. 2238 (Him. Pra.) (D.B.); 1992 Cr.L.J. 2415 (Him. Pra.) (D.B.).

In order to constitute 'same transaction', the series of acts should be connected together and in this respect the proximity of time assumes significance: I.L.R. (1973) 2 Del. 479.

S. 6 read with its *Illus.* (*a*) shows that spontaneous statements made during the transaction are admissible as *res gestae;* they are relevant only if the person making them had seen the actual occurrence and uttered them simultaneously with the incident or so soon thereafter as to make it reasonably certain that he was still under the stress of the excitement caused by his having seen the incident and his statements formed part of the transaction. The by-stander's declaration must relate only to that which came under their observation. Remarks made by persons other than the eye-witnesses are only hearsay; if the transaction had come to its end, statements made thereafter would be irrelevant. [A.I.R. 1951 Ori. 53; 1975 Cr.L.J. 110, Rel. on]: 1985 Ker.L.T. 122; 1992 Cr.L.J. 575 (Ker.) (D.B.). Spontaneous statements made during the incident are admissible as *res gestae;* but all spontaneous statements in some way connected with the transaction are not admissible; only facts connected with the fact in issue as part of the transaction are admissible. [A.I.R. 1945 Lah. 46; A.I.R. 1951 Ori. 53; A.I.R. 1963 J.&K. 37, Foll.]: 1974 M.P.L.J. 357.

S. 6 permits proof of collateral statements which are so connected with the fact in issue as to be a part of the same transaction; whether it is so or not is to be decided on the circumstances of each case. The principle is that it should be so intimately connected with the fact in issue as to be a spontaneous utterance inspired by the occasion's excitement and without there being any opportunity for deliberate fabrication of the statement; such a statement, part of *res gestae*,

does not narrate a past event; it is the event itself speaking through persons: 1970 M.P.L.J. 976.

S. 3 defines 'fact' as anything capable of being perceived by the senses; *Illus.* (*c*) shows 'that a man said certain words is a fact'. 'Statements' can be excluded from the purview of S. 11 by a very restricted interpretation which need not be followed; if the Legislature intended to exclude all statements from the purview of the word 'fact', there was no need for *Illus.* (*a*) in S. 6 which makes it unambiguously clear that a statement made by the deceased shortly before or after his murder, is a relevant fact in certain circumstances; there may be statements which are inadmissible under S. 32 but admissible under S. 6; at any rate S. 6 is not controlled by S. 32; if the scope of S. 6 cannot be whittled down like that, the scope of S. 11 cannot be curtailed either by dragging it under S. 31. Nothing in S. 11 suggests that it is controlled by any other section; rather its language indicates that the provision is an exception to the other general provisions: (1992) 1 Ker.L.J. 491: 1992 Cr.L.J. 2860 (F.B.).

A witness' earlier statement about the time and place of the incident is quite relevant as also a very important piece of evidence; it is admissible as *res gestae* under S. 6 as also under S. 157: (1986) 2 Karn.L.J. 417 (D.B.).

Narration concerning a prior event, if can be statement, under S. 6, *Illus.* (*a*). *See* 1985 Cr.L.J. 1711: 1985 Ker.L.J. 122; 1985 Ker.L.J. 172: I.L.R. (1985) 1 Ker. 846: 1985 M.L.J. (Cr.) 108.

The place where a murder was committed was occupied by a number of persons, apart from the deceased and the eye-witnesses. These persons came up immediately after the murder and they were informed by the eye-witnesses as to who the two accused had been. These persons were not produced as witnesses in the case. Their non-production was explained upon the hypothesis that they did not actually see the culprits. *Held*, that assuming that these persons did not actually see the accused, their evidence was material not with a view to prove the actual 'fact' of murder, which was in issue, but to prove the 'relevant fact', namely, that just after the event the eye-witnesses disclosed the names of the accused to those who came—this relevant fact having been so connected with the fact in issue in view of S. 6, *Illus.* (*a*), Evidence Act, as to have necessitated the giving of evidence of that relevant fact itself as required by S. 5 of that Act: 1955 Cr.L.J. 892: A.I.R. 1955 All. 328.

The essence of the doctrine of *res gestae* in evidence is that the facts which though are not in issue are so connected with the fact in issue as to form part of the same transaction and thereby become relevant like fact in issue: A.I.R. 1957 Cal. 709. *See* also 1972 All.L.J. 744.

Declarations in order that they might be admissible as *res gestae* should be contemporaneous with the transaction in issue, that is, the interval should not be such as to give time or opportunity for fabrication and they should not amount to a mere narrative of a past occurrence. They are admitted when they appear to have been made under the immediate influence of some principal transaction relevant to the issue and are so connected with it as to characterise or explain it. The bare statement of a complainant made sometime after the occurrence is not admissible in evidence: 1941 O.W.N. 1290: A.I.R. 1940 Oudh 130.

Even the statements of by-standers witnessing a transaction are relevant if they are made during the transaction or so shortly before or after it as to constitute a single transaction; they are *res gestae* having been made contemporaneously with the fact; they should not have been made after such an interval as to afford an occasion for fabrication: (1993) 2 Ker.L.J. 387 (D.B.).

Where the witness was standing near the place of occurrence when the shooting took place as a by-stander, a statement made by him shortly after the occurrence is a relevant fact. Statement made by a by-stander while still under the influence of the principal transaction is admissible as *res gestae*: 1956 Madh.B.L.J. 27: A.I.R. 1956 Madh. Bh. 170.

The word 'by-standers' in *Illus.* (*a*) of S. 6 means the persons who are present at the time of the beating and not the persons who gather on the spot after the beating. The remarks made by persons other than the eye-witnesses could only be hearsay, because they must have picked up the news from others: (1944) 46 Punj.L.R. 353: A.I.R. 1945 Lah. 46.

In some cases the distinction between a declaration which is admissible as part of the transaction and a declaration which is

admissible as a complaint is also treated as a part of the transaction. There is general agreement that the declaration must be substantially contemporaneous with the fact. If it is separated from the fact by an interval which however slight, allows of fabrication, it cannot be treated as substantially contemporaneous with it. It may be admissible under S. 157 of the Evidence Act but not as part of *res gestae*: 1951 All.L.J. 149.

Witness learning about murder of deceased going to the spot and there seeing the body being removed by persons—His statement that he learnt that the deceased has been murdered by the accused or that he was told by the various witnesses that the accused had murdered the deceased and had run away, *held*, is inadmissible in evidence because they do not form part of *res gestae*: (1953) 55 Punj.L.R. 221: A.I.R. 1953 Punj. 218.

S. 6 of the Evidence Act and the succeeding sections embody the rule of admission of evidence relating to what is commonly known as *res gestae*. Acts or declarations accompanying the transaction or the facts in issue are treated as part of the *res gestae* and admitted as evidence. They are, roughly speaking, exceptions to the hearsay rule. The obvious ground of admission of such evidence as is referred to in S. 6 is the spontaneity and immediacy of the act or declaration in question. The facts deposed to must form part of the transaction.

S. 6 appears to provide for proof of statements which are more or less of a collateral nature, not the principal fact but the subsidiary ones which are so connected with the facts in issue as to form part of the same transaction are relevant: 1958 Cr.L.J. 1170: A.I.R. 1958 Cal. 482.

The doctrine of *res gestae* is an exception to the hearsay rule. Facts which may be proved as part of *res gestae* must be facts other than those in issue and must also form part of that very transaction and be thus connected with the facts in issue. In view of the fact that a statement in order to be a part of *res gestae*, must have been made substantially contemporaneously with the act or immediately after it, the interval between the act and the statement assumes significance. In no case, the statement should be in the nature of a mere declaration or narration of a past event. Thus, statement made by the prosecutrix after the rape narrating the incident, *held*, could not form part of the transaction constituting rape, which was a fact in issue; it was more of a narration of past event notwithstanding its close proximity in time: 1989 Cr.L.J. 2238 (Him. Pra.) (D.B.); 1992 Cr.L.J. 2415 (Him. Pra.) (D.B.).

A declaration made subsequent to the occurrence is admissible if it could be validly assumed that the exciting influence was still at work; whether the declaration is so connected with the fact in issue as to form part of the same transaction is to be decided on consideration of all surrounding circumstances. Thus, where the shopowner immediately rushed to the Police Station and there was no room to assume that his declaration was not contemporaneous or that the interval could allow fabrication, *held*, the requirements of S. 6 were satisfied; the conditions for admissibility of such statements are proximity of time, proximity of the Police Station and continuity of the action: (1984) 1 An.W.R. 290; 1984 M.L.J. (Cr.) 159: 1984 Cr.L.J. 674: (1983) 2 An.L.T. 374: (1984) 1 A.P.L.J. 38.

Where the first information report, as per the informant, was based on information conveyed by the accused himself, *held*, the accused's admission is not only relevant as *res gestae* but also a most important circumstance against the accused: (1992) 3 S.C.C. 106.

Utterances by the accused that he had killed someone, *held*, are not relevant under S. 6, in the absence of the material as to at what time he committed the crime and how long after the commission of the act he disclosed this fact: 1993 Cr.L.J. 2701 (Ori.) (D.B.).

Statement made to Police—Admissibility of. *See* 50 I.C. 487: 17 All.L.J. 760. Evidence of woman raped—*Res gestae*. *See* 4 L.L.J. 491; A.I.R. 1921 Lah. 258. *See* also S. 7.

Where a woman raped made a statement to her relative shortly after and committed suicide about 3 days after the occurrence, such statement is not admissible under S. 6: 1930 M.W.N. 702.

In a case of rape, a statement made by the complainant immediately after the occurrence to another woman is admissible, not as evidence of the truth of the charge alleged but as corroborating the credibility of the complainant and of the evidence of the consistency of her conduct: 43 I.C. 443: 19 Cr.L.J. 155 (F.B.). *See* also A.I.R. 1930 Cal. 132: 124

I.C. 175 (Statement by the girl to the mother that she was bitten by a leech to be used only to contradict the statement made by the girl). Unless a statement by the girl to her father and the offence under S. 376, I.P. Code, form *res gestae*, such statement is not of much value: A.I.R. 1930 Lah. 337: 127 I.C. 862.

Where a lady teacher had narrated the incident in respect of the Head Master's attempt to outrage her modesty to her three colleagues on the very next day, *held*, even though it was not *res gestae* and, hence, inadmissible under S. 6, but when corroborated by the three witnesses was clearly admissible under S. 157: A.I.R. 1985 S.C. 1268.

Where soon after the attempted rape, the prosecutrix, weeping and wearing blood stained clothes, on being asked by her mother and another, made a statement to them, *held*, her statement is admissible under S. 6 and S. 8, *Illus.* (*j*): 1989 M.P.L.J. 243.

Where a minor married abducted girl stated to her uncle, soon after her recovery that the accused ran away with her ornaments, *held*, same is admissible as *res gestae* under S. 6: 1972 Cr.L.J. 57 (All.).

Hearsay evidence — Statement of bystanders—Admissibility: 34 Punj. Re. (Cr.) 1914: 27 I.C. 664. Hearsay statement to be admissible as substantive evidence of the truth of the facts stated therein must themselves be part of the transaction. The statements as seen from *Illus.* (*a*) in S. 6 of the Evidence Act must be of a person who has seen the actual occurrence and who uttered the same simultaneously with the incident or soon after it so as to make it reasonably certain that the speaker is still under the stress of excitement caused by his having seen the incident. Where the transaction is a single incident, a statement made by a person who was perceiving the statement simultaneously with the occurrence of the incident may be said to be part of the transaction inasmuch as it is the result of a spontaneous psychological reaction through perception. While the spontaneity of the statement is no doubt the guarantee of its truth, the reason for its admissibility under S. 6 of the Evidence Act is that it is a part of a transaction and not merely because it is spontaneous. If the statement is to be admissible, it is not enough that it is made spontaneously, but it must be made out that the person who made the statement had himself seen the incident or occurrence and that the statement was made almost simultaneously with the occurrence: A.I.R. 1951 Ori. 53: I.L.R. (1950) Cut. 509.

Ss. 6 and 32 (1)—Injuries inflicted by the accused on the person of the deceased resulting in fracture of his ribs—Deceased when questioned, soon after, stating that it was the accused who inflicted injuries—Doctor's evidence establishing that the injuries to the ribs were a contributing factor to the death.

Statement of the deceased is relevant under S. 32 (1) of the Act as it was one made by a person who subsequently died and obviously related to the circumstances of the transaction which ultimately resulted in his death—It is also admissible under S. 6 of the Act as it was made by the deceased very shortly after he sustained the injuries: I.L.R. (1964) 16 Assam 67: (1964) 1 Cr.L.J. 393: A.I.R. 1964 Assam 53.

Evidence as to other offences would be relevant and admissible if there is a nexus between the offence charged with the other offence or the two acts form part of the same transaction so as to fall within S. 6. The accused was charged under S. 302, Penal Code, with murder. According to the prosecution case, in the morning of the day of the incident a threat had been given by the accused that he would finish off the deceased and also finish himself off. The Sessions Judge in his charge to the jury referred to the prosecution evidence regarding the attempt by the accused to inflict serious injuries on himself. *Held*, that the evidence as to the manner in which, according to the prosecution, the injuries came to be sustained by the accused must be held to be so closely connected with the offence charged against him as to form part of the evidence upon which the offence charged was sought to be proved. Therefore, the Sessions Judge was right when he referred to that evidence to the jury on the ground that it was a part of the same transaction, and there was no misdirection: I.L.R. (1961) Bom. 183: (1960) 62 Bom.L.R. 857: A.I.R. 1961 Bom. 114.

Statements of witnesses that when they rushed up, they saw the accused with gandasa in his hand and on interrogation he told them that deceased (wife) had abused him, had tried to catch hold of his neck and had even threatened to kill him—Statement of accused is in his favour and not covered by S. 6 as it cannot be treated as *res gestae*—

Statements of witnesses are inadmissible in evidence: 1960 All.L.J. 721: 1960 All.W.R. (H.C.) 556: 1960 All.Cr.R. 355.

Where some witnesses saw the accused grappling with the deceased having a dagger in his hand and soon after the occurrence, a dagger was recovered in pursuance of disclosure by the accused, *held*, the recovery of the dagger formed part of the same transaction: 1989 Cr.L.J. 2486 (J.&K.) (D.B.).

The principle underlying the rule of corroboration is that he, who's evidence is consistence, deserves to be believed. Therefore, where a witness does not support the case of the prosecution at the trial there can be no question of using any earlier statement made by him in favour of the prosecution for purposes of corroboration.

In a trial for murder the wife of the accused had informed the head constable that the accused committed murder and ran away. This statement appeared to have been made sometime after the incident in answer to a query and was not spontaneous. At the trial she became hostile. On the point whether the statement to the police constable could be used to corroborate the evidence of the police constable. *Held*, that her statement to the police constable was not admissible either under S. 6 or under S. 157 of the Evidence Act for corroboration: 1970 M.P.L.J. 976.

Statement of the deceased made to the witnesses, neither spontaneous nor contemporaneous, but made in answer to a query after some time of the occurrence, when the witnesses reached the spot, *held*, the statements of those witnesses could not be considered as *res gestae*: 1990 Cr.L.J. 2763 (Madh. Pra.) (D.B.).

Where the accused gives a spontaneous explanation right at the moment when the crime is committed, the explanation becomes *res gestae* within the meaning of S. 6. Even if such a statement is of doubtful admissibility in a case of corruption because the investigation could be said to have started before the statement was made it should be admissible, especially when it is an exculpatory statement as the conduct of the accused under S. 8. Inasmuch as in cases under S. 109, Cr.P. Code, evidence, that at the moment the accused was apprehended he gave unsatisfactory answers and did not disclose his name but gave a fictitious name, is not shut out as inadmissible under S. 162 of the Cr.P. Code, there is no reason why that evidence should be shut out in other cases: 1959 Cr.L.J. 924: A.I.R. 1959 All. 483. Question of reputation—Relevancy: I.L.R. 32 Pat. 276: A.I.R. 1954 Pat. 84.

The cries and curses of the deceased lady, while in flames, that she had been burnt by her father-in-law and brother-in-law, *held*, are so connected with the criminal act as to form part of the same transaction; they are relevant under S. 6: 1983 Raj.L.W. 723 (D.B.). *See* also 1993 Cr.L.J. 3709 (All.) (D.B.).

Where just after hearing sound of gunfire, the witness reached the spot, his niece told him that the accused had shot his wife, *held*, same is admissible under S. 6 and the further statement that when he went inside the house he saw the accused threatening every one with a pistol that they should get away otherwise he would kill them like the deceased, is also admissible under S. 6: 1993 Cr.L.J. 1736 (All.) (D.B.).

Where the prosecution case was that immediately after the deceased-wife's cries were heard from inside the room, her children started crying from outside, uttering words indicating that their mother was either being killed or had been killed, *held*, the witnesses' evidence about what the children had then said or did is admissible under S. 6: A.I.R. 1974 S.C. 778: 1974 Cr.L.J. 664: (1974) 4 S.C.C. 193. *See* also I.L.R. (1980) 2 Karn. 829 (D.B.).

Where a witness who was present in the room when the accused set his wife on fire by pouring kerosene oil, was found immediately thereafter running in the bazar and crying for help and shouting that the accused had set his wife on fire, *held*, same could be safely classified as a fact so connected with the fact in issue (*viz.*, accused having poured kerosene oil on his wife and setting her on fire), as to form part of the same transaction. Thus, the statements of those witnesses, who had seen the said witness running and shouting for help, were clearly relevant under S. 6: 1992 Cr.L.J. 2415 (Him. Pra.).

In a suit on a promissory note executed by a *pardanashin* lady where it is established by evidence that the promissory note was taken by the husband of the lady inside the house and was brought back after obtaining the signature and the husband stated that the signature on the note was his wife's, the

7. Facts which are the occasion, cause or effect of facts in issue.—Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

---

statement so made is admissible in evidence to prove the signature of the lady on the promissory note: (1960) 1 M.L.J. 142 [*Obiter*].

Ss. 6, 8, 11, 14—Printing and possession of infringing material at one place—Inference: 1963 All.L.J. 930: (1965) 1 Cr.L.J. 530: A.I.R. 1965 All. 206.

Statements made by the workers of the factory to the Factory Inspector at the time of inspection about the person-in-charge of the factory, *held*, is admissible under S. 6 as proof of identity: 1981 All.W.C. 247.

A deed of adoption is not irrelevant to the decision of an issue of adoption. In the majority of cases, as in the instant case, execution of a deed of adoption forms a part of the transaction of adoption itself, and is relevant under S. 6 of the Evidence Act. Apart from it, it is the record of the fact of adoption and can be used to corroborate the testimony of witnesses in Court. Further, as the deed contains the statement of the adoptive mother who being dead could not be called to the witness box and the statement relates to the relationship by adoption it is also admissible under sub-S. (5) of S. 32 of the Evidence Act: (1961) 63 Bom.L.R. 726: I.L.R. (1960) Bom. 847: A.I.R. 1962 Bom. 175.

Where on refusal of the alleged father to pay for maintenance of the illegitimate child, the mother convened a panchayat wherein the father was ordered to pay some money and paddy to the child, *held*, in a suit for maintenance of the said child, the conduct of the mother and the alleged father and the panchayatdars, is a relevant factor: 1993 Cr.L.J. 767 (Karn.).

Agreement by Hindu father on behalf of minor son to purchase property—Agreement reduced to writing—Suit for rescission of contract—Defendant pleading that contract was also on behalf of the entire joint family—Plea amounts to variation or addition to terms of agreement—Not within proviso (6)—Defence, *held*, barred by S. 92: (1966) 68 Bom.L.R. 891.

'Bona fide'—While construing word *'bona fide'* Court has to see that premises are required both reasonably and *bona fide*—*Bona fides* may be proved like any other fact in issue or relevant fact: (1966) 79 Mad.L.W. 612.

Ss. 6, 8 *and* 7—Offence under S. 165-A, Penal Code — Trap laid — Conversation between accused and complainant tape-recorded—Amount handed over to complainant—Voices of complainant and accused identified — Contemporaneous dialogue between them *held* formed part of *res gestae* and was relevant under S. 8—Further, like a photograph of a relevant incident a contemporaneous tape-record of a relevant conversation was admissible under S. 7: (1967) 3 S.C.R. 720: A.I.R. 1968 S.C. 147.

Ss. 6, 137, 3 *and* 155—Impeaching credit of witness — Omission by opponent to put material and essential case in cross-examination—Veracity of opponent's version of the case ought to be taken into account—Omission to do so vitiates appreciation of evidence: 1968 Ker.L.J. 103: I.L.R. (1968) 1 Ker. 129: A.I.R. 1968 Ker. 282.

Section 7—Notes.

Where the accused takes the defence founded on an *alibi*, reasoning from probabilities cannot take the place of evidence: A.I.R. 1930 Pat. 509: 128 I.C. 351.

Scope and applicability: 1968 Cr.L.J. 1584: A.I.R. 1968 Bom. 400.

Police officer asking accused whether he knew of certain dacoity—Accused taking officer to grain bin and producing ornaments—Conduct of accused even if not covered by S. 27 is covered by Ss. 7, 8 and 9: 1965 All.L.J. 344.

A contemporaneous tape-record of a relevant conversation is a relevant fact, and is admissible under S. 7 of the Evidence Act. The manner and mode of its proof and the use thereof in a trial is a matter of detail and it can be used for the purpose of confronting a witness with his earlier tape-recorded statements. It may also be legitimately used for the purpose of shaking the credit of a witness.

For a use of an earlier tape-recorded statement the identification of the taped voices is a crucial matter and indeed such proper

Illustrations

(*a*) The question is, whether *A* robbed *B*.

The facts that, shortly before the robbery, *B* went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.

(*b*) The question is whether *A* murdered *B*.

Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

(*c*) The question is, whether *A* poisoned *B*.

The state of *B*'s health before the symptoms ascribed to poison, and habits of *B*, known to *A*, which afforded an opportunity for the administration of poison, are relevant facts.

---

identification is the *sine qua non* for the use of the earlier tape-recording. Where the voice is denied by the alleged maker thereof, a comparison of the same becomes inevitable and the proper identification of voices must be proved by a competent witness. The recording of the voice of a witness for the purpose of comparison with an identification of his earlier recorded voice can, therefore, be allowed by the Court and such comparison is neither expressly nor impliedly prohibited under any statute: (1969) 71 Punj.L.R. 519: 1969 Cr.L.J. 1422: A.I.R. 1969 Punj. 350. *See* also (1977) 79 Bom.L.R. 217 (D.B.).

Tape-recorded conversation is admissible provided (*i*) the conversation is relevant; (*ii*) the voice is identified; and (*iii*) the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasures. A contemporaneous tape-record of a relevant conversation is relevant and admissible. It is also comparable to a photograph of an incident: A.I.R. 1973 S.C. 157: (1972) 2 S.C.W.R. 776: (1973) 1 S.C.C. 471.

Where evidence is a tape-recorded statement, certain safeguards have to be taken; no possibility of tampering is to be left open. It is well known that a tape-recorded statement may be tampered with by re-recording and suitable deletions and manipulations: A.I.R. 1974 Raj. 79: 1973 Raj.L.W. 409.

On admission of a tape-recorded transcript in evidence, it is essential to prove the conversation; if one of the conversationist has denied his voice, there is no better way than to compare his purported tape-recorded voice with his voice tape-recorded in the Court's presence. For proving a tape-recorded statement, identification of the taped voices is crucial matter; such proper identification indeed is the *sine qua non;* proper identification of voices must be proved by a competent witness; the Court may allow such comparison and identification: 1978 L.L.J. 61.

A tape-recorded conversation is, no doubt, comparable to a photograph; it is admissible provided the recorded conversation is relevant, the voice has been identified and the accuracy of conversation is proved by eliminating possibility of erasing the recorded tape. But where in a divorce proceeding under the Hindu Marriage Act, 1955, for the wife's mental disorder, the husband produced a tape-recorded conversation wherein the wife had admitted about her ailment, but there was not even a remote reference to this recorded conversation in the petition and the husband had nowhere explained either in the petition or in his statement the circumstances and the manner in which this conversation had been recorded and none except himself had proved that the recorded female voice was that of the wife nor was her voice compared by recording it in the Court nor the husband could tell the durations of or different intervening intervals between the recording of the conversation, *held*, the tape could not be used as evidence; the wife's statement therein could neither be used as her admission of her mental ailment nor for shaking her veracity during her cross-examination in terms of S. 145: A.I.R. 1985 P.&H. 128: (1985) 1 Hindu L.R. 378. *See* also S. 3, Note 11, *supra*.

The process of tape-recording offers an accurate method of string and later reproducing sounds. The imprint on the magnetic tape is the direct effect of the relevant sounds. Like a photograph of a relevant incident, a contemporaneous tape-record of a relevant conversation is a relevant fact and is admissible under S. 7 of the Evidence Act. Thus, if a statement is relevant, an accurate tape record of the statement is also relevant

8. Motive, preparation and previous or subsequent conduct.—Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

---

and admissible. The time and place and accuracy of the recording must be proved by a competent witness and the voice must be properly identified. One of the features of magnetic tape recording is the ability to erase and re-use the recording medium. Because of this facility of erasure and re-use the evidence must be received with caution. The Court must be satisfied beyond reasonable doubt that the record has not been tampered with. The fact that the tape-recording was done without the knowledge of the person concerned is not of itself an objection to its admissibility in evidence. The Court cannot accept the inculpatory part and reject the exculpatory part of the accused's answers under S. 342 of the Code of Criminal Procedure.

Where in a bribery case the police set up a trap by concealing a microphone of a tape recorder and recorded the conversation between the accused and the police decoy witness to whom the bribe was offered, by hiding themselves in an adjoining inner room, it could not be said that the statements made by the accused or the decoy witness were made to police officers as to bar the tape recorded statements from being used as evidence, under S. 162, Cr.P. Code. Nor in such a case can protection be claimed against the use of the statements, under Art. 20(3) of the Constitution of India as it cannot be said that the accused was compelled to be a witness against himself. He was free to talk or not to talk. There was no element of duress, coercion or compulsion. His statements were not extracted from him in an oppressive manner or by force or against his wishes: (1967) 3 S.C.R. 720: A.I.R. 1968 S.C. 147.

Where the transcript of conversations recorded on a tape or the tape itself is not produced in the trial Court or before the lower appellate Court, *held*, such conversations cannot be allowed to be adduced as additional evidence in the second appellate Court: A.I.R. 1974 Raj. 79: 1973 Raj.L.W. 409.

Ss. 7 and 45—Evidence that there were foot-prints at or near a scene of offence or that the foot-prints came from a particular place or led to a particular place, is relevant evidence under S. 7 and statements as to these facts made by person skilled in identifying foot-prints are not excluded by S. 45. The words 'science' or 'art' in S. 45 are to be construed widely. The amendment relating to finger impressions is made to meet particular decisions which had been given by the Courts. The amendment does not operate to limit the wide meanings which should be given to the expression, 'science' or 'art'. Whether a particular tracker called upon to assist is or is not an expert in this act or science is a matter to be decided by the Judge or Magistrate. But if it is established to the satisfaction of the Court that the tracker is a person capable of distinguishing and identifying foot-prints, there is no reason why his evidence should not be given consideration: A.I.R. 1942 Sind 11: I.L.R. (1941) Kar. 525.

In case of death by poisoning the prosecution must establish: (*1*) the death was caused by poisoning; (2) the accused had the poison in his possession; and (3) that the accused had the opportunity at the time to administer poison to the deceased; in the absence of evidence to unhesitatingly hold that the poison causing the deceased's death must have been administered by the accused, a conviction under S. 302 of the Indian Penal Code cannot be sustained: (1971) 2 Cut.W.R. 53.

Statement of persons as to cause of his death or as to any circumstances of the transaction which resulted in his death—Conviction based on identification: 1967 Ker.L.T. 466.

Where to prove residence at the suit premises, letters addressed for such premises, were produced without examining the senders thereof, *held*, it could not be said that the letters held no evidentiary value; their contents having no bearing upon the question under consideration, their contents need not be proved by producing their writer as a witness: (1984) 2 Bom.C.R. 671.

Section 8—Synopsis.

1. Scope.
2. Motive.
3. Evidence of conduct.

---

1. Scope.—Evidence of character, conduct and state of mind is admissible under Ss. 8, 14 and 32: 1980 M.P.L.J. 300 (D.B.).

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1.—The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements, but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2.—When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

Illustrations

(*a*) *A* is tried for the murder of *B*.

The facts that *A* murdered *C*, that *B* knew that *A* had murdered *C*, and that *B* had tried to had extort money from *A* by threatening to make his knowledge public, are relevant.

(*b*) *A* sues *B* upon a bond for the payment of money. *B* denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, *B* required money for a particular purpose is relevant.

The admissibility of statements alleged to be made by persons who are not available to give evidence on account of circumstances set out in S. 32, is not circumscribed by that section. If a statement made by a person, since deceased, is admissible under a provision other than S. 32, it can be admitted though it does not fall within the provisions contained in S. 32.

A complaint in writing made to the police by a person who dies some time thereafter, expressing apprehension of death at the hands of a certain person is admissible in evidence under Ss. 32 (1) and S. 8 of the Evidence Act, when the person whose conduct is the source of the apprehension, is charged with the offence of murder of the person making the complaint. The statement is admissible as relating to "the circumstances of the transaction which resulted in his death", within S. 32 (1). The fact that the deceased had made a complaint to the police against the accused charging him with serious offences may also be admitted as showing a motive under S. 8: 1960 Cr.L.J. 894: A.I.R. 1960 Bom. 290.

A false explanation offered soon after the commission of the offence apparently designed to give to the facts an appearance to the accused's advantage is admissible not only under S. 8 but is also of considerable importance: 1972 Cr.L.J. 1342.

The statements made by a victim of a rape to other witnesses regarding the offence are admissible in evidence as evidence of conduct as indicated by *Illus.* (*j*) to S. 8, Evidence Act: 1956 An.W.R. 572.

Evidence referring to threats given by accused to deceased is admissible under the section. The threats given by the accused constitute a motive and explain his antecedent conduct. The presence of motive is relevant under the section as it goes to show the *mens rea* of a crime. It is circumstantial evidence against an accused person. Motive, preparation and opportunity, are mental acts covered by this section: A.I.R. 1970 Goa 96.

Evidence even of the conduct of a deceased conspirator, is not admissible under S. 8 of the Evidence Act on the very terms of S. 8. The evidence of conduct admissible under S. 8 of the Evidence Act is of conduct of a person who is a party to the action: A.I.R. 1957 S.C. 747: 1957 Cr.L.J. 1325.

Accused pointing out stolen property—Recovery from place accessible to others—Presumption : A.I.R. 1958 Mad. 384: 1958 Cr.L.J. 1042.

Statement of witness recorded by Police after detention in Police lock-up—It is not

(*c*) *A* is tried for the murder of *B* by poison.

The fact that, before the death of *B*, *A* procured poison similar to that which was administered to *B*, is relevant.

(*d*) The question is, whether a certain document is the will of *A*.

The facts that, not long before the date of the alleged will, *A* made inquiry into matters to which the provisions of the alleged will relate that he consulted vakils in reference to making the will, and that he caused drafts or other wills to be prepared of which he did not approve, are relevant.

(*e*) *A* is accused of a crime.

The facts that, either before or at the time, of, or after the alleged crime, *A* provided evidence which would tend to give to the facts of the case an appearance, favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(*f*) The question is, whether *A* robbed *B*.

The facts that, after *B* was robbed, *C* said in *A*'s presence—"the police are coming to look for the man who robbed *B*," and that immediately afterwards *A* ran away, are relevant.

(*g*) The question is, whether *A* owes *B* rupees 10,000.

The facts that *A* asked *C* to lend him money, and that *D* said to *C* in *A*'s presence and hearing—"I advise you not to trust *A*, for he owes *B* 10,000 rupees," and that *A* went away without making any answer, are relevant facts.

---

substantive evidence nor can it be reliable evidence of subsequent conduct of the witness under S. 8: 1968 Cr.L.J. 1390 (Manipur).

Wrong interpretation of notifications under Ss. 3, 4 and 5, Minimum Wages Act by Labour Welfare Officer—Relevancy of: 1968 Lab.I.C. 338: A.I.R. 1968 Pat. 90.

Intention is not capable of direct proof as fact—Intention is to be gathered from surrounding circumstance and conduct of accused: 1967 Cr.L.J. 184: A.I.R. 1967 Goa 11 (F.B.); (1969) 18 Law Rep. 412 (Mys.).

Proceeding under S. 10, Hindu Marriage Act—Documents of maintenance proceedings—Admissibility: 1966 Cr.L.J. 1438: A.I.R. 1966 Him. Pra. 70.

"Statement of persons as to cause of his death or as to any circumstances of the transaction which resulted in his death"—Conviction based on identification: 1967 Ker.L.T. 466.

Requisites—Loitering with specified intention—Nature of proof necessary—Proof may be of acts done before or at the time of loitering and/or from conduct: 1967 Cr.L.J. 570: A.I.R. 1967 Ori. 52.

First information report—Use of—Natural death of informant long after occurrence but before commitment proceedings—F.I.R. not admissible either under S. 32 (1) or S. 8, Evidence Act: (1964) 2 Cr.L.J. 696: A.I.R. 1964 Ori. 262.

First information report—What is—Use of, at the trial—First information by accused—Admissibility in evidence: I.L.R. (1961) 11 Raj. 299: (1962) 1 Cr.L.J. 82: A.I.R. 1962 Raj. 3.

Informant belaboured—F.I.R. after occurrence—Informant dying natural death before examination as witness—Statement in F.I.R. admissible under S. 8 of the Evidence Act—Doubt regarding name of prosecution witness can be removed by looking into F.I.R.: 1961 M.P.L.J. (Notes) 309: (1961) 1 Cr.L.J. 270: A.I.R. 1961 Madh. Pra. 45.

Where the accused after stabbing the deceased went to the police station and made a confession and *inter alia* stated that he would show the place where the deceased fell and the tree where the dagger and the stick were kept. *Held*, that the statement was admissible under S. 27. Even otherwise, inasmuch as the conduct of the accused immediately, after the death of the deceased was relevant under S. 8 of the Evidence Act that conduct was admissible. What is admissible under S. 8 of the Evidence Act is the conduct of the accused and the statement which affected or influenced that conduct: (1963) 1 Cr.L.J. 142: A.I.R. 1963 Andh. Pra. 87.

(*h*) The question is, whether *A* committed a crime.

The fact that *A* absconded after receiving a letter warning him that inquiry was being made for the criminal and the contents of the letter, are relevant.

(*i*) *A* is accused of a crime.

The facts that after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(*j*) The question is, whether *A* was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which,the complaint was made, are relevant.

The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant, as a dying declaration under section 32, clause (1), or as corroborative evidence under section 157.

(*k*) The question is, whether *A* was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that he said he had been robbed, without making any complaint, is not relevant, as conduct under this section, though it may be relevant, as a dying declaration under section 32, clause (1,) or as corroborative evidence under section 157.

Ss. 8 and 157—Applicability—Unnatural offence—Statement by girl victim to mother 16 hours after occurrence after persistent questioning—Not admissible in evidence to corroborate her evidence at the trial: I.L.R (1960) 10 Raj. 250.

Ss. 8 and 27—Scope—Event if 'information' under S. 27 is inadmissible, facts discovered therein are admissible under S. 8: 1969 All.Cr.R. 556: 1970 All.L.J. 149: 1969 All.W.R. (H.C.) 865.

Two types of statements may be proved under S. 27: (*i*) where the statement leading to the discovery is a bare expression of knowledge; (*ii*) where the person in custody imparts not only knowledge, but takes the responsibility for the earlier possession of the article, at an earlier stage. If, where the former kind of statement is made, the place of concealment of the article is accessible to others and is not in the exclusive possession or control of the accused, it can be plausibly urged that he had somehow learnt of the existence of the article there and has no more connection with it. In the second type, the place may be accessible to others; but the man says—'I have kept it', and, therefore, at one stage he had the article in his possession. If it is an incriminating article, he is only explaining. Ss. 8 and 27 are not mutually exclusive. A statement of the second type is admissible under S. 27 and also relevant under S. 8 as conduct. It shows that the person has been in possession of the incriminating article. *Held*, as the statement led to the discovery of the dhariya concealed in his haystack and since he had himself placed it, the fact of that place being accessible to others was of no consequence: 1961 Jab.L.J. 1317: 1962 M.P.L.J. 414: (1962) 2 Cr.L.J. 694 (D.B.).

The conduct of a woman who has been raped is relevant only if she lodges a complaint. If she does not make a statement with a view to make a complaint, then that statement will not be admissible in evidence. Where the raped girl, when questioned immediately after the occurrence by her mother and other persons, made statements to the effect that she had been ravished by the appellant, the alleged statements are not in the nature of a complaint by raped girl to witnesses in answer to questions put to her and hence are not admissible in evidence under S. 8 as evidence of conduct. Even if it be held that those statements were admissible under S. 8, they could not be used as the basis for conviction of the appellant under S. 376, Penal Code. They cannot be received as substantive evidence of the facts alleged in the case. They can be used only as evidence of the credibility of the testimony of the

complainant, namely, the girl about the facts alleged. Where the ravished girl soon after the occurrence commits suicide by setting fire to her body ultimately resulting in her death, the statements cannot be admissible under S. 32(1), as the rape on the girl cannot be said to be the cause of her death or transaction resulting in her death. It might have been the motive which led her to set fire to her body. The case is not covered by S. 32, *Illus.* (*a*): 1961 B.L.J.R. 83: (1961) 2 Cr.L.J. 137: 1960 Pat.L.R. 193.

Rape case — Victim's statement to her mother about incident—If admissible: 1969 M.P.W.R. 890: 1970 M.P.L.J. 242: 1969 Jab.L.J. 992.

Scope and applicability: 1968 Cr.L.J. 1958: A.I.R. 1968 Bom. 400.

2. Motive.—Proof of motive is not substantive but only corroborative evidence: 1983 Cr.L.J. 694 (Raj.).

If motive is proved or established, it affords a key or pointer to scan the evidence in the case in that perspective and as a satisfactory circumstance of corroboration. It is a very relevant and important aspect, to highlight the intention of the accused and the approach to be made in appreciating the totality of the circumstances, including the evidence disclosed in the case: 1995 Cr.L.J. 2634 (S.C.).

Motive is not evidence; it only supports the version of the crime and makes probable the commission of the offence. Motive is of importance in cases based on circumstantial evidence; motive is a very relevant and strong link in the chain of circumstances. But non-proof of motive is no reason to disbelieve an otherwise convincing and trustworthy evidence. Success or failure of the prosecution case is not dependent upon the proof or non-proof of the accused's motive: (1992-1) 40 B.L.J.R. 436 (D.B.); 1980 Cr.L.J. 71 (Punj.).

Sometimes motive plays an important role and becomes a compelling force to commit a crime and, therefore, motive behind the crime is a relevant factor for which evidence may be adduced. A motive is something which prompts a person to form an opinion or intention to do certain illegal act or even a legal act but with illegal means with a view to achieve that intention. In a case where there is clear proof of motive for the commission of the crime it affords added support to the finding of the Court that the accused was guilty for the offence charged with. But it has to be remembered that the absence of proof of motive does not render the evidence bearing on the guilt of the accused nonetheless untrustworthy or unreliable because most often it is only the perpetrator of the crime alone who knows as to what circumstances prompted him to a certain course of action leading to the commission of the crime: A.I.R. 1994 S.C. 2420: 1994 Cr.L.J. 3271.

Proof of motive is not necessary: 1985 Cr.L.J. 52 (Ori.); 1985 Cr.L.J. 1633 (Ori.).

Motive is a double-edged weapon; by itself it cannot lead to the only conclusion that the accused alone was responsible for committing the offence: 1979 Bom.C.R. 721 (D.B.).

Motive is a double-edged weapon; it can both be a ground to commit the offence as well as an equally good reason to implicate the innocent: I.L.R. (1979) 2 Del. 373: 1979 Cr.L.J. 1159 (D.B.).

It is not necessary for the prosecution to prove by any affirmative evidence the motive which impelled the offender to commit murder: 1956 Pat.L.R. 434.

The Court need not consider the question of motive if it is satisfied that other evidence is acceptable: A.I.R. 1971 S.C. 1656: 1971 M.L.J. (Cr.) 43.

Motive under S. 8 is undoubtedly relevant but its having been established is no substitute for proof of the offence charged; motive is relevant only for judging the probability of the prosecution case: (1989-2) 37 B.L.J.R. 8 (D.B.).

It is well settled that where direct evidence of the assault is worthy of credence and belief, the question of motive becomes more or less academic and wholly irrelevant. Motive is sometimes clear and can be proved; sometimes it is shrouded in mystery and very difficult to locate: A.I.R. 1976 S.C. 2499: (1976) 4 S.C.C. 362.

It cannot be contended that even if its witnesses are truthful, the prosecution must fail because motive is difficult to find; in fact, it is not incumbent on the prosecution to prove the motive; often, motive is indicated to heighten the probability of the offence having been committed by the person impelled by such motive: A.I.R. 1974 S.C. 1740.

Motive being a mental attitude is often difficult of proof. People do often commit grave crimes from the most inadequate motives. So absence of proof of motive or an adequate motive is not fatal to the prosecution case even in a case depending solely on circumstantial evidence. If the circumstances otherwise establish guilt, inability to prove motive or an adequate motive is not an impediment to a conviction: I.L.R. (1963) 2 Ker. 26: (1963) 2 Cr.L.J. 458.

Where there is positive proof of the man having committed a crime, there is no need to prove motive or previous ill-will; but existence and non-existence of motive often forms an important factor for assessing the guilt or innocence of the accused: A.I.R. 1971 Mad. 194: 1970 Mad.L.W. (Cr.) 239: (1971) 2 M.L.J. 53: 1971 Cr.L.J. 615 (D.B.); I.L.R. (1972) Cut. 600 (D.B.).

Motive, however, adequate cannot sustain a conviction; if evidence against the accused is, clear, cogent and reliable, the absence of proof of motive is of no consequence. Besides, the prosecution is not bound to prove motive. What is more important is to see whether the evidence was clear and convincing and could be acted upon. [1975 Cr.L.J. 66 (S.C.); 1981 Cr.L.J. 714 (S.C.), Rel. on]: (1982) 54 Cut.L.T. 321.

Per *Crump, J.*—A motive is that which moves a man to do a particular act. Whether the belief which produces the state of mind is true or false, the motive remains the same and the truth or falsity of the belief is not really in question: 62 I.C. 545: (1920) 22 Bom.L.R. 1274.

Where an offence is alleged to have been committed for a particular motive, the Court has to inquire whether the pattern of the crime fits in with the motive: A.I.R. 1974 S.C. 1740.

The question of sufficiency or otherwise of motive is a matter depending on the psychology of the individual concerned. Some people may act on the impulse of a motive apparently trivial in character and may commit grave crimes, while others, entertaining the strongest feelings of anger and hatred, may refrain from committing such crimes by falling a victim to such feelings: 1959 Ker.L.T. 167: I.L.R. (1959) Ker. 319.

Motive may not by itself be the proof of guilt; but it is relevant as it makes the prosecution story probable: 1974 Punj.L.J. (Cr.) 338: 1975 Cr.L.J. 132; 1979 W.L.N. (U.C.) 252 (Raj.) (D.B.); 1974 Punj.L.J. (Cr.) 364 (D.B.); 1974 Punj.L.J. (Cr.) 271; A.I.R. 1957 Andh. Pra. 758: 1957 M.L.J. (Cr.) 421; A.I.R. 1968 Mad. 117: 1968 Cr.L.J. 493.

It is not always easy to prove the motive or the immediate cause; the motive is often locked up in the offender's heart; if proved, the motive and the immediate cause does lend additional support to the Court's finding of guilt; but the absence of clear proof of the motive or immediate cause for the incident does not necessarily lead to the contrary conclusion: 1977 Raj.L.W. 212 (D.B.).

The proof of motive satisfies the judicial mind about the likelihood of the accused being author of the crime; its absence only calls deeper forensic search but cannot undo the effect of otherwise sufficient evidence. Often shrouded in mystery, motives are subjective, submerged and not amenable to easy proof. A clear proof of motive lends additional support to the Court's findings that the accused was guilty; but the absence of its clear proof does not necessarily lead to the contrary conclusion. Failure to discover an impelling motive does not reflect upon the credibility of a proved reliable witness: 1977 Raj.L.W. 107 (D.B.); 1993 Cr.L.J. 1656 (S.C.); A.I.R. 1973 S.C. 2622.

Motive can never supply want of reliable evidence of the offence: I.L.R. 7 Lah. 84: A.I.R. 1926 Lah. 88. The prosecution is entitled to call evidence in support of an alleged motive, however improbable it may be and nonetheless so because such evidence may suggest that the accused have committed some crime other than that with which they are charged. If such evidence is given with a view to showing that they are persons likely to have committed the offence with which they are charged the evidence would be inadmissible; but it would be admissible to establish the motive for the offence with which they are charged: A.I.R. 1946 P.C. 187: (1946) 2 M.L.J. 297 (P.C.): (1945-46) 51 Cal.W.N. 200.

Motive or malice in prosecution even if established cannot affect validity of investigation and prosecute if it is otherwise regular: 1968 Cr.L.J. 493: A.I.R. 1968 Mad. 117.

Evidence of prior incidents which took place a fortnight ago between the accused

and the deceased is admissible where they by themselves and in conjunction with other facts make the existence of the facts in issue probable and they show motive on the part of the accused to act in the manner in which he is alleged to have acted: 1958 Cr.L.J. 1170: A.I.R. 1958 Cal. 482.

The evidence of the motive in the assassin's mind is very often not within the reach of others; it may not even be known to the victim. A crime may even be committed without premeditation or preplanning or even on the spur of the moment: A.I.R. 1989 S.C. 733.

The prosecution is not bound to prove motive; for, known only to the perpetrator of the crime, it may not be known to others; on the motive being proved, the Court has to consider whether it was adequate to impel him to commit the offence: A.I.R. 1981 S.C. 1021: 1981 Cr.L.J. 714: (1981) 2 S.C.C. 300.

Prosecution is not bound to prove motive of any offence in as much as motive is known only to the perpetrator of the crime and may not be known to others. It does not, therefore, follow that if motive is not proved, the evidence of any witness becomes automatically unreliable: 1995 Cr.L.J. 2998 (Ori.) (D.B.).

If the crime could be otherwise established, mere absence of a strong enough motive for committing such an unnatural crime as patricide, *held*, could be of no assistance to the accused: A.I.R. 1974 S.C. 1193.

Motive is not a decisive test for criminal character of human acts; an unlawful act will not become lawful even if done with a good motive; and a lawful act will not become unlawful even if done with a bad motive. A man is not punished under the penal law for having a guilty mind; he is punished only for his unlawful actions; the law judges a man by his actions, and not by the motions of his mind. The absence of proof of motive is of no consequence where cogent and reliable evidence as to the accused's guilt is available. Motive need not be the immediate objective of a murder nor is it an ingredient of the offence: (1992) 2 Ker.L.J. 529 (D.B.).

Once there is the clinching evidence of the seriously injured complainant duly corroborated by other attendant evidence, *held*, inadequacy of motive loses all its significance: (1990-2) 31 Guj.L.R. 1215 (D.B.).

Penal Code, 1860, S. 302 — Motive for crime: (1963) 3 S.C.R. 281: A.I.R. 1956 S.C. 1322.

In the absence of clear and cogent evidence pointing to the accused's guilt, the proof of motive, however adequate, cannot sustain his conviction: 1982 Cr.L.J. 534 (Ori.).

Cumulative effect of circumstances may irresistibly prove guilt; circumstantial evidence of conclusive character unerringly pointing to guilt at times may be more reliable than direct evidence; but the absence of motive would be a strong circumstance favouring the accused: 1973 Cr.L.J. 723.

True, motive is of no consequence if the evidence against an accused is clear and cogent; but absence of the proof of motive should put the Court on its guard to examine the prosecution evidence with great care: 1985 Cr.L.J. 580.

The prosecution's failure to establish the accused's motive does not mean that the entire prosecution case had to be thrown overboard; it only casts a duty on the Court to scrutinize other evidence, particularly of the eye-witnesses, with greater care: A.I.R. 1975 S.C. 118: (1975) 3 S.C.C. 266.

In the absence of a clear proof of motive, the Court should thoroughly scrutinize other evidence having bearing on the accused's guilt: (1979) 48 Cut.L.T. 111 (D.B.).

Failure to prove a motive does not necessarily mean absence of motive. If there was really no motive and the crime was completely motiveless then that circumstance can be taken into account along with the evidence of prior insanity: I.L.R. (1955) Nag. 722: A.I.R. 1956 Nag. 187; 1975 W.L.N. 373 (Raj.) (D.B.). While the prosecution is not bound to prove the motive of an occurrence, it is necessary for the Court to consider the matter carefully when, in fact, the prosecution suggests a motive: A.I.R. 1958 Cal. 118.

Undoubtedly, motive has an important significance in evidence; but motive is always locked up in the accused's mind which is sometimes difficult to unlock. Persons do not act wholly without motive; failure to discover the motive does not mean its non-existence; the failure to prove motive is not fatal; when facts are clear, non-proof of motive is immaterial; it does not break the link in the chain of circumstances connecting the accused with the crime; nor does it militate

against the prosecution case: A.I.R. 1992 S.C. 1175: (1992) 3 S.C.C. 43.

The prosecution is not required to establish motive against each and every accused: 1980 Cr.L.R. (Bom.) 437.

Enmity is a double-edged weapon; motive has no importance in such a case: 1993 Cr.L.J. 2574 (Mad.) (D.B.).

In the case of a husband murdering his own wife, there may be many considerations to be looked into; it is very difficult in a given case to know the exact motive: A.I.R. 1983 S.C. 1091: 1983 Cr.L.J. 1444.

In a case of the wife's murder by the husband where there is no motive, *held*, the Court should examine the prosecution evidence with great care and caution: 1985 Cr.L.J. 575. *See* also 1973 Cr.L.J. 829 (Him. Pra.) (D.B.).

Where the murder was a sequal to a very silly quarrel between the accused and the deceased over getting water from the tap, *held*, absence or even insufficiency of motive is not of much significance if direct evidence of murder is available: 1976 Cr.L.J. 1409 (Del.) (D.B.).

Where a son's murdering his father was attributed to the son's desire that his father should transfer land in his name, *held*, the deceased's will bequeathing the lands to the son was sufficient to dislodge the motive; the contention that the will was likely to be changed, in the absence of evidence of the son not having good relations with his father, was a figment of imagination: A.I.R. 1988 S.C. 1705.

Where during the pendency of their trial under Ss. 363, 366 and 376 of the Indian Penal Code, for kidnapping and committing rape on the prosecutrix and while on bail, the accused murdered the prosecutrix, *held*, the overwhelming oral and documentary evidence clearly established their strong motive to murder the deceased: A.I.R. 1992 S.C. 891.

Where the circumstantial evidence made it clear that the accused had an eye on the deceased's property and had illicit relations with his wife, and the accused and the deceased were not on good terms as the accused was claiming a part of the land in the deceased's possession, *held*, the accused had a strong motive to commit the murder as by eliminating the deceased, he could get the property as well as the woman: A.I.R. 1991 S.C. 342.

Where the Courts below had found that there were serious misunderstandings between the deceased and the accused because of the accused's illicit relations with the deceased's wife, *held*, the accused had a probable motive but the motive by itself was no proof of conspiracy: A.I.R. 1993 S.C. 2618: 1993 All.L.J. 1273: (1993) 2 U.J. (S.C.) 632.

Where eyewitnesses stated that while leaving the dead body the assailants had shouted that they had killed the "Police agent" and proclaimed "red salute" to Naxalbari, *held*, the motive that impelled the accused to murder the deceased was that they suspected him to be a Police agent: A.I.R. 1978 S.C. 383: 1978 U.J. (S.C.) 123: (1978) 2 S.C.C. 382.

The deceased's refusal to comply with persistent requests and the possibility of the land going out of accused's reach, *held*, is not an inadequate motive; numerous crimes have been perpetrated for less adequate reasons: A.I.R. 1973 S.C. 55: (1973) 3 S.C.C. 219.

Where from her 'complaint' made a month before her murder against her husband to the Police that he was not providing household expenses and when demanded he would assault her with fist blows, an unchallenged statement proved by the Police Inspector, *held*, the prosecution had clearly established the husband's motive: (1985) 1 Bom.C.R. 559 (D.B.).

Where a father gave the land standing in his own name to the accused but subsequently he got it mutated in the name of his other son, *held*, it constituted a strong motive for the murder: 1985 Cr.L.J. 1416 (Raj.).

Where the accused desiring to have a modern wife was carrying on matrimonial correspondence with exchange of photos in 1971, as established by documents and oral evidence, and he murdered his wife and children in 1973, *held*, the defence could not contend that there was no motive for the accused to finish off his family in 1973: 1985 Cr.L.J. 602 (Raj.).

Mere statement by the accused, a truck driver, to another driver that he would kill the truck-owner, *held*, does not indicate any motive for him to kill the owner: 1990 Cr.L.J. 77 (All.) (D.B.).

Where the accused and the deceased had old election disputes between them followed by pendency of disputes regarding passage of sullage water under S. 107 read with S. 151 of the Code of Criminal Procedure, *held*, it could not be said that it was a weak motive for murdering the deceased: A.I.R. 1992 S.C. 214: 1992 Cr.L.J. 293.

Death due to consuming liquor brought in bottle from accused—Nothing to show how accused got poison nor opportunity to administer poison—In absence of motive, conviction not justified: 1994 Cr.L.J. 814 (Andh. Pra.) (D.B.).

Complaint by deceased widow, some days prior to her murder that she apprehended trouble from accused in her sowing operation—Prosecution case not that making of complaint was cause of her murder—Complaint held not admissible under S. 8 showing motive—*Held*, however, that previous litigation between deceased and accused formed motive for the murder: (1970) 72 Bom.L.R. 405: 1970 Mah.L.J. 634: A.I.R. 1970 Bom. 438.

Where deceased and his brothers had inherited certain property but the accused persons got the lands recorded in their names, in respect of which cases were pending before the Revenue Courts and Criminal Courts and deceased used to do *pairvi* in those cases, *held*, accused persons had strong motive in assaulting the deceased: A.I.R. 1995 S.C. 375.

3. Evidence of conduct.—Under S. 8, Evidence Act, conduct is admissible irrespective of the fact whether the conduct was or was not the result of inducement offered by the Police: 1956 Madh.B.L.J. 1447: A.I.R. 1957 Madh. Bh. 33.

The purpose of a criminal trial is not to enquire into the accused's conduct but to determine whether he is guilty of the offence; obviously, only that piece of conduct would be inculpatory for which the accused has no reasonable explanation: (1972) 2 Sim.L.J. 349.

Previous attempts to commit the offence and preparation to commit it are closely allied; attempts are a step further and nearer to the commission of the offence though both fall short; their probative value manifestly rests on the presumption that the intention to commit the offence was there in the accused's mind and it persisted until power and opportunity came his way to execute it; such evidence is admissible both under S. 8 and S. 14: (1971) 2 M.L.J. 53: A.I.R. 1971 Mad. 194.

As to evidence of conduct and surrounding circumstances, *see* I.L.R. 22 Cal. 406: 24 W.R. 176; I.L.R. 7 All. 385; 25 Sind L.R. 55: A.I.R. 1927 Sind 28; A.I.R. 1937 Sind 293; 35 Cal.W.N. 705: I.L.R. 59 Cal. 40: A.I.R. 1932 Cal. 236; 161 I.C. 885: A.I.R. 1936 Pesh. 72.

The explanation of any admission or conduct must come from the party itself, if alive and able to depose; the Court should not form an explanation of its own not offered by the party; that should lead to an adverse inference against the party: A.I.R. 1971 All. 29 (D.B.).

Subsequent conduct — Relevancy. *See* A.I.R. 1958 Madh. Pra. 246; (1958) 2 W.L.R. 110. 'Conduct' may in certain circumstances include statements as well as acts but in doing so it still retains the difference between an act and a statement. A statement must consist of words, whether they be spoken or written, or spelled out as would be done by a mute person on his fingers; and words would not always be statements. Acts, however, exclude words and cannot be translated into words. So where an accused takes certain articles belonging to the deceased from various places and hands them over to the Police, he cannot be said to be making a statement; much less making a statement amounting to a confession. To such case S. 8 applies: I.L.R. (1941) All. 280: A.I.R. 1941 All. 145; A.I.R. 1941 Oudh 359.

Tenant whether contractual or statutory—On facts, *held* that tenant was not statutory tenant on date of his death and that the tenancy was heritable—Conduct of landlord's Mukhtar in accepting rent, etc., after determination of tenancy, *held*, was evidence of continuation of tenancy: 1965 Cur.L.J. 393 (Punj.).

Copies of the tenant's income-tax returns to prove payment of rent, *held*, are not admissible under S. 3: 1979 U.P. (R.C.C.) 78.

Where the fact in issue was whether the suit properties were private or trust properties, *held*, returns filed under S. 59 of the Bihar Hindu Religious Trusts Act, 1950, might be admissible in evidence, but they cannot themselves be the conduct under S. 8. Mere conduct is no admission, as defined in S. 17 for making it eligible to be used as

admission under S. 21: 1973 B.L.J.R. 509: A.I.R. 1974 Pat. 95 (D.B.).

Though the principle that the factum of adoption and the authority to adopt may be proved by circumstantial evidence alone, like conduct, repute and recognition, etc., but the consideration that evidence naturally gets lost with the lapse of time would not justify acceptance of oral testimony, inherently improbable or instrinsically defective. Scant direct evidence may, in a fit case, be supplemented by convincing circumstantial evidence; but if direct evidence does not inspire confidence and as well appears to be definitely untrue, it cannot be accepted on consideration that no better evidence remained available for lapse of time; it is the paucity and not falsity of direct evidence which may be supplemented; and the inference as to the existence of the authority to adopt may be drawn by a long course of conduct characterised by uniformity and consistency: A.I.R. 1971 All. 29 (D.B.).

Evidence of conduct — Relevancy. *See* Hindu Law — Adoption: A.I.R. 1958 Bom. 270: (1958) 60 Bom.L.R. 605.

A lawyer's statement showing his conduct in giving a particular advice to his client, *held*, is not the client's conduct: A.I.R. 1987 Cal. 115.

Settlement entries—Presumption of correctness attaches to them—They are also evidence of conduct of persons at whose instance the entries were made: I.L.R. (1961) Cut. 635.

Post Settlement Inam granted in lieu of service to ancestors of grantees—Evidence about origin and nature of grant not available—Admission by ancestors of grantees in documents executed by them in favour of plaintiff is strong evidence regarding existence of occupancy rights: I.L.R. (1963) Cut. 146.

Where in a proceeding for divorce under the Hindu Marriage Act, 1955, on the ground of cruelty, the husband, noticing something wrong in the relations between his wife and her *dharambhai* took no action against them but merely reported it to his mother, who spoke to his wife and her mother, *held*, it is not an unnatural conduct; a decent husband would not make a row on such things; reactions differ according to the class to which the parties belong. A husband, an educated and respectable doctor, would not make a hue and cry about such conduct of his wife even if he resented it most deeply. His entire version appears to be quite consistent and natural: (1990) 1 Bom.C.R. 715: (1990) 2 Hindu L.R. 67.

Where the truck driver, after the accident, went to the Police Station and stated that he was driving the truck, a cyclist was injured and people had collected and he had rushed to the Police Station, *held*, though the confessional part of his statement could not be considered admissible evidence because of S. 25, the fact of the driver having gone to and given information about the accident at the Police Station, was admissible under S. 8 as his conduct: (1990-2) 31 Guj.L.R. 785: 1990 Cr.L.J. 2500.

Charge of forgery of sale deed—Statements made by accused before Registrar—Admissibility of: 1933 M.W.N. 96. Absence of entries in account book is a relevant fact: A.I.R. 1924 Nag. 22: 76 I.C. 327.

Agent acting nefariously, presumption from: 80 I.C. 969: A.I.R. 1924 Sind 105.

Where the accused (a woman) is on her trial for making a false charge of rape, the fact that she made certain allegations which she related in the course of an enquiry which she sought and demanded is relevant: A.I.R. 1935 Nag. 69.

A dying declaration by a deceased person made in the form of signs and gestures in answer to questions put to him is admissible evidence: A.I.R. 1936 Bom. 372: I.L.R. (1937) Bom. 68. *See* also 1971 Cr.L.J. 1764 (Punj.) (D.B.).

Evidence even of the conduct of a deceased conspirator, is not admissible under S. 8 of the Evidence Act on the very terms of S. 8. The evidence of conduct admissible under S. 8 of the Act is of conduct of a person who is a party to the action: A.I.R. 1957 S.C. 747.

Conduct in general of each individual co-conspirator, irrespective of the time to which it relates, *held*, is admissible under S. 8: (1978) 2 Cal.L.J. 214. Conduct of an approver. *See* (1978) 5 Cr.L.T. 228 (Punj.) (D.B.).

A missing information given by the accused at the Police Station and entered in the General Diary can be used as a circumstance proving the conduct of the accused, where it destroys the presumption of his innocence.

The General Diary entry is not the first information report at all. A first information report has to answer certain tests, namely, that it must relate to a cognizable offence. A report that somebody is missing is not an information relating to the commission of a cognizable offence under S. 154, Cr.P. Code. Then also it has to be signed by the person giving it. The General Diary Entry about the missing report has not been signed by the person giving it. Every report to the Police is not a first information report. Nor is the entry hit by S. 162, Cr.P. Code: (1962) 2 Cr.L.J. 354: A.I.R. 1952 Cal. 504.

The accused was charged with the murder of his wife who was missing for some time. A photograph of a dead body recovered by the Police was published in a newspaper. The dead body was later on identified as that of the wife. Soon after the photograph was published, the accused was the first to speak to B about it (the photograph) and told him 'People are saying that the photograph is that of S (his wife), please go and see'. The accused appeared to be in a disturbed state of mind and tried to go away from the office taking leave. *Held*, that the statement made to *B* came under para. 2 of S. 8, as showing the conduct and the relevant fact, and was an incriminating circumstance against the accused. The particular statement accompanied and exclaimed acts showing his reaction of a disturbed mind on the publication of the photograph in the newspaper and the suggestion that such photograph was that of his dead wife *S*. S. 157, had no application to the statement at all as in the instant case, there was no question of corroboration. The statement was admissible even under S. 21 as admission: (1962) 2 Cr.L.J. 354: A.I.R. 1962 Cal. 504.

Wife accused of murdering husband—Statement by wife in committal Court that she was sleeping with her husband on the night in question and upon other accused knocking at the door she opened the door and upon entering the room these persons murdered her husband by strangulating him and afterwards took the body outside the room—Her statement in the morning to the brothers of the deceased when questioned by them, that she did not know the whereabouts of her husband—The statement to brother, *held*, not admissible in evidence, as it was a statement which did not accompany and explain an act other than the statement—The conduct of the wife was not the conduct expected of an affectionate wife—'Conduct' in S. 8 according to the *Explanation* does not include statements unless these statements accompany and explain acts other than statements. The conduct of wife would not warrant the inference that she committed the murder: (1961) 2 Guj.L.R. 582: (1962) 1 Cr.L.J. 26: A.I.R. 1962 Guj. 1.

Case of murder purely based on circumstantial evidence — Motive for crime is of importance—Motive alleged by prosecution may mislead and vitiate appreciation of evidence if that is relied on before other evidence is discussed and appreciated: 1961 Ker.L.T. 201.

Conduct of accused — Relevancy: 1960 Cr.L.J. 682: A.I.R. 1960 S.C. 500: 1960 M.L.J. (Cr.) 493: 1960 S.C.J. 779.

Retracted confession — Conviction of — Corroboration in material particulars—Necessity—Extra-judicial confession made immediately after occurrence and subsequent conduct of accused—If sufficient corroboration. *See* (1965) 2 Cr.L.J. 614: A.I.R. 1965 Assam 89. *See* also 1972 Cr.L.J. 204 (Him. Pra.); 1974 Cut.L.R. (Cr.) 203.

Victim of acid throwing giving out names of accused and his companions immediately after the attack at the earliest opportunity before there was opportunity of being tutored—Evidence must be given due weight: I.L.R. (1962) Cut. 303.

Illus. (i).—Gun belonging to deceased taken away by accused in course of commission of crime — Accused making general statement that he had kept gun in his village—Statement relevant under section: (1965) 2 Cr.L.J. 520: A.I.R. 1965 Ori. 175.

Accused giving information to Police Head Constable in presence of Panchas that he would show the stolen goods—He further taking them to cowdung hill and from there taking out stolen articles—This done on very next day after commission of offence—This evidence being evidence of conduct of the accused was admissible under S. 8—It was also admissible under S. 27: 1969 Cr.L.J. 471: A.I.R. 1969 Guj. 100.

S. 27 does not deal with the accused's conduct or acts; they are admissible under S. 8. The accused's conduct, in response to a Police Officer's question even if it is not 'information supplied by the accused which

relates distinctly to the fact thereby discovered' as contemplated by S. 27 is admissible as the 'effect of a relevant fact' under S. 7, and 'as conduct' with reference to a relevant fact under S. 3 or even as part of a set of facts necessary to explain a relevant fact or tending to establish the identity of anything under S. 9; it is not a confession which necessarily must be a statement; the modern tendency is to admit, and not to exclude, pieces of evidence if reasonably and legally possible: (1971) 1 Cut.W.R. 351.

A statement not partaking the character of a confession envisaged by S. 27 would not be admissible because of S. 162 of the Code of Criminal Procedure; however, the accused's going to a place and causing recovery of some clothes, etc. is admissible as his conduct under S. 8: 1992 All.L.J. 588: 1992 Cr.L.J. 1755 (D.B.).

Statements are not synonymous with conduct; only those statements which accompany and explain acts other than statements can be regarded as 'conduct': 1972 All.L.J. 744.

Circumstantial evidence against accused — Conduct of accused incompatible with innocence — Absence of explanation and false explanation regarding facts proved — Offence can reasonably be *held* to be proved: I.L.R. (1963) 2 Ker. 26: (1963) 2 Cr.L.J. 458.

Ss. 8 and 21—First information report—Value and use of — First information by accused containing confession — How far admissible in evidence. *See* A.I.R. 1966 S.C. 119; 1975 Raj.L.W. 542. *See* also 1975 Raj.L.W. 479 (D.B.).

Scope. *See* 1966 Cr.L.J. 318 (All.).

Conduct of witness that after having seen the accused beating victim, he went to the relation of the victim and reported the same to him, *held*, cannot be said to be unnatural: 1974 W.L.N. (U.C.) 118 (Raj.) (D.B.).

Res gestae.—See also S. 6, *supra*. *Cunliffe, J.* S. 8 embodies in a statutory form, the rule of evidence that the testimony of *res gestae* is always allowable when it goes to the root of the matter concerning the commission of the crime. It is controlled and circumscribed by S. 27 of the Act: I.L.R. 63 Cal. 1053: A.I.R. 1936 Cal. 316. *See* also A.I.R. 1936 Nag. 200.

The statements of woman raped by neighbours are inadmissible under S. 6 but admissible as a complaint under S. 8: 4 Lah.L.J. 491: A.I.R. 1921 Lah. 258. As to statements of a raped girl, to persons immediately after occurrence, *see* 82 I.C.142: A.I.R. 1925 Nag. 74; A.I.R. 1926 Pat. 58. *See* also 4 M.L.J. 491.

Naturally, on finding a young girl in a pool of blood her parents or relations or occupants of the house might succumb to the grief and speak nothing; their first endeavour would be to try to save her life rather than to rush to the Police Station to lodge the report; the omission to report the matter to the police immediately, *held*, is not suspicious: (1991) 4 Bom.C.R. 536.

The statements made by a victim in a rape case to other witnesses regarding the offence are admissible in evidence of conduct as indicated by *Illus.* (*j*) to S. 8, Evidence Act: 1956 An.W.R. 572. Rape—No direct evidence—Child victim not making any statement—Statement of mother as regards answers given by child in reply to questions put to her not admissible: A.I.R. 1930 Lah. 84: 120 I.C. 539.

Where soon after the attempted rape, the prosecutrix, weeping and wearing blood-stained clothes, on being asked by her mother and another, made a statement to them, *held*, her statement is admissible under S. 6 and S. 8(*j*): 1989 M.P.L.J. 243.

S. 8 does not render a statement by a woman raped admissible in evidence when there is nothing to corroborate or confirm the same: 32 Cr.L.J. 751: A.I.R. 1921 Mad. 233 (2).

In a case of rape the statement made by the complainant immediately after the occurrence to her mother is legally admissible and relevant as evidence of conduct under S. 8. It is also admissible as corroboration of the evidence of the complainant in Court under S. 157. What weight is to be attached to such statement is, of course, different matter. In some cases its weight may be nil, but in other cases, where corroboration is not essential to conviction, conduct of this kind may be more than enough in itself to justify acceptance of the complainant's story. This depends upon the facts of each case: (1963) 1 Cr.L.J. 310: 29 Cut.L.T. 540: A.I.R. 1963 Ori. 58. *See* also 1990 Cr.L.J. 1129 (Madh. Pra.) (D.B.).

Offence under S. 376, Penal Code—Raped girl aged four years crying and disclosing name of accused—Evidence of commission of offence on her private parts — Also

evidence of stains of blood and semen on clothes of accused—*Held*, that all the circumstances put together would necessarily lead to the only conclusion that it was the accused who had committed the offence and hence the order of acquittal should be set aside. Though evidence of statements made to her mother by the girl could not be given, evidence of her and the mother's conduct was relevant under second part of S. 8. Further, the mere absence of semen on the clothing of the girl or in the vaginal swab or, the request of the girl's father to the Doctor to give anti-tetanus injection to her, did not mean that rape was not committed: (1965) 67 Bom.L.R. 16: A.I.R. 1965 Bom. 154.

Prosecutrix, a six years old girl, narrating the incident of rape to her mother shortly after the occurrence — *Held*, the statement could be received in evidence under S. 8 since it constituted subsequent conduct of the victim: 1989 Cr.L.J. 2238 (Him. Pra.) (D.B.).

Statement by person robbed immediately after robbery and assault is admissible as part of the *res gestae*: I.L.R. 6 Pat. 747: A.I.R. 1928 Pat. 162.

Statement to Police Officer and complaint in his presence — Admissibility — The evidence of Police Officer and the complainant as to the pointing out of the various places by the accused was a confession of his guilt made while he was in the custody of the Police Officer and inadmissible under Ss. 25 and 26. The evidence could not be treated as evidence of conduct, apart from the accompanying statements under S. 8 of the Act: 20 Cr.L.J. 681: (1919) 21 Bom.L.R. 724; 11 O.W.N. 1383: A.I.R. 1935 Oudh 1.

If an accused accompanies a Police Officer and points out the spot where the stolen property is concealed, it amounts to conduct, proof of which is admissible under S. 8: 35 I.C. 962: 17 Cr.L.J. 402: I.L.R. (1936) Nag. 78: A.I.R. 1936 Nag. 200; I.L.R. 63 Cal. 1063: A.I.R. 1936 Cal. 316; A.I.R. 1937 Nag. 220: I.L.R. (1937) Nag. 268 (Conversation between accused and Police at time of search leading to discovery of incriminating article is admissible). But the mere fact that the accused pointed out the several places of incidents narrated by the approver is not admissible as evidence of conduct: A.I.R. 1929 Lah. 794.

An information is not distinctly connected with the fact discovered or its portion which merely explains the thing discovered, being not admissible under S. 27, cannot be proved; if the thing concealed not known to the Police is discovered by such information, it would lend assurance that the information was true. No witness with whom some material fact, like a weapon or stolen property or other incriminating article, is not hidden, or sold or kept, unknown to the Police, can be said to be discovered as a consequence of the information furnished by the accused. These examples are only illustrative, not exhaustive. What makes the information leading to the discovery of the witness admissible is the discovery from him of the thing sold to him or hidden or kept with him which the Police otherwise did not know; a witness cannot be said to be 'discovered' if nothing is found or recovered from him as a consequence of the information; the information which merely disclosed the witness's identity is not admissible under S. 27; but here the evidence of the Investigating Officer and the *panchas* that the accused had taken them to a shopkeeper who sells daggers and pointed him out, as corroborated by the shopkeeper himself, would be admissible under S. 8 of the Evidence Act as conduct of the accused: A.I.R. 1972 S.C. 975: 1972 Cr.L.J. 606.

There is a clear distinction between the conduct of an accused admissible under S. 8 and his statement to a Police Officer during investigation which is hit by S. 152 of the Code of Criminal Procedure; S. 162 excludes the accused's statement to a Police Officer during investigation but not his conduct when confronted or questioned by a Police Officer during the investigation. Thus, evidence of the circumstance, *simpliciter*, that the accused had led a Police Officer and pointed out the place where stolen articles or weapons were found hidden is admissible as his conduct under S. 8, whether or not any statement made by the accused contemporaneously with or antecedent to such conduct falls under S. 27: A.I.R. 1979 S.C. 400.

The accused's conduct in leading the Police to the place and bringing out the stolen articles from underneath the earth, *held*, is relevant under S. 8: (1981) 52 Cut.L.T. 126: 1981 Cr.L.J. 1452. *See* also (1977) 1 Cut.W.R. 351; 1975 Cr.L.J. 1560 (Ori.) (D.B.); (1974) 40 Cut.L.T. 491; 1973 Cut.L.R. (Cr.) 413; (1971) 1 Cut.W.R. 351.

Where the accused's statement was not recorded but he led the Police to a tank and

brought out stolen articles from it, *held*, it amounts to the accused's conduct relevant under S. 8, though as his statement, it is not admissible under S. 27; the evidence of recovery not being contradicted, it could not be contended that the accused merely knew about the articles being there in the tank. [1979 Cr.L.J. 329 (S.C.), Foll.]: 1984 Cr.L.J. 518. *See* also 1972 Cr.L.J. 815 (All.) (D.B.).

An accused's act, as distinguished from his statement, in pointing out case property is admissible under S. 8 as evidence of conduct; non-recovery does not materially affect the account of the incident, for recovery is only a corroborative piece of evidence; if other direct or substantial evidence is on record, want of such corroboration cannot weaken the prosecution: 1973 Cr.L.J. 481.

That human blood was found on the dress worn by the accused is an incriminating circumstance, particularly when the dress is recovered at the accuseds' instance: (1994) 1 Ker.L.J. 136 (D.B.).

Where the accused had merely taken out the axe from beneath his cot and there was nothing to show that he concealed it at a place known to him alone and no one else, and the accused had not even made any statement under S. 27 relating to its recovery, *held*, the production of the weapon is not admissible either under S. 8 or S. 27: A.I.R. 1979 S.C. 1262. *See* also 1972 All.Cr.R. 125 (D.B.).

Conduct of accused.—Hearsay evidence which does not explain the accused's conduct, *held*, is not admissible even under S. 8: A.I.R. 1974 S.C. 898: 1974 Cr.L.J. 751: (1974) 4 S.C.C. 611.

The conduct of an accused soon after an incident, plays an important part in the determination of the guilt and is a corroborative piece of evidence: 1953 Cr.L.J. 217: A.I.R. 1953 Bhopal 1. Where the evidence against a person charged with an offence under S. 147, I.P. Code, is open to doubt, his conduct, some time after the occurrence cannot be taken to be evidence under S. 8 and cannot be used against him in the case: 54 I.C. 775: 21 Cr.L.J. 167. As to evidence of conduct of character, *see* 97 I.C. 1041: A.I.R. 1927 Sind 28.

As to evidence of subsequent conduct, *see* also 5 W.R. (Cr.) 28: I.L.R. 9 All. 528 at 568.

Production of the deceased's watch by the accused before the Police, *held*, can be taken as a conduct against him alongwith other evidence, even though the disclosure statement does not reveal the authorship of the concealment: 1994 Cr.L.J. 555 (Ker.) (D.B.). *See* also 1993 Cr.L.J. 3151 (Ker.) (D.B.); 1994 Cr.L.J. 162 (Ker.) (D.B.).

The conduct of a person who has had no part in a crime and has not been called as a witness cannot be brought under S. 8 as being a relevant fact constituting motive or preparation: A.I.R. 1935 Nag. 81: 17 Nag.L.J. 274. *Illus.* (*e*) to S. 8 apply only if it could be shown that the act of the person providing evidence would have the effect of giving an appearance favourable to himself: A.I.R. 1957 Him. Pra. 52: 1957 Cr.L.J. 1254; 1972 Cr.L.J. 1342 (S.C.); (1975) 2 Cr.L.T. 119 (Him. Pra.).

A husband is expected to protect his wife; but where he left the house after setting her to fire and was arrested the next day, *held*, this conduct was consistent with his guilt: (1985) 1 Bom.C.R. 559 (D.B.).

Antecedent and posterior conduct of the accused showing that he was sane and normal prior to, and after the commission of, offence, *held*, his plea of insanity must fail: 1994 Cr.L.J. 1173 (Ker.) (D.B.).

Where the deceased was murdered in his bedroom by an axe blow on his neck and evidence showed that the accused, his wife, had put the villagers on a false track by telling them that the deceased had gone away from the village and had not returned, *held*, her conduct was clearly admissible under S. 8 as part of *res gestae* as an evidence of conduct immediately after the occurrence: A.I.R. 1987 S.C. 1572: (1987) 3 S.C.C. 227.

The accused-wife's silence after the disappearance of her husband, her not reporting his disappearance to the Police even after about one month, and thereafter recovery of his dead body from the house, *held*, are sufficient circumstances to draw a presumption of guilt against her: 1975 Raj.L.W. 341 (D.B.).

Where the accused brought the deceased's children to the Police Station and confessed his guilt, *held*, it would be admissible only as conduct under S. 8, and not otherwise: 1979 W.L.N. (U.C.) 252 (Raj.) (D.B.).

The surrender of an accused before the Police with least possible delay is not a circumstance going against him: 1985 Cr.L.J. 1373.

A criminal trial is not an enquiry into the accused's conduct; the initial burden always lies on the prosecution, specially in a case of circumstantial evidence, to complete the chain of events which may lead to an irresistible inference of the accused's guilt and to negative every hypothesis suggesting his innocence. Only such conduct which destroys the presumption of his innocence can be accepted as evidence against the accused: (1973) 3 Sim.L.J. 413.

Where the accused, after the offence, went to the Police Patil carrying a sickle and wearing a cap, a banian and a dhoti, all bloodstained, narrated the occurrence to the Patil and took him, alongwith another person, to the spot and showed them the dead body, with numerous injuries, *held*, the accused's conduct immediately after the occurrence, as deposed to by the Patil, is relevant under S. 8: (1972) 2 Mys.L.J. 6.

The refund of the defrauded money by the accused to complainant's mother justified the inference of guilt: (1972) 2 Sim.L.J. 335.

The accused's immediate reactions in a bribery trap case to the complainant's illegal overture or action in inserting unwanted something in the accused's pocket which the accused did not throw out and was caught there or immediately thereafter with the money in his pocket, *held*, is admissible as evidence of his conduct under S. 8: A.I.R. 1976 S.C. 449: (1976) 1 S.C.C. 644: (1976) 3 S.C.R. 119.

At the time when the accused was called upon to produce the money which had been received as bribe from a person, the accused hesitated and he was trembling and perspiring. Held, that the conduct of the accused under such circumstances was a relevant factor which should be taken into consideration by the Court: A.I.R. 1960 Mys. 111: 1960 Cr.L.J. 934. Admissibility of statements accompanying acts. *See* I.L.R. 3 Bom. 12 at 17; I.L.R. 14 Bom. 260; 10 Beng.L.R. App. 2; (1902) 4 Bom.L.R. 284. *See* also A.I.R. 1941 Oudh 359 (Admissibility of voluntary statements to Police by accused subsequent to the first information report.)

What the conspirators did, that is to say, their conduct, is relevant under S. 8 and it is immaterial whether the conduct on which the prosecution relies was previous or subsequent to carrying out of the object of the conspiracy: 1941 O.W.N. 133: A.I.R. 1941 Oudh 130.

Expl. (1).—What is relevant under S. 8 is the particular act upon the statement, and the statement and the act must be so blended together as to form a part of a thing observed by the witnesses and sought to be proved. Otherwise the statements are inadmissible: 29 Nag.L.R. 251: A.I.R. 1933 Nag. 136. Accused while going out after taking the alleged bribe being halted, making statement—Statement, *held*, not admissible under S. 8: 1954 Cr.L.J. 230: A.I.R. 1954 S.C. 15.

Witness not disclosing names of the accused persons to the villagers, *held*, it only shows that the accused were not previously known to him: A.I.R. 1975 S.C. 1814.

Expl. (2).—An informer's statement to the Police that he purchased opium from the accused is not admissible unless it was made in the presence of the accused: 12 Cr.L.J. 479: 4 Bur.L.T. 222.

But the finding of marked coins on the accused and opium on the informer are circumstances from which it may be inferred that the accused sold the opium: 12 I.C. 87.

What is admissible in evidence under S. 8 of the Evidence Act is the conduct of a person and his statement which affects or influences that conduct. Even silence may in certain circumstances amount to conduct, but it must be a positive silence which can conclusively be taken to be conduct: I.L.R. (1950) Cut. 509: A.I.R. 1951 Ori. 53.

Right from the time the mother of the deceased was appraised that her daughter was found to be missing she openly gave out that she suspected foul play and that her fear was that the accused, her son-in-law, must have got her done to death. She repeated this even in the presence of the accused, but on hearing the accusation he not only did not protest but abruptly left the house and thereafter avoided his mother-in-law even when sent for. *Held*, that the silence observed by the accused when the accusation was made and what he did on hearing that would be relevant material to be taken into account alongwith other circumstances: 1959 Ker.L.T. 167: I.L.R. (1959) Ker. 319.

The statement made by the Police Officer to the complainant in the presence of the accused that he (the accused) was going to show the various places connected with the

theft was not admissible under S. 8, *Expl.* (2), because such a statement could not be said to affect the conduct of the accused: 52 I.C. 601: (1919) 21 Bom.L.R. 724.

The conduct of an accused, previous or subsequent to commission of an offence is evidence against him, if relevant. It is relevant if it influences or is influenced by any fact in issue or relevant fact. But where the fact in issue is commission of dacoity and relevant fact is possession of stolen property by accused suspicious conduct of keeping concealed a sum of money and of pointing out the place where it is kept concealed, in the absence of any thing to show that the property is stolen property, is not influenced by any fact in issue or relevant fact: 1954 Cr.L.J. 793: A.I.R. 1954 Kutch 20.

Where *D* and *V* were co-accused in a case under S. 161, I.P.Code, *V* alleged to have taken the bribe on behalf of *D* and as per his instructions, the conduct of *V* in not being able to offer explanation to his taking the amount when questioned immediately, after the event, was suspicious and his explanation in his statement under S. 342, Cr.P.Code, was unsatisfactory and *D* was convicted of the offence on those grounds. *Held*, the conduct of the co-accused *R* in evidence at the trial is relevant for and against himself if such conduct influences or is influenced by any fact in issue or relevant fact whether it was previous or subsequent thereto (S. 8 of Evidence Act).

But if it is not relevant against *D*, there is no indication in S. 342 of the Cr.P.Code that the answers given by one accused can be used against his co-accused. S. 30 of Evidence Act is the only exception to the general rule that the confession is evidence against the confessor alone and not against the co-accused. The statement, under S. 342, Cr.P. Code by *R* cannot be taken into consideration to find if *D* was guilty of the offence: A.I.R. 1951 Simla 14.

First information report as evidence of conduct: I.L.R. 64 Cal. 237: 99 I.C. 227. Accusation by woman against man for attempt to ravish—Statements by her to witnesses—Silence of accused—Relevancy: A.I.R. 1938 Rang. 127.

Illus. (*a*).—In a trial of the accused woman for the murder of her brother-in-law the facts that the relations between the deceased and the accused were strained, that the deceased threatened to expose the accused to her husband when he returned from outstation that the deceased was beaten five days before his murder by poisoning by the accused's paramour are relevant under S. 8, showing motive or preparation: A.I.R. 1959 Him. Pra. 3.

Absconding—Whether proof of guilt.—Absconding is no doubt a relevant piece of evidence but its value would always depend on the circumstances of each case; the Courts are normally disinclined to attach much importance to absconding and treat it as a very small item; it is scarcely taken as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of the accused's guilt: A.I.R. 1971 S.C. 1050: 1971 Cr.L.J. 913; 1976 Cr.L.J. 1629 (J.&K.) (D.B.).

Absconding by itself is no proof of guilt or guilty mind; even an innocent person, falsely suspected of a grave crime, may be moved by the instinct of self-preservation and run away to avoid arrest: (1984) 58 Cut.L.T. 211; A.I.R. 1972 S.C. 110. Absconding is a weak link in the chain of circumstances and is not conclusive either of guilt or a guilty conscience: 1988 Cr.L.J. 1884 (Ori.) (D.B.).

Though abscondence evidence is relevant, it is not of much evidentiary value. Even innocent men when accused of serious offences are likely to run away from the arm of law: (1965) 1 Cr.L.J. 565: A.I.R. 1965 Mys. 128.

Even innocent persons may, when suspected of grave crimes, be tempted to evade arrest; such is the instinct of self-preservation in average human beings. Absconding is not, in itself, indicative of a guilty mind: A.I.R. 1971 S.C. 1871: 1971 M.L.J. (Cr.) 336; A.I.R. 1971 S.C. 1050: 1971 Cr.L.J. 913.

The prosecution cannot benefit from merely the suspicious circumstance of the accused not surrendering or being untraceable for nearly a year. [(1969) 3 S.C.C. 741, Foll.]: A.I.R. 1974 S.C. 1193.

Where the accused who is alleged to have committed murder, remained absconding till the time he surrendered himself in the Court, it is no doubt a circumstance against the accused. However, that by itself leads to nothing. Sometimes even those who are innocent abscond only due to fear. Everything, therefore, depends on the reliability of the eye-witnesses of the occurrence: 1963 All.L.J. 977.

For being an 'absconder', the accused need not have run away from his home; it is sufficient if he hides himself, even in his own home, to evade the process of law: A.I.R. 1976 S.C. 76: (1976) 1 S.C.C. 181.

Though the mere fact that an accused person has absconded will not necessarily fix him with guilt, the fact is undoubtedly a piece of relevant evidence against him: (1933) 35 Punj.L.R. 740; 1980 Cr.L.R. 437 (Bom.).

In order that the Court can legitimately draw the inference that the subsequent conduct of an accused was that of guilty person and not of an innocent man, there must be proper material placed before the Court. Where all that the prosecution has placed before the Court are two bold statements, both made by Police Sub-Inspector: (*1*) that the accused was not in the village on the day soon after the incident when the Police went there; and (2) that Police Sub-Inspector had sent about four constables in search of the accused to some villages, that evidence is wholly insufficient to lead to the inference that the accused was absconding since the date of the incident. In order to lead to that inference, the investigating Police Officer must lay before the Court further evidence to show that continuous watch was kept at the house of the accused concerned, and that a watch was also kept by him of the places which the accused frequented, including his place of work, but the accused did not turn up at all at any of those places during a certain period of time. In the absence of such evidence no inference can be drawn that the accused was absconding and his subsequent conduct was that of a guilty person: (1970) 72 Bom.L.R. 405: 1970 Mah.L.J. 634: A.I.R. 1970 Bom. 438.

Accused absconding from village after commission of offence—Fact of asbsconding is relevant: A.I.R. 1970 Ori. 54.

Absconding—Can be relevant as explaining subsequent conduct under S. 8: 1969 Cr.L.J. 1393: A.I.R. 1969 Goa 116.

That the accused remained absent from their normal residence and remained concealed elsewhere after the occurrence testifies to their guilty mind: (1983) 23 Del.L.T. 338.

Accused escaped from Police custody—This mere conduct is no reason to conclude that he was guilty of the offence charged with: 1974 B.L.J.R. 642.

Mens rea.—The appellant, as a registration clerk in Post Office, was given a permanent advance for purchase of stamps. He was caught redhanded affixing a previously used stamp. As a result of check shortly after, it was discovered that there was a shortage in the advance money as to which the appellant could give no explanation. Originally, the appellant was charged under Ss. 262, 263 and 409, Penal Code. On the objection by the appellant, at the concluding stage of the trial, charges under Ss. 262 and 263 were struck out. It was contended that in view of the charge under Ss. 262 and 263 having been struck out, the evidence in the case that the appellant was found affixing a used stamp on a cover should be left out of consideration. *Held*, that the evidence as to the appellant having been found using a previously used stamp was relevant as proving *mens rea* relating to the offence under S. 409. If that evidence was believed then it furnished unmistakable evidence of *mens rea*. The fact that the appellant was no longer charged with any offence either under S. 262 or under S. 263, Penal Code, could not affect the admissibility of this evidence. In this view, the case against the accused under S. 409, Penal Code was proved beyond all reasonable doubt: A.I.R. 1955 Cal. 608: 1955 Cr.L.J. 1578.

Where the accused who is charged under S. 411, I.P. Code, for dishonestly receiving a bullock knowing it to be stolen property, states to the Police that he purchased it from a certain person and produces in support of his statement a receipt which is found not to include the bullock and as to which there is evidence that he made an attempt to get it altered, the conduct of the accused can be taken into account to prove his guilty knowledge: (1933) 35 Punj.L.R. 738: A.I.R. 1934 Lah. 695.

In criminal proceedings a man's character is often a matter of importance in explaining his conduct and in judging his innocence or criminality. Many acts of an accused person would be suspicious or free from all suspicion when the character of the person by whom they are done is known. Even on the question of punishment an accused is allowed to prove general good character. Thus, where the allegation against the accused was that he was acting in pursuance of

9. Facts necessary to explain or introduce relevant facts.—Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Illustrations

(*a*) The question is, whether a given document is the will of *A*.

The state of *A*'s property and of his family at the date of the alleged will may be relevant facts.

(*b*) *A* sues *B* for a libel imputing disgraceful conduct to *A*; *B* affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between *A* and *B* about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between *A* and *B*.

---

the policy of the Ittehadul-Muslimeen, that his state of mind was to exterminate the Hinduism, *held*, that the accused was entitled to lead evidence to show that he did not possess that state of mind: 1954 S.C.R. 475: A.I.R. 1954 S.C. 51; 1980 M.P.L.J. 300 (D.B.).

Construction of document.—Where the terms of the document (ancient grant) are unambiguous, it is not open to the Court to say that the document means something else than what it clearly says, merely because the parties have gone on for a long time so understanding it. In a case of ambiguity, however, the Court can uphold that construction of a deed which justifies a long usage; but where there is no ambiguity the Court will not accept an erroneous interpretation though consistent with usage so as to sanction a manifest breach of trust: 1954 B.L.J.R. 381: A.I.R. 1954 Pat. 586.

Ss. 8 and 32.—A statement of a person believed but not proved to be dead is no doubt not admissible under S. 32 but the document, however, is admissible under S. 8, to a limited extent, to show the conduct of the party. It, however, is not a direct proof of the facts contained in it: (1938) 40 P.L.R. J.&K. 1.

Where the deceased had made a complaint to the Police shortly before his death, stating that he apprehended danger to his life at the hands of certain persons, *held*, it is admissible under S. 8, whether or not it is admissible under S. 32(1). It is evidence of the conduct of a person, an offence against whom was the subject of the trial: I.L.R. (1938) 1 Cal. 290: A.I.R. 1938 Cal. 51.

Statement of persons deceased inadmissible under S. 32—Evidence of it offered as evidence of that person's conduct and not to prove that statement as the statement of a deceased person is admissible: (1954) 1 M.L.J. 194: A.I.R. 1954 Mad. 215.

Section 9—Synopsis.

1. Scope of section.
2. Identification in Court.
3. Test identification parade.
(*a*) Object of.
(*b*) Need for holding.
(*c*) Precautions to be taken.
(*d*) Duty of Magistrate.
(*e*) Identification in parade—Value of.
4. Covering of identification marks.
5. Identification of property.
6. Value of identification.

---

1. Scope of section.—(*See* also Notes under Ss. 5, 14 and 15). Ss. 9 and 11 read alongwith S. 21 justify a Court in admitting into evidence all previous statements made by the accused bearing on the question of his guilt whether made to a Police Officer or to a third party if the statement is relevant to the fact in the issue. These sections are not controlled by the Cr.P. Code: 73 I.C. 963: 4 Pat.L.T. 381.

(*c*) *A* is accused of a crime.

The fact that, soon after the commission of the crime, A absconded from his house, is relevant, under section 8, as conduct subsequent to and affected by facts in issue.

The fact that at the time when he left home he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

(*d*) *A* sues *B* for inducing *C* to break a contract of service made by him with *A*, *C*, on leaving *A*'s service, says, to *A*—"I am leaving you because *B* has made me a better offer". This statement is a relevant fact as explanatory of *C*'s conduct, which is relevant as a fact in issue.

(*e*) *A*, accused of theft, is seen to give the stolen property to *B*, who is seen to give it to *A*'s wife. *B* says as he delivers it—"*A* says you are to hide this". *B*'s statement is relevant as explanatory of a fact which is part of the transaction.

(*f*) *A* is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

In assessing the value of land the evidence of the value of comparable hereditament is relevant and admissible. But the value of such evidence or the weight of such evidence would depend upon the circumstances of each case. When there is direct evidence of the value of the particular hereditament the evidence of value furnished by a comparable hereditament would be very unimportant but when there is no such direct evidence it would be important: A.I.R. 1959 Cal. 413.

Assessment of market value—Evidence—Sale between two private parties in nature of willing purchaser and willing vendor in open market and land in it also very close to suit lands—*Held*, sale deed could be accepted as sound basis for assessing market value of suit lands: (1968) 1 An. W.R. 348.

Where to prove residence at the suit premises, letters addressed at such premises were produced without examining the senders thereof, *held*, it could not be said that the letters held no evidentiary value; their contents having no bearing upon the question under consideration, their contents need not be proved by producing their writer as a witness: (1984) 2 Bom.C.R. 671.

Scope and applicability: 1968 Cr.L.J. 1584: A.I.R. 1968 Bom. 400: (1967) 69 Bom.L.R. 808.

If after the commission of a crime, a person, whose name is mentioned as a participator in the crime, absconds, his conduct implies that he is concerned in the crime. Anything, therefore, which tends to explain his conduct and furnishes motive other than a guilty conscience, is relevant under S. 9: 62 I.C. 545: (1920) 22 Bom.L.R. 1274. The absconding or disappearance of the accused after the offence, without any plausible explanation therefor, is a circumstance against him; but no conviction can be based thereon unless there is other evidence to connect the accused with the crime when his absconding may serve as corroborative evidence; facts tending to explain the absconding are relevant under S. 9, Evidence Act, *Illus.* (*c*). [A.I.R. 1930 Oudh 324, Foll.]: 1971 Cr.L.J. 1656 (Raj.). *See* also S. 8, Note 3, *supra*.

As to recitals of boundaries in documents between strangers to suit, *see* (1925-26) 30 Cal.W.N. 761: A.I.R. 1926 Cal. 948; I.L.R. 8 Lah. 657: A.I.R. 1927 Lah. 448. *See* also notes under S. 13, *infra*. Court judgments about comparable land is relevant in determining compensation in land acquisition cases. [A.I.R. 1976 S.C. 2403, Rel. on]: A.I.R. 1982 N.O.C. 165 (Del.). Every kind of evidence, whether it is an offer, an agreement to sell, a sale, an award by a Collector or a judgment of the Court in respect of adjacent land, *held*, is relevant for determining the value of acquired land: I.L.R. (1979) 1 Del. 545 (D.B.).

'In so far as they are necessary for that purpose'—Facts as referred to in section, introduced in evidence are useful only for the purpose in question and no other: (1967) 69 Bom. L.R. 808: 1968 Cr. L.J. 1584: A.I.R. 1968 Bom. 400.

In a case of sedition, the copy of the accused's letter to the press is admissible under Ss. 9 and 14, but it is necessary to prove

that such a letter was sent before it could be admitted: (1928) 30 Bom.L.R. 314: A.I.R. 1928 Bom. 77. In an offence of conspiracy to commit dacoity, evidence as to previous association of accused for criminal purposes is admissible under S. 9 but not under S. 11: I.L.R. 54 Bom. 524: A.I.R. 1930 Bom. 157. As to the admissibility of evidence of assessment of neighbouring land to determine the letting of a piece of land, *see* A.I.R. 1940 Cal. 47: (1939-40) 44 Cal.W.N. 165: I.L.R. (1940) 1 Cal. 168. Proceedings under S. 488, Cr.P. Code—Evidence of blood group test when question of paternity is in issue: 1957 M.L.J. (Cr.) 822. A statement of the deceased as to some matter other than the cause and/or the circumstances of his death made two days prior to his death is inadmissible and the fact that the object of introducing this piece of evidence was to furnish a background or indeed a motive for the crime cannot excuse the reception of inadmissible evidence: A.I.R. 1955 Cal. 559: 1953 Cr.L.J. 1358.

S. 27 does not deal with the accused's conduct or acts which are admissible under S. 8. The accused's conduct, in response to a Police Officer's question even if it is not 'information supplied by the accused which relates distinctly to the fact thereby discovered' as contemplated by S. 27 is also admissible as the 'effect of a relevant fact' under S. 7, and 'as conduct' with reference to a relevant fact under S. 3 or even as part of a set of facts necessary to explain a relevant fact or tending to establish the identity of anything under S. 9; the modern tendency is to admit, and not to exclude, pieces of evidence if reasonably and legally possible: (1971) 1 Cut.W.R. 351.

During investigation, identification of the properties or persons involved in the offence may be necessary; recognition, a conscious reminder and a positive representation, involves statements, express or implied. A hint, a tip, a glance, a wave, a nudge, a touch, a sign and other gestures may indicate identity; they constitute implied representations of convincing credibility; when communicated from the core of evidence regarding identity and an identification parade, they are intended to establish the accused's identity from an assembly of persons. [A.I.R. 1955 S.C. 104; A.I.R. 1961 S.C. 1527; A.I.R. 1970 S.C. 1619; A.I.R. 1936 P.C. 253; A.I.R. 1963 S.C. 447 and A.I.R. 1972 S.C. 283, Rel. on]: 1985 Ker.L.T. 62.

The impression about the general appearance of the thing is exceedingly common; a workman has it of his tools and most people have it of their dress, jewellery and other things they are frequently seeing, handling or using. Undoubtedly animals and things may be identified by those familiar with them. Observation teaches that such identification may be safely relied upon. But at the same time, a witness would not be able to formulate his reasons for the identification since it is based upon general untranslatable impressions of the mind: 1958 M.L.J. (Cr.) 341: I.L.R. (1957) Mys. 177: A.I.R. 1958 Mys. 150.

The accused was convicted only on the basis of his having been identified from his voice by a prosecution witness. The prosecution witness had not seen the accused. The plea of *alibi* of the accused was rejected on the ground that the Kotwari book had some torn pages at the end. The entries had been in the register in a serial and chronological order.

Held, that the criterion of recognising people merely from their voice cannot be a sure test of identification as it may prove dangerous as also deceptive on most occasions. The Courts below were not justified in relying on the method of identification from a vocal test. Under the law the Kotwar is required to maintain a register of persons who visit the village. Those entries have been made in the said register in a serial and chronological order. Merely because some pages are torn, the evidentiary value of the said register is not in any way minimised. The Courts had committed an error of law in relying on the prosecution evidence which failed to establish the identity of the accused and in rejecting the defence supported by official record kept in the regular course of business: 1958 M.P.L.J. (Notes) 135.

Superimposed photograph of deceased over skeleton of human body to prove that skeleton was of deceased is admissible to prove the identity of skeleton.

Held, that a superimposed photograph of the deceased over the skeleton of a human body (skull) recovered of a tank was admitted under S. 9 to prove the fact that the skeleton was that of the deceased.

Held also, that even if this photograph was not admissible in evidence the verdict of the jury and the conviction of the accused

under S. 302 could not be set aside because there was very cogent other evidence to prove the identity of the skeleton: (1963) 2 S.C.R. (Supp.) 852: A.I.R. 1963 S.C. 1074.

Photograph, use of in evidence—Question of parentage of person in issue—Similarity in likeness of person admitted and person disputed—Photograph cannot be used to establish parentage: 1962 B.L.J.R. 323: A.I.R. 1962 Pat. 420.

S. 22 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 provides that evidence of the identification of a proclaimed offender in a terrorist case by witnesses on the basis of his photograph shall have the same value as evidence based on a test identification parade, *held*, were that so, it might result in gross injustice to the detriment of the proclaimed offender; S. 22 accordingly struck down: 1995 Cr.L.J. 3139 (S.C.).

The evidence of an identifier himself at the trial that he identified the accused or incriminating articles before the Police is admissible in evidence by way of corroboration of his identification at the trial.

Identification proceedings are held before the Magistrate to enable the Court to judge the value of the evidence of the witnesses identifying the accused or the article. There are so many factors that enter in judging the value of the evidence of a witness and identification proceedings may throw a light on the credit to be given to the evidence of the witness: I.L.R. (1961) 11 Raj. 299: A.I.R. 1962 Raj. 3.

Statement made to a Police Officer is inadmissible in evidence under S. 162 of the Code of Criminal Procedure. A statement made to a Police Officer regarding investigation is also within the mischief of S. 162. If, however, the identification parade is conducted under the exclusive direction and supervision of Panch witnesses, the statement involved even by implication in the process of recognition and identification will be outside the purview of S. 162. Under the guise of conducting an identification parade, it is not the province of a Magistrate to record "other statements which have a bearing in establishing the guilt of the accused except in accordance with S. 164 of the Code". He is not expected and he cannot interrogate witnesses to elicit any other fact or call them to make any statement beyond mere identification. Those statements if recorded, would be clearly inadmissible in evidence. The present direction of the Chief Judicial Magistrate is not covered by any statutory provisions. The case is still at the investigation stage. The powers of Court at this stage do not extend to give directions either to the prosecution or to the defence regarding the conduct of the investigation or the shaping of the defence. It is the statement of witnesses in Court that constitute substantive evidence. The sworn testimony of a witness in Court as to the identity of a person requires corroboration which is provided by an earlier identification parade. This is a relevant fact under S. 9 of the Evidence Act. When there is no substantive evidence as to the identity of the accused, the earlier identification parade is no longer of any assistance to the prosecution. An identification parade on its own force does not constitute substantive evidence. [A.I.R. 1955 S.C. 104; A.I.R. 1961 S.C. 1527; A.I.R. 1970 S.C. 1619; A.I.R. 1936 P.C. 253; A.I.R. 1963 S.C. 447 and A.I.R. 1972 S.C. 283, Rel. on]: 1985 Ker.L.T. 62.

Applicability—Pointing out by a person to Investigating Officer, apprehended persons as culprits is tantamount to statement made to Police Officer and is sufficient to attract S. 162—But it does not exclude evidence which such person himself may have to give in regard to his mental act of identification by way of corroboration of his identification of accused at trial: 1968 All Cr.R. 224.

The test identification parade conducted by a Police Officer alone attracts the operation of S. 162, Cr.P. Code which makes that evidence inadmissible: 1960 Ker.L.T. 965.

Statement of witness recorded in derogation of S. 164, Cr.P. Code is not admissible under S. 9, Evidence Act—Memorandum of condition of house by Magistrate and his evidence thereon is admissible under S. 9, Evidence Act: A.I.R. 1961 S.C. 1527. *See* also 1974 Raj.L.W. 192.

Where the property to be identified was not scaled at the time of the recovery, little value can be attached to the test identification proceeding. But even a total failure to hold a test identification proceeding would not make inadmissible the evidence of identification in Court: 1960 Raj.L.W. 411: I.L.R. (1960) 10 Raj. 921: (1961) 1 Cr.L.J. 310: A.I.R. 1961 Raj. 35.

No hard and fast rule can be laid down that oral evidence of identification ought never to be accepted without corroboration. Where the circumstances in the case disclosed any necessity for it, it should be sought for. The evidence of identity must be thoroughly scrutinized, giving benefit of all doubt to the accused, but, if, after a thorough scrutiny, there appears to be nothing on record to suspect the testimony of the identification witnesses, the Court ought not to feel shy of basing a conviction on such evidence alone because of the bare possibility that there could be honest though mistaken, identification: 1960 M.P.C. 216: 1960 Jab.L.J. 356: 1960 M.P.L.J. 299.

Test identification ordered—If violates fundamental rights: (1961) 2 Cr.L.J. 462: A.I.R. 1961 Cal. 531.

Identification—Suspect in dacoity case—Identification—Suspect arrested in connection with some other offence under Arms Act, in this case — Normal precautions should be taken: 1969 Cr.L.J. 680 (All.).

Identification—Accused arrested during dark night—Witnesses failing to identify in Court — Failure cannot be considered as material—To consider such failure as natural is curious reasoning and unsupportable in law: 1969 Pat.L.J.R. 21.

Procedure under S. 202 (1), Cr.P. Code, is to be adopted where it is necessary to put up person named as accused for identification: A.I.R. 1969 All. 591.

To test the assertions of identifying witness it becomes necessary to pay attention to the following circumstances: (*a*) whether the witness was a stranger to the accused. How intimate was his knowledge and whether the circumstances under which he first observed him were such as to permit a lasting impression on his mind ? (*b*) whether the accused had any marked personality or any special peculiarities which at the time of the witness's first observation impressed themselves upon him? (*c*) whether the length of time which had elapsed between the date of the incident and the date when he was first asked to identify him was not such as to totally affect or considerably dim his original impression ? (*d*) whether any incident had happened subsequently which had affected, altered or replaced his original impression ? (*e*) whether the circumstances under which the witness was first asked to identify the accused were such that it could fairly be said that the resemblance between the original impression and the accused was sufficient to base a judgment, not of resemblance, but of identity ? the test identification must, therefore, be conducted under circumstances free from police influence, by independent persons, when the accused is mixed with a sufficient number of persons of like physical appearance. The Court must, therefore, consider what a man placed in the position of the identifying witness could fairly and reasonably be expected to recollect: 1960 M.P.C. 216: 1960 Jab.L.J. 356: 1960 M.P.L.J. 299.

Identification evidence—Defence witness stating that the accused have been frequently visiting village of complainant in connection with his cane business and he was known to complainant and his witnesses from before the occurrence—Nothing on record for rejecting it as untrue—Mere fact that the witness was confined in jail for a trial under Arms Act would not affect his credibility—Identification evidence, *held*, valueless: 1969 All.Cr.R. 240: 1969 All.W.R. (H.C.) 369.

A statement by the brother of a kidnapped woman that the woman denounced the accused as one of the abductors is admissible under S. 9 as explaining the circumstances of the arrest of the accused and also for the purpose of establishing his identity: A.I.R. 1944 Sind 38. Admissibility of judgment to prove identity. *See* I.L.R. 18 All. 98. As to comparison of thumb-marks to prove identity, *see* (1895-96) 1 Cal.W.N. 33; (1904-5) 9 Cal.W.N. 520: I.L.R. 32 Cal. 759. Evidence of identification of accused: 28 O.C. 258: A.I.R. 1926 Oudh 36. Identification proceedings being facts which establish the identity of the accused persons, are themselves relevant under S. 9. [A.I.R. 1944 Sind 38; A.I.R. 1928 Lah. 546; A.I.R. 1930 Oudh 455: 92 I.C. 167 and A.I.R. 1942 Lah. 59, Foll.; A.I.R. 1934 Lah. 641, Diss. from]: A.I.R. 1949 East Punj. 361: (1949) 51 Punj.L.R. 215.

Hearsay evidence is admissible only for certain purposes like when it introduces or explains a conduct or action of the witness before the Court; it cannot be used to examine its truth or otherwise but to establish its connection with the conduct of the witness. Thus, where a boy of seven years, had informed the witnesses that he had seen accused going in a certain direction

whereupon they went in that direction to search the accused, and the boy is not examined, this hearsay is admissible for the limited purpose of explaining why the witnesses had gone in that particular direction: 1971 M.P.L.J. 829.

2. Identification in Court.—It is the identification of an accused by a witness in the Court of Sessions or before the Committing Magistrate in the presence of the accused that can be substantive evidence of identification. If that is wanting in a case, the mere fact that in a previous test identification parade he was able to identify him and he admitted this fact during his deposition in Court would not make it substantive evidence. Such a piece of evidence would be very weak: I.L.R. (1956) Cut. 195: A.I.R. 1956 Ori. 177.

The test identification parade only gives some guarantee of truth of identification in Court but ultimately it is identification in Court of the accused persons that should weigh with the Court. Whether there was opportunity for the witness to see the accused at the time of incident, whether they could remember by face the accused persons and whether they could identify them by such memory in Court is the relevant consideration: 1994 Cr.L.J. 1042 (Karn.) (D.B.).

Identification in Court nearly after one year of dacoity, without proof of any special feature in appearance of accused—Evidence of witnesses found artificial and unreliable in cases of co-accused—Accused entitled to benefit of doubt: 1965 All.L.J. 166.

Consistent identification of an accused by an eyewitness, both at the test parade and the trial, may safely be accepted, unless circumstances indicated that the witness has probably made a mistake; when the identification in the Court is not supported by an earlier test parade, it is unsafe to act on that evidence but for the exceptional circumstances like the accused's adequate descriptive particulars earlier given by the witness which corroborate the identification: I.L.R. (1975) Cut. 1384: 1977 Cr.L.J. 319 (D.B.).

The substantive evidence is the statement of the witness in the Court; the object of the test identification is to test the substantive evidence; the safe rule is that the sworn testimony of witness as to the accused's identity in the Court, as a general rule, requires corroboration in the form of an earlier identification: (1971) 2 S.C.W.R. 446: A.I.R. 1972 S.C. 283. *See* also (1978) 46 Cut.L.T. 496; 1988 Cr.L.J. 264 (Pat.) [1953 B.L.J.R. 703 held no longer good law in view of A.I.R. 1972 S.C. 283].

Identification for the first time during trial is inherently of a very weak character which loses much of its value without prior test identification parade: 1995 Cr.L.J. 2255 (Ori.) (D.B.).

Where a witness, stranger to the accused, identifies him before the Court for the first time, the Court will not ordinarily accept such identification as conclusive; it is to lend assurance to the other testimony of the witnesses; if the accused were identified by the witness soon after their arrest and it did not suffer from any infirmity, the evidence given before the Court stands corroborated. But if the evidence before the Court is itself shaky, the test identification would be of no avail: A.I.R. 1991 S.C. 1468: (1991) 3 S.C.C. 434.

The idea of holding a test identification parade is to test the veracity of the witness about his capacity to identify an unknown person whom the witness may have seen once; in cases where no test identification parade is held, it will be wholly unsafe to rely on his bare testimony about the identification of the accused for the first time in the Court: 1980 All.Cr.R. 142. *See* also 1982 Cr.L.J. 94 (Ker.) (D.B.).

The evidence of mere identification at the trial for the first time is from its very nature inherently of a weak character. The evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances he came to pick out the particular accused and the details of the part which the accused played in the crime in question with reasonable particularity. The purpose of a prior test identification, therefore, seems to be to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witness in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings: A.I.R. 1970 S.C. 1321: 1970 Cr.L.J. 1149.

Where no prior test identification parade was held and the witness identified the accused for the first time in the Court, *held*,

such evidence as to the accused's identity is worthless: 1983 Cr.L.J. 1854 (Cal.); 1982 Raj.L.W. 669 (D.B.); (1982) 53 Cut.L.T. 342; A.I.R. 1980 S.C. 1382: (1980) 2 S.C.C. 665; A.I.R. 1979 S.C. 1127; 1994 Cr.L.J. (N.O.C.) 34 (Raj.) (D.B.).

Without a prior test identification parade, the identification by a witness of the accused not known to the witness, *held*, is of no value: (1984) 57 Cut.L.T. 27; 1982 All.L.J. 871; A.I.R. 1955 Tripura 19: 1955 Cr.L.J. 1292.

Description of the accused given by the witness in her statement recorded under S. 161, Cr.P.Code entirely different from the one given later—She was not knowing the accused previously and no identification parade was conducted—*Held*, his identification for the first time in the Court was of no value: 1994 Cr.L.J. 509 (Raj.) (D.B.).

Identification of an accused in the Court alone is not of much evidentiary value; no conviction can ordinarily be based on it. Besides, if the accused offers a reasonable and proper explanation, it is then for the prosecution to affirmatively prove it to be false. In a criminal trial, the accused need not produce defence evidence; he can prove his version by the prosecution witnesses' admissions or the prosecution's documents. The Court should probe and consider the materials relied upon by the defence; it should not draw adverse inferences against the accused for non-production of defence evidence; the prosecution cannot derive any strength or support from weakness of the defence: 1979 Sim.L.C. 262: (1979) 6 Cr.L.T. 18: 1979 Cr.L.J. 1176 (Him. Pra.). *See* also 1980 All.Cr.R. 185.

Where a crowd of hooligans killed certain persons and the written statement given by witness to the Police did not fully describe the culprits and the prosecution failed to collect sufficient evidence to link the appellants to the particulars of the culprits given in the said written statement and further Investigating Officer did not resort to test identification parades of appellants and it was only in the Court that the witness recognised the appellants as culprits, *held*, appellants could not be convicted on the basis of such an evidence. [A.I.R. 1970 S.C. 1321; A.I.R. 1978 S.C. 1204; A.I.R. 1979 S.C. 1127, Foll.]: 1995 Cr.L.J. 1116 (Del.) (D.B.).

Identification during the trial is substantive evidence; the test identification parade is only a corroborative evidence. Thus, where the prosecutrix gave the accused's name in the F.I.R., identified him during the trial but failed to do so in the test identification, *held*, this fact alone was not sufficient to impair an otherwise truthful testimony: 1991 M.P.L.J. 69.

We may presume that the witnesses have correctly identified the accused, but the distance between 'may presume' and 'must presume' is long. In a criminal trial, the prosecution must adduce sufficient evidence to infer that the accused must be presumed to have committed the crime; any infirmity in the identification made for the first time before the Court cannot be set right by such presumption alone. It is high time for the Police and other investigating agencies to realise the necessity of the prior test identification because the accused usually state that they had already been seen by the witnesses, should not stand in their way in arranging such parades: (1972) 2 Sim.L.J. 349.

The evidence of a witness in the Court about the accused's participation in the occurrence is substantive evidence when the accused was not known to the witness prior to the occurrence; the Court, as a rule of prudence, looks for some good corroborative evidence which may come from various circumstantial factors; one of them being the evidence of test identification; it may be of some other kind as well: 1982 All.Cr.R. 326: 1982 Cr.L.J. (N.O.C.) 177.

Identification in an identification parade can be used only as corroboration of identification in the Court; if the accused is not identified in the Court, his identification in the parade is of no use: (1983-84) 88 Cal.W.N. 922 (D.B.). *See* also 1979 B.L.J.R. 404 (It must also be stated before the Court that the person identified at the parade was who committed the crime).

In case of total strangers, it is not safe to place implicit reliance on the evidence of witnesses who had just a fleeting glimpse of the accused identified or had no particular reason to remember him where the identification is made for the first time in the Court, and more so if the accused had since changed their appearance: A.I.R. 1992 S.C. 2100: 1992 Cr.L.J. 3454.

Where the victim, not knowing the accused earlier, gave no description of the accused in the F.I.R. and no test identification

parade took place, and it was only in the Court after four months of the occurrence that the victim identified the accused, *held*, such identification was no evidence against the accused: A.I.R. 1983 S.C. 367: (1983) 1 S.C.C. 143: 1983 Cr.L.J. 689; 1993 Cr.L.J. 2364 (Mad.) (Identification by the prosecutrix of the accused, not known to her previously, for the first time in Court, after more than three months, *held*, was of no value). *See* also 1994 Cr.L.J. (N.O.C.) 399 (Ori.).

Where an accused, wholly unknown to the witnesses, was arrested several years after the offence and there being no test identification, he was identified for the first time in the Court eleven years after the incident, *held*, such identification could not be relied upon; witnesses could not have recalled the accused's face after eleven years: 1985 Bih.L.T. (Rep.) 82 (D.B.). *See* also 1992 Cr.L.J. 3987: 1992 All.L.J. 1187.

Under S. 9, facts which establish the identity of a relevant thing or person are relevant in so far as they are necessary for that purpose; identification parades are not substantive evidence; these are helpful to the investigating officer who can satisfy himself of the *bona fides* of the prosecution witness and also corroborate the testimony of the witness in the Court. Thus, where a witness who had identified the accused in the test identification parade, but was not examined in the Court, the evidence of test identification will have no value; no purpose will be served by examining the Magistrate who had conducted the identification parade; it will only be a hearsay evidence and a waste of public time and public money. [1980 Ker.L.T. (S.N.) 54; 19 All.L.J. 947, Rel. on]: 1982 Ker.L.T. 287.

Where the witness admitted that he was seeing the accused for the first time in the Court $3^1/_2$ years after the theft and that the Police had shown the accused to the witness in the Court prior to his statement, *held*, evidence of the witness could not be relied upon as to the accused's identification: 1979 Bom.C.R. 30.

Where a witness had described particularly distinguishing features, like being one-eyed or with an amputated leg or hand or being a cripple, of the accused before the Investigating Officer but no test identification parade could be held for want of persons similar to the accused, the identification of the accused by the identifying witness in the Court, even though subjective evidence, could be relied upon, but not if none of the witnesses had described such features during the investigation but had identified the accused in the Court after about 7 years: 1992 All.L.J. 1187: 1992 Cr.L.J. 3987.

Identification in Court long after the incident is of little value in a case where the wrong-doers are strangers and unknown to the victims at the time of the incident. Corroboration by an identification parade to be held soon after the arrest of the suspected persons and other circumstances which do not give an opportunity to the witnesses to see the accused before the parade is held, is expected in such a case: 1953 Raj.L.W. 228.

Where the report of the test identification parade was not proved by the Magistrate conducting it but there was nothing to show that any witness had made a wrong identification or identified persons other than the accused, *held*, the identification in the Court cannot be called in question; in the background of the identifying witnesses having acquaintance with the accused, the identification in the Court cannot be faulted: (1994) 1 Ker.L.J. 136 (D.B.).

Ocular witnesses having an opportunity to notice special features of the accused and identifying them in the Court after a long lapse of time, *held*, is sufficient to establish the accused's identity: 1985 Cr.L.J. 1621 (Del.).

Where a prosecution witness categorically stated that he did not know the accused person in question from before but he stated that a man of his stature and age was with the other accused persons and he was armed with a hand-grenade and it was he, who had thrown hand-grenade on the deceased and the said witness identified said accused in the Court, but the Magistrate recorded that witness did not identify accused in the first round, *held*, it was not a case of total non-identification and, therefore, the importance of the identification made by the accused in the Court could not be minimised: 1994 Cr.L.J. 2952 (Raj.) (D.B.).

The substantive evidence of a witness is his statement in Court; but the purpose of test identification is to test that evidence and

the safe rule is that the sworn testimony of witness in Court as to the identity of the accused who are strangers to the witnesses, requires corroboration which should be in the form of an earlier identification proceeding: A.I.R. 1960 S.C. 1340.

It was urged for the appellant on the basis of the observations of the Supreme Court in A.I.R. 1960 S.C. 1340 that since the appellant was a stranger to *M* (P.W. 1) his identification at the trial, without his being corroborated by an earlier test identification, should not have been relied upon.

Held, that it was not being laid down as invariable rule that an identification by a witness at the trial would not be of much evidentiary value without his being corroborated in that respect by his having identified the person at an earlier test identification parade. There could be exceptions to the rule where the Court was satisfied that the evidence of a particular witness was such that it could safely rely on it without precaution of an earlier identification proceeding. In this case a test identification would have been not of such consequence as corroborative evidence since the P.W. 1 had occasion to see the appellant just after the assault when he was being accused of being the assailant: 1962 M.P.L.J. (Notes) 70.

As observed in A.I.R. 1960 S.C. 1340, the statement of a witness in the Court uncorroborated by an earlier identification parade can be relied upon in those exceptional cases where it is considered reliable; *a fortiori* the statement in Court of a reliable identifying witness, corroborated by an earlier identification proceeding, can sustain the conviction of the accused so identified: A.I.R. 1971 Manipur 43. *See* also A.I.R. 1971 S.C. 1050.

Though the identification of the accused in the identification parade before a Magistrate during investigation is a relevant fact; but not having been led in the Court during the course of trial, *held*, it is not substantive evidence; it is only corroborative evidence: (1972) 38 Cut.L.T. 294.

In a case under the Narcotic Drugs and Psychotropic Substances Act, 1985, the departmental witnesses who recognised accused in Court did not know accused before the raid and just had a transitory glimpse of the accused during raid. Further, no test identification parade was held. *Held*, Identification of accused by the departmental witnesses had no significance. Accused was entitled to acquittal. [(1991) M.P.W.N. 104; 1983 Cr.L.J. 1276 (S.C.); 1979 Cr.L.J. 919 (S.C.) and 1990 Cr.L.J. 1510 (S.C.), Rel. on]: 1994 Cr.L.J. (N.O.C.) 381 (Madh. Pra.).

3. Test identification parade—(*a*) Object of.—The evidence of identification figures a good deal in both criminal and civil matters. Evidence of fact is factual and pertains to observance. If one has earlier known the accused, the question left is merely of the witness's credibility; but if the accused is a stranger, the fact of identity becomes hazardous; it is well said that even if witness's veracity is above suspicion, his evidence of identity based on personal impression should be approached with considerable caution; much really depends upon the opportunity that the witness had of forming his impression, the length of time the perception lasted, and other circumstances. The memory may be faulty; its tricks, conscious or unconscious, may also warp the vision. A witness may have formed his own impression but still, if he were to compare that impression with that of others, who had also seen, his impression may get mixed up with what the others tell him; so viable is the mind that in the end he can very well adopt the others' impressions to have been truly formed by him and to swear about it in all earnestness; again, calm minds view a thing better than the emotionally stirred persons; the question of eyesight, colour and moon blindness and other defects, is also there; of all evidence of fact, the evidence of the identification of a stranger is perhaps the most elusive; the Courts generally agree that such evidence should be approached with considerable caution: 1978 Raj.L.W. 239 (D.B.). *See* also 1973 W.L.N. 934 (Raj.) (Facial recognition of a person is dependent on the particular quality of the memory).

A test identification is designed to furnish evidence to corroborate the evidence which the witness concerned tenders before the Court: I.L.R. (1960) 2 All. 488: (1961) 1 Cr.L.J. 340: A.I.R. 1961 All. 153.

Test identification parades are held by the Police in the course of their investigation for the purposes of enabling witnesses to

identify the properties which are the subject-matter of the offence or to identify the persons who are concerned in the offences. They are not held merely for the purpose of identifying property or persons irrespective of their connection with the offence. Whether the Police Officers interrogate the identifying witnesses or the Panch witnesses who are procured by the Police do so, the identifying witnesses are explained the purpose of holding these parades and are asked to identify the properties which are the subject-matter of the offence or the persons who are concerned in the offence: 1955 S.C.J. 129: (1953) 1 S.C.R. 903: A.I.R. 1955 S.C. 104; 1978 Raj.Cr.C. 18. Per *Desai, J.* The whole object behind an identification proceeding is to find out whether the suspect is the real offender or not: 1953 Cr. L.J. 848: A.I.R. 1953 All. 385.

It is well settled that identification in the Court is legal evidence and identification in the test parade has only corroborative value; the test identification parade has a dual purpose: (*i*) to give assurance to the investigation that it was proceeding on the right lines, and (*ii*) to test the veracity of the witnesses identifying the accused in the Court: (1987) 35 B.L.J.R. 340 (D.B.); 1978 B.L.J. 381.

Identification is one of the vexatious questions of criminal jurisprudence; in all cases of personal identification, there is abundant material to put to the witnesses in the cross-examination, depending on variable inconsistent factors like eyesight, facial or bodily peculiarities, the possibility of a duplication of those peculiarities in other persons, the identifier's ability to describe accurately the distinguished mannerisms of the accused and other persons of similar build, the ability to retain a clear mental vision of the person seen, the length of time between the occurrence and the test identification parade, the possibility of external influences (photographs, newspapers, descriptions, conversations with other witnesses, etc.), as well as the actual conditions under which the identification parade is conducted: (1978) 1 Karn.L.J. 30: 1978 Cr.L.J. 462: I.L.R. (1978) Karn. 133.

The identification by the witnesses during the trial is primary and substantive evidence; an identification parade belongs to the stage of investigation by the Police and is not primary or substantive evidence. Like any other evidence procured during the investigation, a test identification parade and its result can be utilised either for corroboration or contradiction: 1979 Chand. L.R. (Cr.) 39: (1979) 6 Cr.L.T. 151: 1979 Sim.L.C. 363 (Him.Pra.) (D.B.).

Identification parades are ordinarily held at the instance of the investigating officer; they belong to the investigation stage and provide assurance of the investigation being on the right lines; they should be held at the earliest possible opportunity which also tends to minimise the chances of the fading of memory by long lapse of time. But of much more vital importance is the effectiveness of the necessary precautions so that the identifying witnesses get no opportunity before the parade of seeing the accused to be identified or other unfair aid or assistance: (1971) 2 S.C.W.R. 446: A.I.R. 1972 S.C. 283; A.I.R. 1958 All. 746.

Identification parade is meant to find out whether or not the suspect is the real offender; though such parade is not by itself substantive evidence, it furnishes evidence to corroborate the concerned witnesses's testimony before the Court about the accused's identity; in case the accused are not known previously to the witnesses, an identification parade is a must; otherwise, it is not necessary: 1992 M.P.L.J. 775 (D.B.); 1978 Raj.Cr.C. 126.

Normally the use of an identification parade is that the identifying witness identifies a particular suspect and testifies to his role in the incident: (1984) 2 Bom.C.R. 615 (D.B.).

Identification at test parades is not substantive evidence; it is only to be used as corroboration; an identification parade cannot, thus, improve the prosecution case: A.I.R. 1973 S.C. 2190.

Identification parades have been common over a very long time; the object of placing a suspect in a line up with others for identification is to find out whether he is the perpetrator of the crime; all the more necessary when his name is not mentioned by the purported eye-witnesses who claim that, even if not knowing him earlier, they could recall his features in sufficient details to identify him if they happened to see him. A test identification in such cases is in the interest of both the prosecution and the accused; it enables the investigating officer to fill up the gap regarding the culprits' identity and saves the

accused from the sudden risk of being identified by them in the dock. A test identification parade is, thus, a workable way of testing the memory and veracity of witnesses; it has worked well in actual practice: A.I.R. 1978 S.C. 1204: (1978) 3 S.C.C. 86: 1978 Cr.L.J. 1137; (1984) 2 Bom.C.R. 615 (D.B.).

Identification tests do not constitute substantive evidence; they are primarily meant for helping the investigating agency with an assurance that it is proceeding on the right lines: A.I.R. 1971 S.C. 1050: 1971 Cr.L.J. 913. *See* also 1992 Cr.L.J. 3251 (Him. Pra.) (D.B.).

The evidence given by a witness in the Court is substantive evidence; if the accused is not previously known to the witness, the accused's identification soon after his arrest is of vital importance; it assures the investigating agency that investigation is on the right lines and furnishes corroboration of the substantive evidence of identification; it is of great importance both for the investigating agency and for the accused and *a fortiori* for the proper administration of justice that identification parade is held without avoidable and unreasonable delay after the accused's arrest and that all necessary precautions and safeguards therefor are effectively taken. It is also fair to the witness, a stranger to the accused, as it reduces the chances of his memory fading if he is to identify the accused at the earliest possible opportunity after the offence: (1971) 2 S.C.C. 715: 1972 Cr.L.J. 15: (1972) 1 S.C.R. 627: A.I.R. 1972 S.C. 102; 1980 Raj.L.W. 341 (D.B.); 1977 Cr.L.J. 1788 (D.B.).

The object of a test identification parade under S. 9 is to test the capacity of a witness to identify an unknown person whom the witness may have seen only once; where a witness identifies in the Court an accused, not known to him, for the first time, *held*, his evidence is absolutely valueless: A.I.R. 1979 S.C. 1127: (1979) 2 S.C.J. 373: (1979) 3 S.C.C. 319. *See* also 1993 Cr.L.J. 2364 (Mad.).

The evidence of test identification is not the only type of evidence to confirm the evidence of the accused's identification tendered in the Court; his identity can also be fixed by circumstantial evidence: 1974 Cr.L.J. 674: (1974) 4 S.C.C. 213: A.I.R. 1974 S.C. 791.

The test identification parade is meant to test the witnesses' power of recollection; it belongs to, and is part of, the realm of investigation, admissible under S. 9; but its value depends on the promptitude with which the suspects are put up for test identification. An unexplained and unreasonable delay itself detracts from its credibility: A.I.R. 1988 S.C. 345: (1988) 1 S.C.C. 14: 1988 Cr.L.J. 422.

The evidence of test identification parade is meant to corroborate the witnesses's substantive evidence in the Court; the witness has not merely to prove that he had identified the accused at the identification parade but also that the accused had committed the offence: 1979 B.L.J. 395: 1980 Bih.Cr.C. 15: 1979 B.L.J.R. 404: 1979 B.B.C.J. (H.C.) 544; (1981) 52 Cut.L.T. 512.

Identification—Criminal trial—Identification proceedings, conduct of—Test identification proceeding not reliable—They cannot corroborate evidence of identification witnesses: 1965 All. L.J. 197.

The evidence of test identification, admissible under S. 9, is, at best, only corroborative; by itself, it has no independent value: 1974 Cr.L.J. 674: (1974) 4 S.C.C. 213: A.I.R. 1974 S.C. 791.

A.I.R. 1970 S.C. 1321, cited in Note 2, *supra*, did not lay down a rule of universal application about the identification evidence being a very weak type of evidence; where the witness correctly identifies the accused at a test identification parade held by a Magistrate after all essential formalities and necessary precautions, and also identifies the accused in the Court, the evidence of identification can be believed unless the evidence suffers from some other infirmity; the evidence of identification becomes even stronger if the witness had seen the accused not for a few minutes but for some length of time and in broad day light, when he could note the accused's features more carefully: A.I.R. 1978 S.C. 1770: 1978 All.L.J. 1156.

It is true that human memory is fallible and it is some times difficult to identify a person not very well known whom one sees with a rather different appearance at the time of identification proceedings. But this does not necessarily cause any infirmity in the evidentiary value of the witnesses who do, in spite of this difficulty, find it possible to identify the accused; nor is the value of the identification minimised because of the time gap between the occurrence and the identification proceedings. If the accused cannot be

put up for identification for sometime after the occurrence the prosecution obviously suffers inasmuch as it becomes more and more difficult for the witnesses to identify persons who were not known to them at all and who were seen by them for the first time at the time of occurrence. But if in spite of fading memory and the effect of seeing the accused in a different appearance and the long gap between the time of the occurrence and holding of identification proceedings, the witnesses do identify the accused, there should be no justification whatsoever for discarding their evidence. The evidence of the identification has to be judged on the basis of various facts and circumstances of the particular case and it is not possible to lay down hard and fast rule as to when a particular identification should or should not be accepted. Where the accused were arrested after about 8 months of the commission of dacoity and identification proceedings were arranged within $2^1/_2$ months of their arrest, *held*, that the evidence furnished by the identification could not be discarded merely because the identification proceedings took place months after the commission of the offence: (1964) 1 Cr. L.J. 378: A.I.R. 1964 All. 139. *See* also 1975 Raj.L.W. 469: I.L.R. (1975) Raj. 1087 (D.B.).

Identification—Accused not shown to identifiers before parade—Exact number of slips concealing marks on his face not available—Accused identified by witnesses whose evidence was found reliable—Conviction maintained: 1965 All.L.J. 166.

Evidence of identification proceedings must not be rejected on the sole ground that the accused person was on bail. The value to be attached to an identification parade depends upon circumstances of each case. The main considerations before the Court are whether the identification parade was conducted in a fair manner, and whether witnesses in fact saw the accused between the commission of the offence and identification parade.

When an accused person is on bail and he is to be put up for identification, the responsibility for keeping himself away from prosecution witnesses lies mainly upon him. The responsibility of the accused is all the greater in a case, where he gives an undertaking to keep himself in Court till the day of identification. In such cases the prosecution cannot do much for keeping the accused away from prosecution witnesses: 1959 All.W.R. (H.C.) 410: 1959 All.Cr. R. 326: 1959 All.L.J. 548.

An application for conducting an identification parade after the accused had been committed to the Sessions Court and enlarged on bail, *held*, being belated, it was rightly rejected: 1981 All.Cr.R. 151: 1981 All.W.C. 268: 1981 All.Cr.C. 232.

Inordinate delay in taking the arrested accused to the Police station throws doubt on the test identification's fairness. *See* 1982 All.Cr.R. 200: 1982 All.W.C. 329: 1982 All.L.J. 1061.

Where an accused was apprehended not by the Police but by one of the eye-witnesses and was put to T.I. parade long after his arrest, *held*, the accused would be entitled to the benefit of doubt as the possibility of other eye-witnesses being tutored by the eye-witness apprehending the accused could not be ruled out. *See* 1979 Raj. Cr.C. 39; 1992 Cr.L.J. 1491 (Raj.) (Accused as well as Police Officials present at the Police Station for photograph and the identification parade held more than one month after arrest—No conviction could be based on such identification).

In the absence of a valid explanation for the delay in holding the identification parade and in the face of unreliable evidence regarding the accused's identity, *held*, the accused was entitled to acquittal: A.I.R. 1991 S.C. 1938. *See* also 1992 Cr.L.J. 1256 (Ori.); 1992 Cr.L.J. 3251 (Him. Pra.) (D.B.).

But where the accused were put on test identification within 24 hours of their arrest, the identification cannot be rejected merely on the ground that it was not possible for them to identify the accused after a lapse of a period of three months: A.I.R. 1994 S.C. 739: 1994 Cr.L.J. 922.

The value of test identification depends on two most important factors: (*i*) the person identifying the accused had no opportunity of seeing him after the occurrence; and (*ii*) the witness had made no mistake; a test identification conducted long after the accused's arrest is of little value; there is every possibility of a mistake by the witness if the identification proceedings are held after an inordinate delay; thus, an identification parade conducted 11 days after the accused's arrest with no convincing explanation for the

intervening days, *held*, the identification had no evidentiary value: A.I.R. 1971 Raj. 184: I.L.R. (1970) 20 Raj. 439: 1971 Cr.L.J. 974. *See* also 1980 All.L.J. 370; (1978) 46 Cut.L.T. 260. It is unsafe to rely on the evidence of a test identification parade conducted 13 months after the accused's arrest: 1983 Cr.L.J. (N.O.C.) 202; 1992 Cr.L.J. 1136 (Cal.) (D.B.); 1992 Cr.L.J. 2271 (Ori.) (Delay of $3^1/_2$ months in holding parade held to be fatal); 1992 Cr.L.J. 1150 (Madh. Pra.) (Identification parade held after 57 days of arrest without any explanation for the same, had no evidentiary value); 1992 Cr.L.J. 3819 (All.) (D.B.) (Delay of 2 months).

In assessing the value of the test identification parades, one of the vital factors is whether the identification parade was held within a reasonable time after the accused's arrest and, if not so, whether there is convincing explanation from the prosecution for delay in conducting the test parade. Thus, where identification parade was conducted after about 25 days of the arrest with no explanation for the delay, *held*, it cannot be relied on: 1977 Raj.L.W. 178. *See* also 1959 M.P.L.J. 862: 1959 Jab.L.J. 576; 1977 Cr.L.R. 143 (Mah.) (D.B.); (1977) 43 Cut.L.T. 38; 1994 Cr.L.J. (N.O.C.) 105 (Ori.).

When there was a delay of four months in holding the identification parade and the witnesses had, neither in the F.I.R. nor in their statements before the Police, given any descriptive particulars of the accused, *held*, it is not safe to act upon such identification: A.I.R. 1987 S.C. 1222; A.I.R. 1988 S.C. 345: 1988 Cr.L.J. 422.

An identification parade conducted after a long delay from the date of the accused's arrest with no explanation for the delay, *held*, the parade would be of no help to the prosecution. [1977 Cr.L.R. 316 (Mah.), Rel. on]: 1981 M.P.L.J. 755.

The whole purpose of holding an identification parade is defeated and its value almost completely lost if there is a long lapse of time between the date of arrest of the accused and the date of identification parade. What delay is inordinate is a question which must be answered by reference to all the circumstances of the case. The nature of the offence, the state of mind of the witness at the particular time when the offence was committed, terror, excitment, etc., and the duration in which the witness had the opportunity to see the accused are facts to be particularly taken into account. The reason for rejecting the evidence of identification on the ground of inordinate delay is that ordinarily the human mind does not register an impression of a face seen only once for a brief moment, for a long time thereafter unless that face has some special features or peculiarities which help to fix its memory on the mind of the witness.

In a trial under S. 376, Penal Code, it may be said that the girl of 15 years who rendered herself easily accessible to five persons within 24 hours and did not complain to person to whom she had occasion and opportunity to complain must have become acquainted with the accused persons, because they were in physical contact with her during coition when she had intercourse with them during day time. But the inordinate delay of one and a half months from the date of offence together with the facts that the first identification parade proved abortive and on the second occasion, the girl was seated in the courtyard while accused persons were seated in the verandah in front of her, would take away all the evidentiary value of the identification parade: 1962 Jab. L.J. 825: 1962 M.P.L.J. (Notes) 325: (1963) 1 Cr. L.J. 686.

Where the delay was of about three months in holding the identification parade, the Investigating Officer was not cross-examined about the reason for the delay, *held*, the prosecution's burden to establish the guilt cannot be carried so far as to require it to lead evidence to rebut all possible defences; the validity of the parade cannot be challenged if the Magistrate had held that parade and the investigating officer was not cross-examined about the delay or other irregularities: 1972 S.C.D. 1119: (1973) 3 S.C.C. 896: A.I.R. 1972 S.C. 2478.

Where a test identification parade held after long delay was not relied upon by the prosecution, *held*, the accused is not thereby prejudiced in any way; it is not substantive evidence and could be used only to corroborate other evidence: 1971 S.C.D. 62: 1971 Cr.L.J. 921: A.I.R. 1971 S.C. 1058.

Where an identification parade was held more than six months after the arrest with no plausible explanation for the inordinate delay and the other co-accused had been acquitted, *held*, a conviction based on such

identification evidence is liable to be set aside: A.I.R. 1992 S.C. 1032: 1992 Cr.L.J. 1122.

Where in a case of dacoity, the question was whether it was erroneous to reject the evidence of identification which was held about 12 months after the occurrence of the incidence, only on the ground of unexplained delay, *held*, the identification could not safely be relied upon and was thus rightly rejected: A.I.R. 1979 S.C. 1188.

It is not a rule of law that after a long lapse, witnesses would not be able to identify the accused seen by them committing the dacoity during the night; but the Courts have to be extremely cautious while appraising such evidence: A.I.R. 1972 S.C. 3: 1972 Cr.L.J. 1: 1972 M.L.J. (Cr.) 205. *See* also 1981 Bom.C.R. 798; 1977 Raj.Cr.C. 344 (No universal measure of time after which the evidence of identification would be necessarily disbelieved).

But where it was a case of dacoity committed in broad daylight for sufficiently a long time, *held*, delay of about six weeks in holding identification parade was not fatal: 1993 Cr.L.J. 3719 (All.) (D.B.).

The performance of a witness at a test identification as recorded in the identification memo can be used only for the purpose of corroborating his testimony in Court which alone is substantive evidence in the case. If the evidence given in Court by him cannot be implicitly relied, the absence of corroborative evidence in the shape of identification memo is wholly immaterial: 1965 All.L.J. 478: 1965 All.W.R. (H.C.) 811: 1965 All.Cr.R. 543.

Prosecution case depending upon identification evidence—Committing Magistrate should examine identifying witnesses: 1964 All.W.R. (H.C.) 6: 1966 Cr.L.J. 200.

(*b*) Need for holding.—General principles emerging from the Court's decisions are: (*i*) test identification evidence is universally accepted as very weak; (*ii*) the statement of a witness before Court, as a general rule, is substantive evidence; (*iii*) test identification after long lapse of time is not of much value as human beings cannot remember the accused's features and the identifying witnesses are likely to commit mistakes; (*iv*) substantive evidence in the Court may be corroborated by the accused's prior test identification by an unknown witness in an identification parade held by a Magistrate after observing all essential formalities and necessary precautions; (*v*) the identifying witnesses should give out details of the part the accused played, his features, his stature as also whether he is fat or thin or whether he is black or fair or any identification mark; (*vi*) the evidence of identification becomes more weighty where the witness had an opportunity of seeing the accused not for a few minutes but for some length of time in broad daylight. But if the witness, while picking out the accused at the test parade, does not disclose the accused's specific part in the offence (dacoity), that will not render his evidence of identification inadmissible; and (*vii*) if identification evidence is reliable, trustworthy and inspires confidence and is also corroborated by other materials on the record, such qualitatively rich evidence prevails over quantitatively poor evidence: (1988) 36 B.L.J.R. 720 (D.B.).

The accused persons may or may not have legal right to claim for test identification and the holding of test identification may or may not be a rule of law, but it is a rule of prudence. Test identification parade should be held, especially when the accused persons definitely assert that they were unknown to the prosecution witnesses either by name or by face and they requested the authorities concerned to have the test identification parade held. The non-holding of a test identification parade though may not be a ground to vitiate the trial, is undoubtedly a very important feature in considering the credibility of the witnesses on the point of identification: 1954 B.L.J.R. 23: A.I.R. 1954 Pat. 483. Although the accused has no right to claim identification if the prosecution turns down his request for identification, it runs the risk of the veracity of the eye-witnesses being challenged on that ground. The prosecution will be exposing the claim of such witnesses to the criticism that the test of identification was shirked because the witnesses would not have been able to stand that test. Unless therefore, the prosecution can nullify that criticism, there would be an element of doubt attaching to the testimony of those witnesses of which the benefit should go to the accused: A.I.R. 1955 All. 671: 1955 Cr.L.J. 1547; 1973 All.Cr.R. 307. Per *Sankar Sarang, J.*—It cannot be said that on account of absence of identification

proceedings, the entire sworn testimony of witnesses should be discarded. Per *Desai, J.*—The above observation should be taken as modified by the rule of caution or prudence that there must be corroboration. At the same time, it must not be thought that identification proceedings are required in order to supply material to the accused for challenging the evidence of the witnesses: 1953 Cr.L.J. 848: A.I.R. 1953 All. 385. By its very nature test identification proceedings may be considered to form part of investigation, but once a case has been challaned the investigation is over and if the prosecution desires to complete or undertake some portion of the investigation, it can do so only with the approval of the Court who is seized of the case. It would be wrong on principle to call investigation of a case independently of the Court when it has taken cognizance of it. Where, therefore, a Sub-divisional Magistrate who is holding the inquiry does not consider it necessary to order a fresh test identification parade on the request of the prosecution, it is not competent for the District Magistrate to interfere in his discretion by issuing a direction to the contrary. [(1947) 2 M.L.J. 252, Rel. on]: 1956 Raj. L.W. 15: I.L.R. (1955) 5 Raj. 769.

Though an accused cannot ask for the identification parade as of right, all the same by refusing to accept such request in an appropriate case, the prosecution runs the risk of losing the case; an accused has no statutory right to ask for an identification parade and it is only by way of prudence that the Investigating Officer is expected to concede to the accused's request so as to assist the Court in arriving at the truth: 1982 Raj.L.W. 319; 1974 Cr.L.J. 240 (Punj.).

The request of the accused, a stranger to the prosecution witnesses, for test identification parade, *held*, must always be allowed; it is only by the test identification that the veracity of the eye-witnesses can be checked; by turning down the request, the prosecution would run the risk of the eye-witnesses's veracity being challenged; and it would not be proper to place much reliance on the identification evidence given in the Court: 1979 All.Cr.R. 385: 1979 All.Cr.C. 250: 1979 All.L.J. 1160.

No rule of law requires that a witness's oral testimony should be corroborated by evidence of identification which is itself a weak type of evidence; nevertheless, if the accused had at the earliest asked for the parade which was opposed by the prosecution, *held*, the Court may acquit the accused: A.I.R. 1975 S.C. 175: (1975) 2 S.C.R. 622.

Where the accused requested for a test identification saying that the eyewitnesses did not know him and would not be able to identify him but the Magistrate found from the case diary that the witnesses had previously known the accused, *held*, the request was properly rejected: 1981 All.Cr.R. 379: 1981 All.W.C. 736: 1982 All.L.J. 21.

Failure to put up arrested persons for identification, where accused themselves do not claim identification, is not fatal to prosecution's case: 1968 All.W.R. (H.C.) 344: 1968 All.Cr.R. 224.

It is not the right of an accused to claim identification and duty of the Court to direct one if the same is claimed before the Court begins to record the prosecution evidence, identification proceedings are held only during the course of investigation as it is for the investigating agency to satisfy itself as to whether a certain witness had at all seen the suspects put up for identification before him and whether he will be in a position to support the prosecution case against the suspect in Court. Reliance can be placed on identification proceedings only by way of contradiction or corroboration of the evidence in Court when he states whether or not a particular person was seen by him at the time of commission of the crime. While the investigation is in progress, the witness can only point out the omission on the part of the investigating authority to hold an identification parade, which if refused, entitles the accused to challenge the veracity of the witnesses on that ground at the trial. The fact that the accused alleging that the witnesses could not identify them claimed to be put up for identification and the opportunity was denied to them would raise a doubt about the veracity of those witnesses but is not by itself sufficient to hold that the witnesses are liars and that they should not be believed. In a case, where the investigating authority not only refused to comply with the accused's request to arrange an identification parade but also omitted to examine any of the witnesses of a certain village at which a dacoity was allegedly planned by the accused and such witnesses had also sworn to affidavits

that no such incident occurred and that they did not also participate in the raid, it was *held* that the totality of the above circumstances did raise a benefit of doubt in favour of the accused: 1968 Cr.L.J. 9: A.I.R. 1968 All. 28.

The accused cannot compel the prosecution to hold their identification during the investigation, and there is no law or procedure under which the Magistrate could pass such an order. But if such a prayer is made by the accused and the prosecution opposes such a request, by so doing it exposes the witnesses of identification to a genuine criticism that they would probably not be able to identify the offenders correctly if the parade was held. Under such circumstances, therefore, it is desirable that the identification parade of the culprits should be held if so desired by the offenders. Where the culprits, though they initially refused identification, subsequently made a request that they should be identified, and the request was refused for no valid reasons, and the Court identification was made long afterwards, it was *held* that the identification evidence in Court could not be relied on, unless it was corroborated: (1965) 1 Cr.L.J. 466: A.I.R. 1965 Punj. 146.

As observed by Supreme Court in (1971) 2 S.C.R. 917: A.I.R. 1971 S.C. 363, the absence of test identification is not necessarily fatal: A.I.R. 1975 S.C. 1814: 1975 Cr.L.J. 1553: (1975) 4 S.C.C. 580. *See* also A.I.R. 1971 Madh. Pra. 116; 1989 Cr.L.J. 2362 (Ker.); 1993 Cr.L.J. 1608 (Bom.).

The absence of test identification is not always fatal; if the accused is well-known by sight to the witnesses, his identification would be waste of time; but if asserted by the prosecution that the witnesses already knew the accused and thereby identification not being held, and it transpires during the trial that the accused was not previously known to the witnesses, the prosecution runs the risk to lose; if in doubt, especially when the accused says that the eye-witnesses did not know him previously, the identification parade should be held: A.I.R. 1971 S.C. 363: 1971 Cr.L.J. 305: (1971) 2 S.C.J. 285: 1971 All.W.R. 692: 1971 M.L.J. (Cr.) 692.

The prosecution need not conduct an identification parade where the accused are arrested at the spot; it is for the accused, if they feel that the witnesses would not be able to identify them, to request for the identification parade: A.I.R. 1971 S.C. 708: 1971 Cr.L.J. 642. *See* also 1988 Cr.L.J. 319; 1993 Cr.L.J. 1800 (S.C.); A.I.R. 1967 All. 447.

Prosecution witnesses deposing that they know the accused as resident of their locality from before the occurrence of offence—Witnesses not cross-examined on the point—Accused later praying for identification by witnesses in identification parades—Omission to conduct such identification parade—*Held*, no adverse inference could be drawn: 1967 All. L.J. 252: 1967 Cr. L.J. 1579: A.I.R. 1967 All. 543.

Where the witness had known the accused even before he saw the accused at the occurrence and the accused did not contend that he was not previously known to the witness, *held*, the identification parade was not required to be conducted: 1972 Cr.L.J. 1342.

Absence of test identification parade is not material when the accused could be sufficiently identified beyond reasonable doubt by the witnesses: 1973 Cr.L.J. 526 (Gau.) (D.B.).

Test identification parade — Suspects known to eye-witness—Test identification parade is a farce and hence unreliable: (1964) 2 Cr.L.J. 585: A.I.R. 1964 Tripura 54; A.I.R. 1975 S.C. 274: 1975 Cr.L.J. 290: (1975) 3 S.C.C. 407.

Where overwhelming evidence on the record showed that the accused was chased and arrested and most of the witnesses had identified him, *held*, it could not be contended that for want of identification parade, his identification by the witnesses could not be relied upon; the test identification parade in such a case would have been a farce; admittedly many had seen him under arrest and if they had identified him in the parade, the argument would have been that he was seen soon after his arrest and, therefore, his identification was of no value at all; the accused's test identification parade was, thus, not at all necessary: (1987) 35 B.L.J.R. 127 (D.B.). Where the accused was in the hospital and there was cogent evidence regarding the part played by him in commission of offence, *held*, non-conducting of identification parade was not fatal: 1994 Cr.L.J. 37 (Andh. Pra.).

Where though the accused were not previously known to the witnesses, they were not put up for test identification, *held*, it was

proceedings, the entire sworn testimony of witnesses should be discarded. Per *Desai, J.*—The above observation should be taken as modified by the rule of caution or prudence that there must be corroboration. At the same time, it must not be thought that identification proceedings are required in order to supply material to the accused for challenging the evidence of the witnesses: 1953 Cr.L.J. 848: A.I.R. 1953 All. 385. By its very nature test identification proceedings may be considered to form part of investigation, but once a case has been challaned the investigation is over and if the prosecution desires to complete or undertake some portion of the investigation, it can do so only with the approval of the Court who is seized of the case. It would be wrong on principle to call investigation of a case independently of the Court when it has taken cognizance of it. Where, therefore, a Sub-divisional Magistrate who is holding the inquiry does not consider it necessary to order a fresh test identification parade on the request of the prosecution, it is not competent for the District Magistrate to interfere in his discretion by issuing a direction to the contrary. [(1947) 2 M.L.J. 252, Rel. on]: 1956 Raj. L.W. 15: I.L.R. (1955) 5 Raj. 769.

Though an accused cannot ask for the identification parade as of right, all the same by refusing to accept such request in an appropriate case, the prosecution runs the risk of losing the case; an accused has no statutory right to ask for an identification parade and it is only by way of prudence that the Investigating Officer is expected to concede to the accused's request so as to assist the Court in arriving at the truth: 1982 Raj.L.W. 319; 1974 Cr.L.J. 240 (Punj.).

The request of the accused, a stranger to the prosecution witnesses, for test identification parade, *held*, must always be allowed; it is only by the test identification that the veracity of the eye-witnesses can be checked; by turning down the request, the prosecution would run the risk of the eye-witnesses's veracity being challenged; and it would not be proper to place much reliance on the identification evidence given in the Court: 1979 All.Cr.R. 385: 1979 All.Cr.C. 250: 1979 All.L.J. 1160.

No rule of law requires that a witness's oral testimony should be corroborated by evidence of identification which is itself a weak type of evidence; nevertheless, if the accused had at the earliest asked for the parade which was opposed by the prosecution, *held*, the Court may acquit the accused: A.I.R. 1975 S.C. 175: (1975) 2 S.C.R. 622.

Where the accused requested for a test identification saying that the eyewitnesses did not know him and would not be able to identify him but the Magistrate found from the case diary that the witnesses had previously known the accused, *held*, the request was properly rejected: 1981 All.Cr.R. 379: 1981 All.W.C. 736: 1982 All.L.J. 21.

Failure to put up arrested persons for identification, where accused themselves do not claim identification, is not fatal to prosecution's case: 1968 All.W.R. (H.C.) 344: 1968 All.Cr.R. 224.

It is not the right of an accused to claim identification and duty of the Court to direct one if the same is claimed before the Court begins to record the prosecution evidence, identification proceedings are held only during the course of investigation as it is for the investigating agency to satisfy itself as to whether a certain witness had at all seen the suspects put up for identification before him and whether he will be in a position to support the prosecution case against the suspect in Court. Reliance can be placed on identification proceedings only by way of contradiction or corroboration of the evidence in Court when he states whether or not a particular person was seen by him at the time of commission of the crime. While the investigation is in progress, the witness can only point out the omission on the part of the investigating authority to hold an identification parade, which if refused, entitles the accused to challenge the veracity of the witnesses on that ground at the trial. The fact that the accused alleging that the witnesses could not identify them claimed to be put up for identification and the opportunity was denied to them would raise a doubt about the veracity of those witnesses but is not by itself sufficient to hold that the witnesses are liars and that they should not be believed. In a case, where the investigating authority not only refused to comply with the accused's request to arrange an identification parade but also omitted to examine any of the witnesses of a certain village at which a dacoity was allegedly planned by the accused and such witnesses had also sworn to affidavits

that no such incident occurred and that they did not also participate in the raid, it was *held* that the totality of the above circumstances did raise a benefit of doubt in favour of the accused: 1968 Cr.L.J. 9: A.I.R. 1968 All. 28.

The accused cannot compel the prosecution to hold their identification during the investigation, and there is no law or procedure under which the Magistrate could pass such an order. But if such a prayer is made by the accused and the prosecution opposes such a request, by so doing it exposes the witnesses of identification to a genuine criticism that they would probably not be able to identify the offenders correctly if the parade was held. Under such circumstances, therefore, it is desirable that the identification parade of the culprits should be held if so desired by the offenders. Where the culprits, though they initially refused identification, subsequently made a request that they should be identified, and the request was refused for no valid reasons, and the Court identification was made long afterwards, it was *held* that the identification evidence in Court could not be relied on, unless it was corroborated: (1965) 1 Cr.L.J. 466: A.I.R. 1965 Punj. 146.

As observed by Supreme Court in (1971) 2 S.C.R. 917: A.I.R. 1971 S.C. 363, the absence of test identification is not necessarily fatal: A.I.R. 1975 S.C. 1814: 1975 Cr.L.J. 1553: (1975) 4 S.C.C. 580. *See* also A.I.R. 1971 Madh. Pra. 116; 1989 Cr.L.J. 2362 (Ker.); 1993 Cr.L.J. 1608 (Bom.).

The absence of test identification is not always fatal; if the accused is well-known by sight to the witnesses, his identification would be waste of time; but if asserted by the prosecution that the witnesses already knew the accused and thereby identification not being held, and it transpires during the trial that the accused was not previously known to the witnesses, the prosecution runs the risk to lose; if in doubt, especially when the accused says that the eye-witnesses did not know him previously, the identification parade should be held: A.I.R. 1971 S.C. 363: 1971 Cr.L.J. 305: (1971) 2 S.C.J. 285: 1971 All.W.R. 692: 1971 M.L.J. (Cr.) 692.

The prosecution need not conduct an identification parade where the accused are arrested at the spot; it is for the accused, if they feel that the witnesses would not be able to identify them, to request for the identification parade: A.I.R. 1971 S.C. 708: 1971 Cr.L.J. 642. *See* also 1988 Cr.L.J. 319; 1993 Cr.L.J. 1800 (S.C.); A.I.R. 1967 All. 447.

Prosecution witnesses deposing that they know the accused as resident of their locality from before the occurrence of offence—Witnesses not cross-examined on the point—Accused later praying for identification by witnesses in identification parades—Omission to conduct such identification parade—*Held*, no adverse inference could be drawn: 1967 All. L.J. 252: 1967 Cr. L.J. 1579: A.I.R. 1967 All. 543.

Where the witness had known the accused even before he saw the accused at the occurrence and the accused did not contend that he was not previously known to the witness, *held*, the identification parade was not required to be conducted: 1972 Cr.L.J. 1342.

Absence of test identification parade is not material when the accused could be sufficiently identified beyond reasonable doubt by the witnesses: 1973 Cr.L.J. 526 (Gau.) (D.B.).

Test identification parade — Suspects known to eye-witness—Test identification parade is a farce and hence unreliable: (1964) 2 Cr.L.J. 585: A.I.R. 1964 Tripura 54; A.I.R. 1975 S.C. 274: 1975 Cr.L.J. 290: (1975) 3 S.C.C. 407.

Where overwhelming evidence on the record showed that the accused was chased and arrested and most of the witnesses had identified him, *held*, it could not be contended that for want of identification parade, his identification by the witnesses could not be relied upon; the test identification parade in such a case would have been a farce; admittedly many had seen him under arrest and if they had identified him in the parade, the argument would have been that he was seen soon after his arrest and, therefore, his identification was of no value at all; the accused's test identification parade was, thus, not at all necessary: (1987) 35 B.L.J.R. 127 (D.B.). Where the accused was in the hospital and there was cogent evidence regarding the part played by him in commission of offence, *held*, non-conducting of identification parade was not fatal: 1994 Cr.L.J. 37 (Andh. Pra.).

Where though the accused were not previously known to the witnesses, they were not put up for test identification, *held*, it was

a serious lacuna in the prosecution's case: 1980 All.Cr.R. 299; 1992 Cr.L.J. 1959 (Del.) (Where the accused not named in the F.I.R. and living faraway was neither arrested at spot nor was known to witnesses previously, *held*, failure to hold identification parade was fatal).

Where the accused declined to participate in the test identification parade, although held on the very next day of his arrest, *held*, an adverse inference may legitimately be drawn against him unless there is material to show that he was, while in custody, shown to the complainant; and in that case his substantive identification by the witness in the Court would have no probative value. [1982 Cr.L.J. 630 (S.C.), Rel. on]: 1985 Cr.L.J. 1700. *See* also 1980 Chand. Cr.C. 121 (Del.).

Non-participation of the accused in the identification parade, *held*, does not detract from the value of the eyewitnesses' evidence when they had otherwise ample opportunity to see the occurrence: A.I.R. 1994 S.C. 1536. *See* also 1988 Cr.L.J. (N.O.C.) 28 (Del.) (Refusal by accused to take part in identification parade).

Identification of washerman's mark on the clothes found near the dead body by the washerman before Magistrate is sufficient proof—Test identification is not essential. [1972 Cr.L.J. 11 (S.C.), Rel. on]: 1975 Cr.L.J. 354.

Case of dacoity — Statement by identifying witnesses about the precise part played by different accused in the offence is not necessary—It is enough if a person identified is shown to have taken part in the dacoity—No hard and fast rule for evaluating identity evidence can be laid down in such cases, each case depends on its facts and circumstances: (1964) 66 Punj.L.R. 173.

Merely because the witnesses, while picking out the accused at the test identification parade, said nothing about the specific part played by him in the crime, *held*, that would not render the evidence of such identification inadmissible: A.I.R. 1976 S.C. 2207: (1976) 3 S.C.C. 454: 1976 Cr.L.J. 1723: (1976) 3 S.C.R. 929.

Principles regarding identification parades. *See* 1962 M.P.L.J. 352: (1962) 2 Cr.L.J. 682.

If inferences are drawn on mere possibilities, then there is a possibility in every case, of an accused being shown to the witnesses before they are put for identification. But a judicial finding is not based on such surmises. S. 3 defines when a fact may be said to have been proved. The circumstances in the case must be such that a prudent man would act on the supposition that a particular fact exists and it is only then that the Court would hold that the fact has been proved: (1964) 1 Cr.L.J. 378: A.I.R. 1964 All. 139.

The evidence of identification of the accused cannot be accepted unless the Court is satisfied that the identifying witnesses had no opportunity to see the accused after their arrest; if such a possibility could not be ruled out altogether because the witnesses and the accused were present in the Court premises for hours together, *held*, the identifying witnesses' evidence could not be relied upon: 1977 Raj.L.W. 178.

Where the identifying witness, an admitted acquaintance of the accused, stated having gone to the Police Station seven or eight times when the accused were in the lock-up and the conviction was not based on his but on the testimony of eye-witnesses, *held*, the contention that the identifying witness might have been seeing the accused in the lock-up is of no value: A.I.R. 1993 S.C. 1243: 1993 Cr.L.J. 169.

Prosecution witnesses having opportunity to see the accused before proceedings for identification were held—Identification of accused by such witnesses cannot be said to have been made out unaided and beyond doubt: I.L.R. (1963) Andh. Pra. 349: (1964) 2 An.L.T. 77: (1964) 2 Cr. L.J. 78.

Where the accused in a robbery case had declined to participate in a test identification parade on the ground that he had been taken to and shown to the lady complainant soon after his arrest by the Police and the other witness who identified the accused did not know him and had seen the accused for less than a minute while scaling over the boundary wall 21 months earlier and could describe the accused only in a general way, *held*, no implicit reliance could be placed on such testimony; conviction set aside: 1994 Cr.L.J. 3442 (Del.).

Once it is established that faces of some of the accused while in judicial custody had dishonestly been shown to the witnesses before identification parade, *held*, it is difficult

to believe that the investigation did not do the same *qua* other accused who were also present there and then; benefit of doubt also given to such other accused: 1978 All.Cr.R. 65: 1978 Cr.L.J. 381: 1978 All.L.J. 13.

Where all necessary precautions to conceal the accused's identity had been taken but there was no formal entry of the accused having been brought to the Police Station, *held*, it was not by itself sufficient to contend that the accused had been shown to the witnesses and the identification parade had no value: 1978 Cr.L.J. 324: 1978 All.Cr.R. 100.

The persons required to identify the accused should have had no opportunity of seeing him after the offence and before the identification; and no mistakes are made by them or the mistakes made are negligible. [1974 Cr.L.J. 674 (S.C.) and 1973 Cr.L.J. 926 (S.C.), Rel. on]: (1981) 52 Cut.L.T. 512: 1982 Cr.L.J. 500.

Accused is not to prove his plea of having already been shown to witnesses, beyond reasonable doubt; it is enough if it is shown to be reasonably probable: 1980 All.L.J. 674.

Ability of witness to identify should be tested without showing him the suspect, or his photograph, or furnishing him data for identification—Showing photograph prior to identification makes identification worthless: 1968 Cr.L.J. 1124: A.I.R. 1968 S.C. 938: (1968) 2 S.C.R. 624.

Showing of photographs to seek information as to person or persons who may have committed crime is not objectionable—Value of only subsequent identification by witness is impaired: I.L.R. (1962) Andh. Pra. 96: (1963) 2 Cr.L.J. 121: A.I.R. 1963 Andh. Pra. 314. *See* also 1994 Cr.L.J. 1042 (Karn.) (D.B.).

Witness alleging to have seen accused two months before identification parade at Police Station—This fact cannot by itself be a reason for discarding his evidence unless there is proof that accused had been shown to him by police: 1960 M.P.C. 216: 1960 Jab.L.J. 356: 1960 M.P.L.J. 299.

Held, that one witness of identification was good as far as it went, as he had ample opportunity of making the observation and had no motive of speaking falsehood; but that by itself could not support the conviction because the test identification had been held by the Sessions Judge to have been held without sufficient precautions: 1962 M.P.L.J. 352: (1962) 2 Cr.L.J. 682: 1962 Jab.L.J. 901 (D.B.).

It is true that the evidence about identification of a person by the timbre of his voice depending upon subtle variations in the over-tones when the person recognising is not familiar with the person recognised may be somewhat risky in a criminal trial.

But where the accused is intimately known to witness and for more than a fortnight before the date of the offence he had met the accused on several occasions in connection with the dispute, it cannot be said that identification of the assailant by the witness from what he heard and observed was so improbable that the Supreme Court would be justified in disagreeing with the opinion of the Court which saw the witness and formed its opinion as to his credibility and of the High Court which considered the evidence against the appellant and accepted the testimony: (1964) 3 S.C.R. 992: A.I.R. 1965 S.C. 712.

There is no inflexible rule that in no case can the evidence of a witness who has identified the assailant through his voice form foundation of a conviction. The question whether such evidence is or is not sufficient to support the conviction must depend upon the facts and circumstances of the case. The weight to be attached to such evidence must depend upon a multitude of factors and circumstances, the question being whether the degree of conviction in the mind of the Court is such as to render it acceptable and trustworthy. [(1925-26) 30 Cal.W.N. 166 and A.I.R. 1928 Lah. 925 and A.I.R. 1937 Rang. 407, Disting.].

Held, that the instant case was not a case in which the evidence of identification could be kept aside on the mere ground that what enabled the witness to identify the assailants was the fact that she heard their voices. The Court was not prepared to discard her testimony on that extremely slender foundation when the numerous other features of the prosecution case offered such great support to her story: 1966 Cr.L.J. 1155: A.I.R. 1966 Mys. 248.

Identification of accused by voice—Accused close relation of identifier—Identification can be relied on: (1961) 3 Orissa J.D. 110.

Where the witnesses who identified the voice were close neighbours of the accused,

charged for committing murder of his daughter in an attempt to have sexual intercourse with her, *held*, as those witnesses would naturally have close familiarity with his voice, identification by voice could be relied on: 1992 Cr.L.J. 1644 (Ker.) (D.B.).

When the voice of a person is familiar to the hearer, the identification of such person by voice is dependable: 1978 Cr.L.J. (N.O.C.) 138 (Cal.) (D.B.). *See* also (1974) 76 Punj.L.R. 84. However *see* 1988 Cr.L.J. 508 (Pat.) (Identification by voice is a weak type of evidence).

Per *Anna Chandy, J.*—Identification by voice is a risky thing and a person cannot be deprived of his life by relying on such an unsafe test.

Per *Govinda Menon, J.*—It is never safe to rely on the identification of a person by his voice alone: 1963 Ker. L.J. 369: 1964 M.L.J. (Cr.) 347: (1964) 1 Cr. L.J. 493; 1972 Cr.L.J. 177 (Pat.) (D.B.); 1981 Cr.L.J. 1060 (Ori.). *See* also A.I.R. 1954 Tripura 11. But *see* 1954 Madh.B.L.J. (H.C.R.) 1548; 1955 Madh.B.L.J. (H.C.R.) 75.

Where no precautions necessary to ensure reliability of identification at test parade was taken, no reliance can be placed on the test identification parades, or the identification later on before the Magistrate or the Sessions Court, and the evidence in that respect must be excluded from consideration, while judging the guilt of the appellants: A.I.R. 1958 Tripura 40: 1958 Cr.L.J. 1549.

Identification parade before Magistrate—Accused not identified by witnesses—Identification of accused by them before Court is of little value: A.I.R. 1960 Ker. 238.

The purpose of test identification is to test the evidence in Court. The safe rule is that the sworn testimony of the witnesses in Court as to the identity of the accused who are strangers to the witnesses, generally speaking requires corroboration which should be in the form of an earlier identification proceeding. There may, however, be exception to this rule where the Court is satisfied that the evidence of a particular witness is such that it can safely rely on it without the precaution of an earlier identification proceeding. In such circumstances identification evidence should always be examined with great care. The identifying witnesses never knew the accused from before and the accused were strangers to them. The occurrence took place in dark night. Torchlights were flashed and the witnesses identified the accused. The accused persons had no distinctive marks in their appearance to fix their features indelibly upon the minds of the witnesses. The F.I.R. also did not contain any description of any of the accused persons. In prosecution of accused persons for offence of dacoity, *held*, that no reliance could be placed on the evidence of such identifying witnesses: I.L.R. (1963) Cut. 762: (1964) 1 Cr. L.J. 210: A.I.R. 1964 Ori. 37.

Appreciation of evidence—Eye-witnesses — Sessions trial — Dacoity cases — Identification evidence — Prosecution adducing identification evidence in Sessions Court—Non-examination of such eye-witnesses in committing Magistrate's Court—No ground for disbelieving them: I.L.R. (1963) 1 All. 585: (1963) 1 Cr. L.J. 404: A.I.R. 1963 All. 161 (F.B.); (1962) 2 Cr.L.J. 411 (All.).

S. 207-A, Cr.P.Code, does not lessen the degree of proof—Identifying witness not examined in committing Court—Evidence of such witness not to be accepted: (1961) 2 Cr.L.J. 744: A.I.R. 1961 All. 612.

Ordinarily, the person identifying the assailants at the identification parade must himself give evidence; if he does not do so and leaves it to the officer holding the identification parade to depose, it would deprive the defence of an opportunity to cross-examine the identifier as to whether the witness had an opportunity to see the accused; the evidence of test identification at the highest is a corroborative piece of evidence; if the legal evidence of the witness is suffering from serious infirmity, his evidence of test identification parade cannot improve the situation: A.I.R. 1977 S.C. 135: (1976) 2 S.C.W.R. 266: (1977) 1 S.C.C. 707.

Where at least two of the witnesses emphatically claimed from the very beginning to have noticed the culprit whom they had in fact described and could identify him, *held*, holding of a test identification parade was absolutely necessary; such a parade having been held within two days of his arrest by a Judicial Magistrate with all necessary precautions and arrangements, evidence of the test identification was of considerable importance; the accused was aware of that evidence from the very date; and if he wanted to demolish it, he could, but did not, do so by

effective cross-examination of the witnesses and/or by examining his own witnesses in rebuttal; it is, thus, futile for him to contend that this important piece of evidence should be rejected merely because the prosecution led no evidence of the accused being kept *'ba parda'*. [A.I.R. 1962 Raj. 78 (F.B.), Approved]: A.I.R. 1978 S.C. 1204.

Where a witness of the accused's identification, being deaf and dumb, could not be examined in the Court, *held*, no useful purpose would be served by the testimony of the Magistrate, who had conducted the test identification parade, about the witness having identified the accused: 1982 Cr.L.J. 94: 1982 Ker.L.T. 287.

Test identification — Witnesses whose performance at test identification parade is 66% or more—Evidence could be relied and utilised for purposes of proving identity—Witness whose performance is 33% or less—Not reliable. [A.I.R. 1960 S.C. 1340, Rel. on]: 1979 All.W.C. 488: 1979 All.W.R. 363: 1979 All.Cr.C. 219 (D.B.).

Where the accused was identified by the victim's servant in the test identification parade but he was not examined as a witness, *held*, the servant's evidence of identification is of no avail: 1987 Pat.L.J.R. 211 (D.B.).

Memorandum of identification—Not a record of evidence of a witness—Presumption under S. 80 not available—Statement in identification memo, recorded by Magistrate under S. 164, Cr. P. Code, not evidence within S. 3: 1963 All. L.J. 61: (1963) 2 Cr. L.J. 1: A.I.R. 1963 All. 308.

A Magistrate recording a confession under S. 164 of the Code of Criminal Procedure or holding an identification parade does so as a matter of duty and discretion; he does not act as a Court; and where the identification memo prepared by the Magistrate had been lost and identification was sought to be proved by its copy prepared by the Investigating Officer, *held*, it could not be so proved; it had to be proved by the Magistrate from the original: 1974 Raj.L.W. 192.

The purpose of identification test is to test the memory and veracity of a witness who claims to identify an accused person as the participant or one of the participants in a crime. Such identification test may be needed in a case of dacoity, assembling of persons for the purpose of committing dacoity, riot and any other offence, the participants in which were not known to the witnesses from before and could not be apprehended at the spot. It may be quite easy for a witness to identify an accused in the dock and say that he was the person who had committed or had participated in the commission of the crime. Therefore, for the purpose of testing the memory and veracity of the witnesses identification parades are held in jail and the witnesses are asked to pick out the culprits from the group of persons in which suspects as well as other persons are mixed. If, on the other hand, an alleged culprit has been arrested at the spot, his culpability will depend on the veracity of witnesses who would say that he had committed the offence. It is not necessary to put up such arrested person for identification at an identification parade. There may be cases in which the accused himself may claim identification test in order to support his plea of non-participation in the crime. In such a case, the Court may consider the request of the accused on its merits and may in a suitable case require the prosecution to hold an identification parade. If, however, no request is made by the accused or where a request has been made by the accused but is considered by the Court to be devoid of merits, it will not be necessary to hold an identification test, and the failure of the prosecution to put up the accused for identification test will not be deemed to be fatal weakness in the prosecution case: A.I.R. 1967 All. 447.

The rule that results of test identification parades, separated by too long intervals of time should not be considered together ought to apply only to exclude later test identification parades and not earlier ones when the memory is fresher. In exceptional cases evidence of identification by a single witness may suffice. But, the general rule of practice and prudence in dacoity cases is that a single satisfactory identification should not be acted upon. The correct way of showing that the evidence of identification is above board and reliable is that investigation authorities should try to gather from witnesses the particulars about the features and the actions of the persons seen. It may be that in some cases the features cannot be properly described by witnesses. This is likely to be so when there is no special feature in the appearance of an accused person. Nevertheless, the Investigating Officer must try to obtain descriptions

from the identifying witnesses and say that they are unable to give any description if that is the position in a case. The printed form used for the memorandum of a test identification parade contains a note at the end showing that the Magistrate conducting a test parade should ask the witnesses participating in the parade about the particular action in which they saw a particular suspect whom they identify. This direction is invariably overlooked by Magistrates conducting test identification proceedings. The test identification proceedings would be more useful, if, instead of containing descriptions of minute marks on the bodies of the suspects, they contained the statements of the identifying witnesses about the particular actions in which particular suspects were seen. This would help to make the test identification proceedings more reliable guides and more effective tests of truthful identifications: 1966 Cr.L.J. 1369: A.I.R. 1966 All. 607.

In a case where the accused is apprehended or caught redhanded in the presence of a number of persons who are produced by the prosecution as witnesses in the case, the question of identification does not and cannot arise.

Where the accused never demanded that the witnesses should be made to identify him or was it his case that they did not know him from before no such application was ever made on his behalf, nor was any such suggestion made in the Courts below, more over in the first information report lodged by the complainant, the name of the accused as well as his place of residence, were clearly mentioned.

Held, the accused was known to the complainant and the witnesses: 1966 All.Cr.R. 354: 1966 All.W.R. (H.C.) 584.

Identification parade conducted by Police Official instead of a Judicial Magistrate—Statements made therein by witnesses are hit by S. 162 and are not admissible in evidence: 1967 Cr.L.J. 746: A.I.R. 1967 Goa 60.

Ss. 9 *and* 3.—The evidence of identification must satisfy the test of being 'proved' as contained in S. 3; if the accompanying statement made at the time of identification renders the accused's recognition at the occurrence improbable, it cannot be excluded from the process of assessing his guilt; the purpose of such evidence is to indicate the witness's state of mind; the statement will be in issue or relevant for a reason quite apart from its truth or falsity: 1980 All.Cr.R. 313.

Accused pleading that he was known to identifying witnesses from before occurrence and that he was shown to them—No inherent inconsistency between the pleas—Two pleas are not destructive of each other—Employment of improper and unfair methods for helping or ensuring identification does not exclude possibility that the person put up for identification was known to witnesses from before occurrence — No evidence on record to show that accused was shown to witnesses—But plea that he was known from before occurrence supported by reliable evidence—That evidence cannot be rejected on ground that the accused also stated that he had been shown to witnesses: 1969 All.Cr. R. 240: 1969 All W.R. (H.C.) 369.

The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of the occurrence are to identify them from the midst of other persons without any aid or any other source. The identification test is usually adopted during the investigation of a crime by the Police, when the witnesses are interrogated for the first time and state that they had seen some persons committing the crime but do not know their names and would be able to identify them if they would see them again. The identification test is a check upon their veracity. These proceedings are in the nature of tests and the Courts regard them as record of facts which establish the identity of any thing or person. The facts are to be proved according to law, and in the absence of such proof the identification proceedings are valueless. The fact if proved can be used both for purposes of corroboration as well as for contradiction.

The standard of judging the identification evidence of the persons arrested on the spot would be quite different from the general identification normally held of the culprits arrested long after the crime. In the latter case the witnesses are required to identify the accused whom they saw committing the crime. Proper identification would depend on numerous factors such as one's power of observation, distance, time and light, etc. The result would also be affected if the identification was held long after the incident but in the case of arrest on the spot, the identification would be directed mainly to test the

credibility of the witnesses who actually helped or effected the arrest. In such a case, the attention of the witness would be solely concentrated on the person arrested: 1968 Cr.L.J. 1320: A.I.R. 1968 All. 333.

Eye-witnesses of the same family or distantly related to each other—Necessity of corroboration: 1968 Cr.L.J. 218: A.I.R. 1968 All. 49.

Precautions for concealing the identity of accused prior to parade—Contention that Police must prove that all precautions were taken was held not accepted in view of the wideness of the proposition—Accused was moved from one place to another by train—Objection at the appellate stage that he was exposed to the gaze of witnesses—No objection made earlier—Investigating Officer not cross-examined on the question of precaution—*Held*, on the facts, that the accused could not challenge the identification parade: (1966) 68 Bom. L.R. 941: 1968 Cr.L.J. 453: A.I.R. 1968 Bom. 127.

Value of evidence obtained by test identification parade as corroborative evidence of identification in Court is very great indeed. But that is so only when test identification parades are held in the manner and under conditions which preclude even faint possibility of collusion or machination during investigation. If the identification parades are held in the Police Court's precincts, it amounts to violation of reasonable guarantees against any collusion: 1968 Cr.L.J. 40.

The identification evidence in Court is substantive evidence, and unless any intrinsic infirmity appears in the evidence of the deponents, their evidence in Court should be accepted.

Ornaments can be properly identified without any identity marks on them. Therefore, when the inmates of the house hold have identified the ornaments in Court, there is no reason to reject their evidence merely because the ornaments were being used on ceremonial occasions, or had no identification marks: 1968 Cr.L.J. 201: I.L.R. (1967) Cut. 980: A.I.R. 1968 Ori. 20.

Identification parade — Joint identification parade for two occurrences on different dates — Result of parade should be discarded: 34 Cut.L.T. 215: 1968 Cr.L.J. 1251.

Charge of cheating — Only evidence against accused that he wrote some of invoices and took to complainant but no representation made by him to induce complainant to part with funds—*Held*, if charge of conspiracy had been made, that evidence might have been relevant but as no such charge was made, charge of cheating had to be made out on good and proper evidence: (1968) 2 S.C.W.R. 598: 1968 Cr.L.J. 1469: A.I.R. 1968 S.C. 1267.

There is no provision in Cr. P. Code, for a suspect being put to identification first before he is prosecuted or asked to stand trial in a Court, where he is not named in the first information report. Even when a person is put up for identification proceedings before he is prosecuted for an offence, the evidence which can be relied upon against him for his conviction is that given in Court.

The earlier identification of the accused merely corroborates the evidence which is given in the Court. A witness will, therefore, not be treated unreliable or his evidence discarded merely because the accused was not put up for identification. All what will happen in such a case will be that the evidence given in Court, corroboration by the earlier identification proceedings not being available, will be examined a little more closely to find out its reliability even without that corroboration.

Where a constable ascertaining the names of the accused at the incident spot, mentions those names in the first information report filed by him, but in the Court, he, without naming the accused, points out towards them as the offenders, and the constable's statement is corroborated by two others to whom the accused are known, it cannot be said that the constable should have put up the accused for identification: 1968 All.W.R. (H.C.) 788: 1968 All.Cr. R. 489.

An accused's identity may as well be established by circumstantial evidence: 1985 Cr.L.J. (N.O.C.) 39 (Cal.).

No positive rule can be laid down as to whether identification test is necessary in every case. It must be decided on facts of each case whether want of identification test had any material bearing. In a case under Ss. 399 and 402, Indian Penal Code, when the prosecution evidence leaves no manner of doubt as to the correctness of the fact that a number of persons were arrested at the spot and those persons who were thus arrested

remained in confinement throughout thereafter and if this evidence has been found to be convincing by the Courts below, in the absence of any overriding consideration the Court will not be justified in disagreeing with the view, thus taken in revisional jurisdiction: 1969 Cr.L.J. 833 (All.).

The identification proceedings conducted before submission of a charge-sheet against an accused is merely a step in the process of investigation of a crime. When witnesses claim that they had marked the features of an accused during the commission of a crime, the prosecution has to ascertain whether the said claim is correct or incorrect. It is merely for this purpose that the investigating agency puts up an accused at a test identification parade. If the witnesses fail to identify an accused at the test identification parade and there is no other evidence connecting the accused with the crime, the officer-in-charge of the Police Station or the Investigating Officer has to release the accused under S. 169, Cr.P.Code and submit a final report under S. 173(1), Cr.P.Code. Identification of an accused at a test identification parade is not a substantive piece of evidence and consequently, identification proceedings are not subject to directions by a Court. The substantive evidence against an accused is only his identification by the witnesses in Court and the record of the test identification proceedings can be utilised only for the purpose of corroborating or contradicting the witnesses who identify the accused in Court.

The holding of a test identification parade is merely a step in the investigation of a crime and it is entirely up to the investigating agency to decide as to whether it would hold a test identification parade or not and if it decides to do so, the venue for it: 1968 All.Cr. R. 561: 1968 All. W.R. (H.C.) 855: 1970 Cr.L.J. 78.

True test identification parade is a step in investigation, but it is the identification made in the Court which is evidence. In a case of circumstantial evidence, the test identification parade assumes importance particularly if conducted within a reasonable time after the offence; a test identification parade conducted after a long delay may make it possible for the witnesses to have an opportunity to see the culprits and, thus, is of little value. [1985 Cr.L.J. (N.O.C.) 79 (Del.), Reversed]: A.I.R. 1993 S.C. 2618: (1993) 2 U.J. (S.C.) 632.

Where even though the complainant made no mention of the prominent mark like deep cleft in the middle of the chin of the accused in the first information report nor any of the witnesses identifying the accused made mention of the mark during the various stages of the trial and the Magistrate, holding the identification parade failed to conceal the mark, identification of the accused at the parade could not be implicitly relied upon and the accused was entitled to the benefit of doubt. If the complainant or any of the identifying witnesses had identified the accused at the time of occurrence, by reason of the mark, it was to be expected that mention thereof would have been made in the complaint or the deposition of witnesses: 1970 All.W.R. (H.C.) 23: 1970 All.W.R. 28.

Finding that deceased died of gun shot wound, common case of the parties that there was only one gun at time of occurrence and that gun belonged to and was held by accused on the spot. *Held*, that the wound was caused by the gun held by the accused and that it was not necessary for prosecution to further establish that injuries caused by gun shot were from the gun held by accused: I.L.R. (1969) Cut. 33: 1970 Cr.L.J. 931.

Facts which establish the identity of an accused person are relevant under S. 9. As a general rule, the substantive evidence of a witness is a statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances he came to pick out the particular accused person and the details of the part which the accused played in the crime in question with reasonable particularity. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceeding. There may, however, be exception to this general rule, when, for example, the Court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the

investigation stage. They are generally held during the course of investigation with the primary object of enabling the witnesses to identify persons concerned in the offence, who were not previously known to them. This serves to satisfy the Investigating Officers of the *bona fides* of the prosecution witnesses and also to furnish evidence to corroborate their testimony in Court. Identification proceedings in their legal effect amount simply to this: that certain persons are brought to jail or some other place and make statements either express or implied that certain individuals whom they point out are persons whom they recognise as having been concerned in the crime. They do not constitute substantive evidence. These parades are essentially governed by S. 162, Cr. P.Code.

Held, on facts, that the test identification parades in the case could not be considered to provide safe and trustworthy evidence on which the conviction of accused could be sustained: 1970 Cr.L.J. 1149: A.I.R. 1970 S.C. 1321. *See* also 1988 Cr.L.J. 780 (Del.) (Dock identification without any supporting evidence has been considered as a suspect).

Test identification proceedings are not falsified on assumption that investigating authorities necessarily resort to unfair means and dishonesty—Criminal trial—Investigation by Police: 1965 All.L.J. 166.

Recovery of gun under Arms Act—Recovered article not sealed nor link evidence to identify arms adduced — Evidence of recovery may be accepted—Para. 142 (1), Police Regulations, is not mandatory: 1964 All.L.J. 621: (1965) 1 Cr.L.J. 667: A.I.R. 1965 All. 260.

Identification of property—Recovery of articles subject-matter of a dacoity—Articles recovered, common articles easily available in the market—Fact that the articles recovered are common-articles does not render them incapable of identification—Whether the articles recovered were those that were stolen or not, depends upon the circumstances of the case always: (1964) 66 Punj.L.R. 173.

It is well known that evidence about the identity of, particularly a previously unknown person, is deceptive, and has sometimes led to miscarriage of justice: A.I.R. 1973 S.C. 337: 1972 Cr.L.J. 1254: (1972) 3 S.C.C. 639: (1973) 1 S.C.R. 291.

In cases where the accused are not known to witnesses the value of prior identification need hardly be emphasised. There may be a case where the Court places an explicit reliance upon a witness and his identification in Court itself is not of much value unless it is corroborated by prior identification in a parade. The substantive evidence is the statement of the witness made in Court: (1972) 2 Sim.L.J. 349.

No adverse presumption could be drawn against accused when in identification parade held in Court, witnesses admitting in cross-examination that they did not know accused or only knew him by face. The Court cannot rely on the identification of accused by witnesses: 1981 Cr.L.J. 512: 19 Del.L.T. 244.

Test identification—Value and importance of—Precautions to be taken by Police—Precaution of *ba parda* (under proper cover) with corresponding routine entries in Police dairy or in jail warrant—Insistence by Courts on observance, if essential: I.L.R. (1961) 11 Raj. 1010: (1962) 1 Cr.L.J. 461: A.I.R. 1962 Raj. 78 (F.B.).

The rule of approach to the evidence of identification is that normally the result of the proceedings in which a particular accused was put up must alone be taken into consideration. But other identification proceedings in which the particular accused was not put up for identification and other accused were put up are relevant in so far as inference may be drawn against the power or observation of the witnesses. The inference may be drawn from those identification proceedings when they were held prior to the identification proceeding relating to the particular accused or simultaneously with or shortly after it. But no conclusion can be drawn from these other identification proceedings if they were held long afterwards: I.L.R. (1958) 1 All. 151: (1961) 1 Cr.L.J. 22: A.I.R. 1961 All. 50.

Every test identification of suspects should be held with only one suspect mixed up with nine or ten innocent persons, the innocent persons being changed every time a fresh suspect is put up for identification: I.L.R. (1960) 2 All. 488: (1961) 1 Cr.L.J. 340: A.I.R. 1961 All. 153.

Evidence of identification—Identification parade—Purpose and value of—Who can

conduct—Manner of holding parades—Exclusion of Police from parades—Holding of parade by Magistrates—Compliance with S. 164, Cr.P.Code, if and when necessary—Magistrate, third class holding parade—Statements of identifying witnesses made to him are admissible—S. 164 is no bar: (1965) 2 Cr.L.J. 507: A.I.R. 1965 Madh. Pra. 225.

Evidence of identification—Duty of Magistrate—Failure to hold test identification parade—Whether affects evidence of identification in Court: (1964) 6 O.J.D. 12.

Though the arranging by the Police of an identification parade to be conducted by Panch witnesses instead of by a Magistrate where one is available, cannot be approved of as a matter of prudence, and though, such identification may, in the circumstances of particular case, be held as infirm and unsafe of reliance, the evidence cannot be struck down as inadmissible unless a Police Officer is present at the time when witnesses identify. The statements involved in the process of such identification would be statements made by the identifying witnesses to the Panch witnesses, so that such statements would be outside the purview of S. 162, Cr.P. Code, provided the process of identification was carried out under the exclusive direction and supervision of the Panch witnesses and the Police had completely obliterated themselves from the parade: 1962 M.P.L.J. 1064: 1962 Jab.L.J. 876: (1963) 1 Cr.L.J. 433: A.I.R. 1963 Madh. Pra. 106.

Test identification parades are not to be held in mechanical or routine fashion. While they constitute valuable corroboration they are also a safeguard for the accused persons. The Magistrates are called upon to hold such parades so that the parades which take place during the investigation of the offences by the Police, may be beyond all suspicion and free from influence by the Police. Instructions are given to them in judgments of High Courts to aid them in such work and they are bound to follow them. The Magistrates must, therefore, see that the proceedings are conducted very fairly and in accordance with instructions given by the decisions of the High Courts, and that the memo of the parades correctly and fully record what took place.

Magistrate in Union territory of Manipur enjoined to follow instructions laid down in A.I.R. 1957 Manipur 21.

Held, that even though there were irregularities in the identification parades since none of the accused raised any objections either before or during or after the parade, and as the victim had sufficient opportunity to see the accused in the course of commission of offence, the identification of accused was true: (1963) 2 Cr.L.J. 562 (Manipur).

It is the duty of the prosecution to show that from the time of the arrest of an accused person to the time of his admission into the jail, precautions were taken to ensure that he was not seen by any outsider. Once evidence has been led to show this, the burden shifts on the accused to show otherwise. The law does not require the accused to do so affirmatively; it is sufficient if he can succeed in creating a reasonable doubt in the mind of the Court.

Any person can conduct a test identification, but Magistrates are preferred. His identification memo is a record of the statement which the identifier expressly or impliedly made before him. The statement is a former statement of the identifier and in Court is usable not only for contradicting him under S. 145 or S. 155 but for corroborating him under S. 157, except that if it was made before the Police it would be hit by S. 162, Cr.P.Code and would therefore, not be admissible for purposes of corroboration. If the person holding the identification is a Magistrate of the first class, or one of the second class specially empowered, S. 164, Cr.P.Code applies and his identification memo is admissible in evidence under S. 80 without proof. But if other Magistrate or private persons held it, they must be called in evidence to prove their memo. Where S. 164, Cr.P.Code, operates the proceedings are independent even of the territorial jurisdiction of the Magistrate concerned. Normally, the result of identification proceedings in which a particular accused is put up must alone be taken into consideration in deciding the value of identification of a particular witness with respect to that accused; other test identifications, provided they were held within a short period of test under consideration, can be taken into account solely for judging the memory and power to observation of the witness concerned: I.L.R. (1960) 2 All 488: (1961) 1 Cr.L.J. 340: A.I.R. 1961 All. 153.

The substantive evidence of a witness is his statement in Court, but the purpose of

test identification is to test that evidence and the safe rule is that the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to the witnesses, requires corroboration which should be in the form of an earlier identification proceeding. Where in a murder charge against several accused under S. 302 read with S. 34, Penal Code, an identification parade consisting of 46 persons in which there were 7 suspects, and an eye-witness while picking out 9 persons, made 3 correct identifications and made 6 mistakes, no reliance could be placed on such an identification by the witness even though he was disinterested and it could not be used as corroboration of the evidence of another interested eye-witness. Where any eye-witness failed to pick out an accused both in the identification parade as well as in the Committing Magistrate's Court, it would be entirely incorrect to rely upon his belated identification in the Sessions Court: 1960 Cr.L.J. 1681: A.I.R. 1960 S.C. 1340. *See* also 1988 Cr.L.J. 264 (Pat.).

If the witnesses do not give the name of any accused, it is necessary to hold a test identification parade. Where, however, a witness gives the name of an accused as one whom he has identified, ordinarily, no test identification parade is necessary. But if any accused holds out a challenge and says that he will not be identified by the witnesses, or makes a prayer that he should be put upon a test identification parade, such a parade must always be held in order to meet the challenge. There must, however, be one exception. If the accused is arrested on the spot and if he is in custody from that time up to the date of his trial, there can be no question at all about his identity. If a parade is held, it will be only a test of the memory of the witness or witnesses concerned. It cannot possibly be a factor of any importance on the question identification because the accused all the time remained in jail: 1960 B.L.J.R. 511: 1960 Cr.L.J. 1650: A.I.R. 1960 Pat. 582.

Where, in a murder case, an inference could legitimately be drawn that after the arrest of the accused he was not properly dealt with, the possibility of his having been shown over to the witnesses before the identification proceedings could not be excluded and no incriminating or stolen article was recovered from his possession.

Held, that under the circumstances the evidence of identification could not be safely relied upon and the accused would be entitled to an acquittal: 1959 All.W.R. (H.C.) 500: 1959 All.Cr.R. 418: 1959 All.L.J. 694.

Human experiences and commonsense considerations warrant, that it is dangerous and risky to formulate and act upon any rule of thumb in the matter of appraising the effects of delay in identification. The proper course to be followed in such a case is that Judges and Magistrates in dealing with such a question should avoid uncritical over credulity as also unnecessary scepticism and should bring to bear judicial maturity and consider and weigh the circumstances and facts of individual cases and proceed to decide them on a consideration of the individual peculiarities of the cases in the light of experience as to human affairs and the building rules of prudence enunciated in the leading cases but without treating them as rigid, mathematical formula. The Court's approach to the cases should be prudent, intelligent and pragmatic and not mechanical wooden or unnecessary doctrinnaire. To lay down a hard and fast rule, with regard to the period of time which may elapse between the commission of a crime and the identification of the culprits, would be to impose an arbitrary rule, which neither commonsense nor the statute law of evidence can or would justify. If there were such a rule, it would be the easiest thing for a culprit to avoid his arrest for a certain period of time and then turn up with confidence that he can go with impunity because of the lapse of the requisite period of time. In this view of the law, delay by itself cannot justify the rejection of the identification evidence irrespective of the facts and the circumstances of the case. A satisfactory evidence of identification in Court corroborated by an equally satisfactory evidence of identification at a prior parade can be corroborated and given strength by proof of the possession of property by the accused sometime after the commission of the crime: 1966 Cr.L.J. 1332: A.I.R. 1966 Raj. 241.

Witnesses omitting to give description of the offenders during investigation—Subsequent identification of accused by such witnesses—Identification cannot be said to be not reliable therefor: 1966 Cr.L.J. 1332: A.I.R. 1966 Raj. 241.

(*c*) Precautions to be taken.—No presumption attaches to identification proceedings conducted by Magistrate and it is for the prosecution to prove affirmatively that every

possible precaution was taken to ensure fair identification and the proceedings were not only fairly conducted but were correctly recorded. It is necessary that the accused persons whom it may be necessary to put up for identification should be warned at the time of their arrest that it may be necessary to put them up for identification and that they should keep their faces covered and to take them to the Police Station in that state. In the Police Station the lock-up in which they are kept should be covered with a purda so that no one is able to see their faces. When they are taken to Court or to Jail their faces should be kept covered. In Jail also no outsider should be allowed to see their faces. All these precautions should not only be taken but should be proved to have been taken. That these precautions were taken should be recorded in official records like the general diary of the Police Station and the Jail register and they should be produced in Court. In the absence of such evidence no value can be attached to the identification of an accused person made by a witness: 1954 Cr.L.J. 1819: A.I.R. 1954 Vindh. Pra. 42; A.I.R. 1955 Tripura 19: 1955 Cr. L.J. 1292. But *see contra*. It is not correct to say that the lock-up should be covered with a purdah so that no one should see the faces of the prisoners. All that is required is that every precaution should be taken that the public have no opportunity of seeing the suspects while they are in the lock-up as otherwise the parades would become meaningless, for the witnesses might get some clue as regards the identity even before the proceedings commenced and they should be kept out of the view of the witnesses: 1956 An.L.T. 833: 1956 An.W.R. 788.

The elaborate rules on the conduct of identification parade are not merely mechanical devices, but are calculated to guarantee against the wrong men being pointed out. It is the duty of the prosecution to establish beyond any doubt that the witnesses who identified the accused before the identification parade had seen him at the time of occurrence and they did not know him from before, also they did not see him at any time after the occurrence and before the identification parade. If this is not done, the accused is entitled to contend that his case has been gravely pre-judiced and he is entitled to benefit of all or any of short-comings of the prosecution on this score. (Principles to be observed and precautions to be taken at the time of conducting of identification parade stated): A.I.R. 1957 Manipur 21: 1957 Cr.L.J. 870.

Per *Desai, J.*—An ideal identification proceeding is that which is held in the same conditions in which the offenders were seen by the witnesses: 1953 Cr.L.J. 848: A.I.R. 1953 All. 385.

It is the prosecution's duty to produce before the Court all evidence to convince it that the identification parade was conducted in a fool proof manner, leaving no doubt about its honesty, integrity and safety: (1984) 2 Bom.C.R. 615 (D.B.); 1980 All.L.J. 664.

. The law laid down by the Supreme Court and R. 236 of the Bihar Police Manual, 1978 (Vol. 1), requires very strict conditions for holding fair and impartial test identification parades so that innocent persons may not be falsely implicated; the identifying witnesses must not have any opportunity to see the suspect after the commission of the crime and abundant precautions should be taken for the same; the parade should be conducted either by a Magistrate or another responsible officer and the Investigating Officer should in no case be present at the parade: 1985 Bih.L.T. (Rep.) 129 (D.B.).

When persons who are already known to the accused and are to be identified are mixed up with the identifying witnesses, *held*, the identification is clearly vitiated. Value of identification parade depends on the effectiveness and the precautions taken against the identifying witness having an opportunity of seeing the persons to be identified before they are paraded with others and also against the identifying witness being provided by the investigating authority with other unfair aid or assistance so as to facilitate the identification of the concerned accused: (1991) 2 S.C.J. 618.

Where innocent persons mixed in the identification parade are wearing different type of clothes than the suspect, *held*, the evidence of identification will not be of much value: 1979 All.Cr.R. 371.

Merely because the accused was mixed with persons not similarly dressed by itself is not sufficient to justify the inference that the identifying witnesses must have seen the accused before the parade: (1976) 42 Cut.L.T. 228.

Where several suspects are to be put up for identification, *held*, a single parade would constitute a fundamental wrong; separate parades should be held for each suspect with its results recorded on a separate sheet; and same innocent persons should not be mixed up as dummies in each parade: 1982 All.Cr.R. 200: 1982 All.W.C. 329: 1982 All.L.J. 1061.

The most elementary precautions in an identification parade are that dummies similar in appearance, height, age, etc., to the suspect should be arrayed in the parade; thus, where the witness had described the offender as having a clean shaven head with a tuft and apart from the suspect, none other had such a head, *held*, the parade was only a farce: 1985 Cr.L.J. 191.

The Investigating Officer has to ensure that the accused sought to be identified by the witnesses is not seen by them; the accused must be kept in such circumstances that he is not exposed to the witnesses' view: 1982 Cr.L.J. 2056 (Bom.).

In identification parades, it is always better to have as large a number of persons mixed up with the accused as possible. But no hard and fast rule can be laid down and if five times the number of accused persons are mixed with them, it cannot be said that there is any flaw in the identification proceedings: 1952 All.L.J. 568: A.I.R. 1953 All. 314; A.I.R. 1960 All. 50: (1961) 1 Cr.L.J. 22: I.L.R. (1958) 1 All. 151 (D.B.). (Ratio of 9 or 10 to 1 would be proper).

The proper way to hold identification is to put up each suspect separately for identification mixed with in any case, not less than nine or ten. While no categorical observation that the ratio of 7 to 1 in the case of one or two suspects *ipso facto* destroys the results of identification can be made there can be no hesitation in holding that it considerably diminishes the value of identification and unless the investigation is absolutely above board, it would not be prudent to place any reliance on such identification. A graduated scale of the number of under-trials to be mixed with the suspects would be most desirable: I.L.R. (1958) 1 All. 151: (1961) 1 Cr.L.J. 22: A.I.R. 1961 All. 50 (D.B.).

The proportion of outsiders with the number of the persons to be identified must be sufficiently large to eliminate the chance of the accused being picked up by chance. Where the witnesses were asked to identify 6 persons out of a line of 13. *Held*, that the chances were all in favour of the witnesses picking up the accused in view of their number being almost equal to the number of outsiders and the Court could not rely much on the identification parade: A.I.R. 1953 Sau. 4: 1955 Cr.L.J. 31.

It cannot be overemphasized that the accused should be paraded with a fairly large number of persons of similar age, height, stature, etc., so as to eliminate the possibility of his being picked up or identified by chance; in a fair identification parade the proportion of the suspects to the undertrials should be as 5:1 or 4:1; where such proportion was 4:10, *held*, the identification test parade was not fair: 1977 Raj.L.W. 178: 1978 Cr.L.J. 269.

Identifying parade—Proportion of outsiders to be mixed with suspects should be fair. (Proportion of 1:5 held fair): 1953 All.L.J. 94: A.I.R. 1953 All. 123.

Proportion of outsiders with suspects should be 3 to 1: 1953 Cr.L.J. 610: A.I.R. 1953 Madh. Bh. 87.

Per *Desai, J.*—Where several suspects are put up for identification the proper way to hold identification proceedings is to put up each suspect separately for identification mixed with as large number of innocent men as possible, in any case not less than nine or ten. Care must be taken to see that the same innocent men are not mixed with each of the suspects: 1953 Cr.L.J. 848: A.I.R. 1953 All. 385.

It cannot be laid down as a general rule that wherever more than one suspect is put up in an identification parade, the identification made in such a proceeding should be held invalid. The chief thing which should be done is that as many persons as possible should be mingled with the prisoners so that the witnesses might pick out the real offenders without any extraneous aid. Each case must be decided on its particular facts and no hard and fast rules could be laid down in such a matter. If three or four suspects are mixed up with only four or five under-trial prisoners or innocent persons, the chances of a witness identifying the suspects are greater even if he were not sure of the identity of the real offender and the idea underlying the identification parade frustrated. On other

hand, if two suspects are mingled with a large number of other persons, the same result would not follow: 1956 An.L.T. 833: 1956 An. W.R. 788.

It is better if a large number of under-trials are mixed up with the accused intended for identification. However, one cannot expect the same ratio between the accused put for identification and the persons mixed with them in a case where the number of accused is large as in the case where the number of accused is one or two. There is greater probability of a single accused being identified by chance if he is mixed up only with two or three other persons. There is much less probability when the number of accused is large and they are mixed up with say 20 or 25 other persons. Therefore, simply because a number of accused had been mixed up only with 22 other persons cannot lead to the conclusion that the identification has been by mere accident: 1958 Raj.L.W. 527.

The accused and two other persons who were put up for identification had their ears bored. At this identification parade although twenty-five men were mixed, amongst those who were mixed there were only ten persons who had their ears bored. No steps were taken to cover up the bored ears so that the witnesses had really to pick out three men, out of thirteen, *held*, that in view of the small number of under-trials with bored ears who were mixed at the parade the assurance which flows from the mixing of a larger number was not available in this case: 1958 Cr.L.J. 966: A.I.R. 1958 All. 616.

The evidence of identification to carry conviction should ordinarily clarify as to how and under what circumstances the witness came to pick out the particular accused and details of his part in the offence with reasonable particularity; the object of prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence; it is accordingly a safe rule of prudence to seek corroboration of the sworn testimony of the identifying witnesses in the Court: 1979 Chand. L.R. (Cr.) 58 (Him. Pra.) (D.B.).

(*d*) **Duty of Magistrate.**—When a witness makes a statement in Court the Magistrate is expected either to record it wholly in his own hand or to record at least, the substance of it in his own hand. The statement is read over to the witness there and then when what the witness has stated is fresh in the memory of the Magistrate and he can correct it. Where a Magistrate conducts a proceeding like an identification proceeding it is incumbent on him to note down the result of the proceeding in his own hand so that not only he but the Court also can be certain that the result has been recorded correctly. Where the Magistrate who conducted the identification proceeding did not take the trouble of filling in the memorandum with his own hand but dictated it to his clerk, who might have committed mistake in entering the result and the memorandum is not read over in the presence of the suspects after it has been recorded and there is no opportunity for correcting any errors which he might have made in writing it, the identification is of no value. A.I.R. 1954 Vindh. Pra. 42: 1954 Cr.L.J. 1819.

The conduct of identification proceedings requires attention to a number of details. The Magistrate has to make sure that at least persons not of too dissimilar appearance or build or height are paraded with each suspect separately. He has to examine the marks likely to affect identification of the suspect and to arrive at a decision as to what marks are so distinctive that they are likely to affect identification in the case of each suspect. It is fundamentally wrong to falsify identification proceedings by passing excessive number of slips or concealing parts of the bodies of the participants to such an extent that no honest or truthful identification can possibly take place. Where the test identification proceedings have not been shown to be sufficiently regular to be considered reliable, they cannot serve the purpose of corroborating the evidence of identification given by the witness in Court. It is true that the manner in which any irregularities affected the identification by witnesses in jail could have been brought out by cross-examining the witness who actually participated in those proceedings. But, where proceedings are actually proved from the statement of Magistrate who conducted the proceedings, to be irregular and uncertain no presumption of their regularity can arise or save proceedings from becoming totally unreliable: 1965 All.W.R. (H.C.) 437: 1965 All. Cr.R. 282: 1965 All.L.J. 197.

Where the Magistrate did not make any note, in the identification memo of the

distinctive marks of the accused, *held*, that any competent Magistrate having experience of identification proceedings would have made a note about it if he had really paid attention to it. The defects in the conduct of the identification proceedings reduced the value of the identification: 1955 All.L.J. 330: A.I.R. 1955 All. 138.

Where the evidence against an accused person is said to be the evidence of identification alone, the person in question should not be enlarged on bail before the identification proceedings are held. It is open to the Magistrate to accelerate the proceedings of identification. It is further open to him to postpone the grant of bail and to take up the application for bail after the proceedings of identification have been conducted. But simply because an accused person gives an undertaking that he will not raise the plea that the witnesses had the occasion to see him before the identification proceedings are conducted, it is not open to any Magistrate to grant bail to the accused. An undertaking of that nature never acts as an estoppel and what the Magistrates in such a case have to consider is whether prudence requires that bail should be granted at that stage. If bail is granted, the risk of the accused person being seen by the witnesses before the identification proceedings are held cannot be eliminated. And if that risk is there, the identification proceedings are reduced to an absolute farce: 1956 Cr.L.J. 181: A.I.R. 1956 All. 122.

(*e*) Identification in parade—Value of.— (*See* also Note 3(*b*), *supra* and Note 6, *infra*). The essence of identification evidence is that at its best it is the recognition of a stranger's face seen momentarily during the stress and excitement of an incident in torchlight or under artificial light after a lapse of several days or months as the case may be and the identifier claims that he carried that image all that time in his mind and when he went to the identification parade the image in his mind corresponded with the features of a suspect in the parade whom he accordingly picked out. It can, therefore, be accepted only if the Court is satisfied: (*1*) that the witness had atleast a fair, if not good opportunity of seeing the dacoits, which naturally raises the question of sufficiency of light and proximity of the witness to the offenders; (*2*) that the identification parade was held within a reasonable time of the incident; (*3*) that the witness has reliable powers of observation to be judged from the facts that the parade was not made too easy for him to pick out the suspect and that he did not commit so many mistakes that it would create doubt in the mind of a reasonable man; (*4*) that the statement of the witness that he did not know the suspect from before is believable; and (*5*) that the witnesses were not given an opportunity to see the accused after their arrest, and that the investigation conducted in the case inspires confidence. The evidence of identification at its best is a weak type of proof, for the chances of mistake are far greater in this type of evidence than where the witness deposes about facts within his knowledge. Where the investigation inspires confidence and the witness was fairly tested before he picked out the suspect, the demands of prudence are satisfied and the Court feeling re-assured rejects the possibility of a coincidence, which becomes remote. But where the investigation is tainted, the performance of the witness cannot be accepted at its face value for the reasonable possibility of external aid being given to the witness cannot be eliminated: I.L.R. (1958) 1 All. 151: A.I.R. 1961 All. 50: (1961) 1 Cr.L.J. 22. *See* also 1989 Cr.L.J. 2106 (Pat.) (The crucial requirement is the satisfaction of Court).

Generally, the safe rule is that the sworn testimony of a witness in Court about the identity of the accused not known to the witness requires corroboration from an earlier test identification; but in the absence of substantive evidence about the accused being one of the dacoits, *held*, the test indentification parade is of no assistance to the prosecution: A.I.R. 1972 S.C. 283.

Identity of accused person is of no evidentiary value unless corroborated by the witness having pointed him out in an identification parade with precautions taken against collusion, inadvertent mistake, and intentional or accidental prompting. The elaborate rules on the conduct of identification parades are not merely mechanical rituals but are calculated to guarantee against the wrong men being pointed out. The impression that witness who has seen the offender at the time of the crime, and who apparently has no personal motive to make any intentional mistake should be implicitly believed when he points out the accused in the dock, is most unsafe: 1954 Cr.L.J. 401: A.I.R. 1954 Vindh. Pra. 6.

The fact of the identification in a parade is by itself not substantive evidence but is admissible under S. 9 of the Evidence Act and provides a strong corroboration to the identification made in Court: 1953 Raj.L.W. 228.

Identification is an act of the mind and the primary evidence of what was passing in the mind of a man is his testimony in the Court. The entire statement of the witnesses as a part of the act of identification or as explanatory of it is admissible in evidence. The statement made at the parade and recorded by the Magistrate in column No. 10 was so closely connected with the act of identification that it has to be admitted as the part of the very act of identification itself. Where the question for determination is whether the witness had the power of observation and recollection, any circumstance or fact bearing on it would be relevant when the identity of the suspect is in issue: 1980 All.Cr.R. 313.

Per *Desai* and *Sankar Saran, JJ.*—The evidence of a witness against an accused is the direct statement made in Court that he was one of the offenders. His earlier identification of him is simply a corroboration of the evidence given by him in Court. The identification has by itself no independent value: 1953 Cr. L.J. 848: A.I.R. 1953 All. 385.

Accused known to witnesses—Accused seen by witnesses, leading a mob out to commit murder—Identification parade—Identification memo not produced—*Held*, that the mere fact that there was no memorandum produced would not show in this particular case that the accused were not identified at the time of the commission of the offence: I.L.R. (1954) Punj. 649: A.I.R. 1954 Punj. 37.

There are certain principles which a Court has to bear in mind in deciding whether the identifying witnesses are worth relying upon or not. Among other things, what the Court of law has to see can be catalogued as follows: (*1*) the number of wrong persons picked out by the identifying witnesses; (2) consistency of the identification made at different times; (*3*) sufficiency of number of men on parade; and (*4*) number of wrong identifications. Apart from what is stated, the other facts which should weigh with the Judge in scrutinising the identifying evidence is whether the witnesses had known the accused and whether they were close enough to the accused about the time of the alleged occurrence and whether the accused had taken some prominent part which impressed the witnesses in the matter of identification: 1953 Cr.L.J. 692: A.I.R. 1953 Bhopal 8.

Normally, the result of identification proceedings in which a particular accused was put must also be taken into consideration in deciding whether the identification was good. It is upon the basis of it that it must be held whether identification is good and reliable or fit to be discarded. Other identification proceedings in which the particular accused was not put up for identification and other accused were put up, are immaterial except in so far as inference may be drawn against the power of observation of the witnesses. The inference may be drawn from these other identification proceedings when they were held either prior to the identification proceeding relating to the particular accused or simultaneously with or shortly after it. But no conclusion can be drawn from those other identification proceedings if they were held long afterwards, because by the lapse of time a witness may lose that freshness of impression which he might have retained at the time when the proceeding connected with the particular accused was held. Therefore, identification proceedings held long after the particular proceeding with which the Court is concerned should not be taken into consideration in weighing the evidence of identification with regard to particular accused: 1952 All. L.J. 568: A.I.R. 1953 All 314. This case was followed in 1957 Cr.L.J. 113 (All.) and A.I.R. 1960 All. 50 (D.B.).

Quality, and not quantity, is the real criteria; if there is only one witness who alone had an opportunity to see the accused, his evidence has to be subjected to strict scrutiny and careful examination; if thereafter his evidence inspires confidence and rings true, it should not be discarded for being quantitatively insufficient: (1988) 36 B.L.J.R. 720 (D.B.). However *see* A.I.R. 1981 S.C. 1392. *See* also S. 134.

It cannot be said that the number of witnesses who failed to identify an accused should be set off against those who did identify him, so that if an accused was identified by two, but not by two others, he should be deemed to have been identified by none; because a witness should be judged on the strength of what he himself has seen and not

on the inability of somebody else to see it: 1957 Cr.L.J. 1378: A.I.R. 1957 All. 809.

It is not unusual for witnesses to make mistakes of identity when a large number of persons are concerned in committing a crime; in any event it is a question of fact to be decided in each case and is not a question of law: A.I.R. 1960 S.C. 289: 1960 Cr.L.J. 424. If at least two out of five witnesses identify accused, *held*, conviction can be based on such identification: 1994 Cr.L.J. 37 (Andh. Pra.).

Per *Desai, J.*—The weight to be attached to the identification of a suspect by a witness should ordinarily not depend upon his failure to identify suspects. It follows that it should not depend upon the mistake committed by him, *i.e.*, upon the number of innocent men picked out by him as other offenders: 1953 Cr.L.J. 848: A.I.R. 1953 All. 385.

Where a person identifies one suspect correctly but commits several mistakes that identification should not be accepted and the evidence of that witness should be discarded. To hold otherwise would be to ignore the rule of prudence and caution completely and would be quite contrary to the definition of the word 'proved' as given in S. 3: 1957 Cr.L.J. 113 (All.).

At an identification parade there is always a possibility of mistaken identifications. When the assailants and the person assaulted came close together, it is no doubt possible that the assailants may be recognised, but in an assault at the dead of night in intermittent light with large number of persons being amongst those who were assaulting and with the natural fear and confusion that the presence of dacoits creates in the hearts of men and women persons would not be in a position to so carefully notice the feature of those who were assaulting them as to enable reliance to be placed upon their identification after a period of eight months, particularly when upon a total view of their picking out at two identifications it is seen that they picked out an equal number of suspects and non-suspects: 1958 Cr.L.J. 996: A.I.R. 1958 All. 616.

Where the accused was identified by most of the witnesses in the test identification parade, *held*, a few defects in the test parade do not justify rejection of the identifying witness's evidence of the accused having committed the offence: A.I.R. 1979 S.C. 1831: 1979 Cr.L.R. 499.

When all but one witness had correctly identified the accused in the identification parade, *held*, the mere fact that one witness identified a wrong person instead of the accused, is no ground for rejecting the evidence of those who had rightly identified the accused: 1974 S.C.C. (Cr.) 760: A.I.R. 1974 S.C. 2267.

Where in an identification parade the witness picked up three persons correctly and committed one mistake, *held*, his performance is good and his testimony can be accepted; a witness need not be able to identify all the suspects: 1979 All.Cr.R. 460: 1980 All.Cr.C. 61: 1979 All.L.J. 1151.

According to the six identifying witnesses they had last seen the accused during the course of the commission of a dacoity at which firing was taking place and did not see him again till a year later. Still all of them identified him and not one of them made mistake. *Held*, that the whole identification became suspicious: 1954 Cr.L.J. 1762: A.I.R. 1954 All. 795. The fact that every one of the identifying witnesses was not able to identify every one of the accused in the case does not detract from the evidence of those witnesses who identified particular accused: 1958 Raj.L.W. 527. Correct identification by three out of four persons *held* sufficient to bring home the guilt to the accused: 1954 Cr.L.J. 1762: A.I.R. 1954 All. 795.

Identification by one out of four persons *held* not sufficient for conviction: 1954 Cr.L.J. 1762: A.I.R. 1954 All. 795.

No hard and fast rule can be laid down that in every case of dacoity, if there is identification by only one witness, that identification should never be accepted. Every instance of identification in circumstances which usually accompany a case for dacoity has to be judged on the facts of that particular case presented by the prosecution and if after a careful scrutiny there is the slightest hesitation in the mind of the Court that there was possibility of a mistaken identification or that the statement of the sole witness was influenced by some other cause, the accused, in view of the matter, is entitled, as a matter of course, to the benefit of a reasonable doubt: 1955 B.L.J.R. 428: A.I.R. 1956 Pat. 39.

Accused identified by only one witness—Identification *held* not sufficient to corroborate the statement made by an accomplice before his death: 1960 All.L.J. 567: 1960 All.W.R. (H.C.) 431: (1961) 1 Cr.L.J. 591.

Solitary evidence of identification—Cannot be relied upon for conviction: 1979 All.Cr.R. 390 (D.B). *See* also 1977 B.B.C.J. (H.C.) 84: 1977 Cr.L.J. (N.O.C.) 30 (Pat.) (Sole witness—Not safe to convict an accused); 1992 Cr.L.J. 863 (Ori.).

Where witnesses who were admittedly present at the place of occurrence and had seen the accused failed to give any description of the accused persons, but nevertheless they identified accused during identification parade, *held*, their evidence could not be disbelieved particularly when it inspired confidence and their statements found corroboration from the earlier identification parade: 1994 Cr.L.J. 3531 (Raj.).

The accused were unknown to the witnesses before the occurrence. Though there was bright moonlight, these witnesses had the opportunity of seeing these fleeing strangers for a very short time. These accused persons also had no distinctive appearance or infirmities which would fix their features indelibly upon the minds of these witnesses. The first information report and the dying declaration did not contain even a description of accused. The identification parade had been held practically 15 months after the date of occurrence. *Held*, that in these circumstances it would be unsafe to rest the conviction of the accused upon the identification evidence: 1959 M.L.J. (Cr.) 994: I.L.R. (1959) Mad. 1032: (1960) 1 M.L.J. 12.

Where in a dacoity case it was contended that it was not possible for witnesses to identify the accused persons as it was a dark night and accused were in muffled faces, but the witnesses specifically stated that all the lights in the temple were on and they identified accused in the light and though the accused were in muffled faces but in the scuffle the clothes on their face came down and subsequently witnesses identified accused in the identification parade, *held*, the evidence of witnesses could be relied upon: 1994 Cr.L.J. 3531 (Raj.).

Where direct evidence of identity of the accused who have been moving about under assumed names and are total strangers, comprises of (*i*) a first time identification in the Court after a lapse of considerable time or (*ii*) identification at a test parade, *held*, it is not safe to place implicit reliance on the evidence of witnesses who had just a fleeting glimpse or no particular reason to remember the accused: A.I.R. 1992 S.C. 2100: (1992) 3 S.C.C. 700.

It is not necessary to take into consideration the mistakes committed by the witnesses at other identification parades unless any of the witnesses has made a palpably large number of mistakes at all other identification parades: 1954 Cr. L.J. 1439: A.I.R. 1954 All. 684.

Where moles and marks on the accused's face were covered with paper as also the faces of some other persons and they were joined in the test identification, *held*, such paper make up rendered the parade wholly unreliable; the prosecution having failed to eliminate the possibility of the accused being shown to the witnesses before the parade, it is not safe to convict the accused: A.I.R. 1992 S.C. 601: 1992 Cr.L.J. 524.

The fact that the accused had not protested cannot be brushed aside in adjudging the truthfulness of his contention that the witnesses were known to him before the test identification parade and more so when the parade had taken place much after the date when he is alleged to have been shown: 1980 All.Cr.R. 313.

Where of the three accused in a murder and attempt to murder case one had absconded and the other was acquitted for want of evidence against him, the star prosecution witness was the deceased's wife who had also been attacked and inflicted sharp incised wounds on her cheek and neck with a *daranti*, a sharp edged weapon, with which her husband had been murdered only a few moments earlier in the drawing room and her testimony by and large tallied with her statement to the Police which constituted the F.I.R. and she had also identified the accused and no reason was shown to doubt her testimony which was found to be straight forward and free from any embellishments, *held*, some innocuous omissions in the F.I.R. would not show that she was not a wholly reliable witness; merely because she was admitted, and remained, in hospital for treatment and the application for identification parade was moved a few days thereafter stating therein that the accused had been

asked to keep his face muffled up but he declined to join the parade on the ground of having already been shown to the witness would detract from the veracity of her testimony when no suggestion was made in cross-examination of his having been so shown to the witness nor was it shown by him that he was not kept in muffled face: 1995 Cr.L.J. 1618 (Del.) (D.B.).

Accused confined into two jails at *P* and *J*—Witnesses identifying accused at *P* jail—Only some of them sent to *J* for identification—Evidence of witnesses who did not go to *J held* should not be discarded—Evidence of other witnesses who had gone to both places *held* could not be ruled out on the ground that they stood in company of former—Identification at *J held* was quite irrelevant in judging results of identification *P*: 1953 Cr.L.J. 848: A.I.R. 1953 All. 385.

Per *Desai, J.*—If the identification appears to have been induced by any suggestion or other means, the Court should not hesitate to quash any conviction which follows, particularly when justice depends upon the identification of the accused: 1953 Cr.L.J. 848: A.I.R. 1953 All. 385.

Identification held on a day previous to his arrest, as the accused was in judicial custody in connection with some other case, *held*, is not in accordance with law: 1977 Raj.Cr.C. 238.

Each of the accused was correctly and consistently pointed out by at least four of the eye-witnesses of the crime. These witnesses had also pointed out the accused before the Court and sworn that they saw them taking part in the dacoity. The witnesses further declared that they had never seen these persons before the dacoity and the identification parade. There was bright moonlight and the robbers and their victims had seen each other from very close quarters. *Held*, that the eye-witnesses had every chance of marking features of the accused. Accordingly, the evidence on the test identification was deserving of very high value: A.I.R. 1956 All. 163: 1956 All.L.J. 206.

Where four identification parades were held by the Magistrate on one and the same date in the jail in which each of the four accused was put up for identification separately, the evidentiary value of a witness against all the accused should be judged in the light of the cumulative result of all the four parades and not of the particular parade in which he may identify a particular accused, because all the four tests were held on one and the same date: 1957 Cr.L.J. 1378: A.I.R. 1957 All. 809.

Where a witness without any adequate reason is not sent to the subsequent parades, it is a circumstance which throws doubt upon his power of observation and memory: 1957 Cr.L.J. 113 (All.).

Where identity of the accused was established: (1992-1) 40 B.L.J.R. 436 (D.B.); (1992-1) 40 B.L.J.R. 49 (D.B.); (1991-1) 39 B.L.J.R. 587; (1991-2) 39 B.L.J.R. 1000 (D.B.); (1990-1) 38 B.L.J.R. 676 (S.C.); 1989 M.P.L.J. 497 (D.B.); 1984 Cr.L.J. 445; 1983 Raj.L.W. 395; 1983 Raj.L.W. 397 (D.B.); A.I.R. 1979 S.C. 1831; 1979 All.Cr.R. 284; A.I.R. 1973 S.C. 1200.

Where identification *held* not established: (1992-2) 40 B.L.J.R. 870; 1992 Mah.L.J. 1106; 1992 All.L.J. 371 (S.C.); 1992 All.L.J. 1179: 1992 Cr.L.J. 3819 (D.B.); (1991) 2 S.C.J. 618; (1991) 4 S.C.C. 536; A.I.R. 1991 S.C. 1468: (1991) 3 S.C.C. 434; (1990-1) 38 B.L.J.R. 222; (1988-1) 8 Guj.L.H. 264; (1986) 34 B.L.J.R. 782 (D.B.); 1985 Cr.L.J. 1977; 23 Del.L.T. 178; (1985) 2 An.W.R. 357 (D.B.); 1984 Raj.L.W.286 (D.B.); 1984 Cr.L.J. 588; 1984 Bih.L.T. (Rep.) 298; (1983) 56 Cut.L.T. 139: 1983 Cr.L.J. 1715; A.I.R. 1983 S.C. 349; 1983 Raj.L.W. 326 (D.B.); (1982) 8 All.L.R. 515; 1982 Cr.L.J. 106 (Madh. Pra.); A.I.R. 1982 S.C. 839; (1981) 51 Cut.L.T. 319: 1981 Cr.L.J. 1060; 1979 All.Cr.R. 390 (D.B.); A.I.R. 1979 S.C. 1188; A.I.R. 1973 S.C. 337: 1972 Cr.L.J. 1254; (1972) 1 Cut.W.R. 464 (D.B.); (1971) 1 Cut.W.R. 351.

Violent mob spearheaded by party at 20/25 men attacking Police party from behind with bombs—*Held*, that circumstances were such that persons in spearhead could be identified by members of Police party: (1965) 1 Cr.L.J. 160: A.I.R. 1965 Cal. 89.

4. Covering of identification marks.—The Court is under a duty to see that justice is not defeated by the prosecution witnesses being deprived of an opportunity of seeing the face of the accused or as much of it as is necessary for identifying him. The right of the accused to dress in any manner that he likes or to cover his face or marks on it is subject to the right of the prosecution witnesses to see so much of his face as is necessary for their being able to identify him. An accused

can claim the right to go to the Court wearing a mask, but certainly he cannot claim this right in order to prevent the prosecution witnesses being able to identify him. If an accused has prominent marks on his face so that he may be identified by any person, though he has never seen him before, merely on the basis of the information that he has such and such marks, it may be necessary to cover the marks so that if the person identifies him it cannot be contended that he identified him because he was informed of the marks. The Court must be assured that the identification is genuine, *i.e.*, is based only upon the recollection that the witness has the features of the person committing the crime. But this covering of marks should be within reasonable limits and should not be carried on to such an extent as to disfigure the face or to make its identification practically impossible or extremely difficult. The covering of marks should not be allowed to defeat the very object of identification. This is essentially a question of credibility of the witnesses and it is always better to face this question than to prevent all identification by completely disguising the face. No question of testing the credibility of a prosecution witness arises at the stage when he identifies the accused during his examination-in-chief; therefore, at that stage the accused has no right to subject to him to any test. While he is examined-in-chief, he is under the control of the State counsel and the accused has no right to interfere with the examination-in-chief and cannot direct the manner in which he should be asked to identify him. He cannot require the Magistrate to have an identification parade or to collect men to stand with him. It is only when the witness is being cross-examined that he can put questions to test the truth of his statement that he had identified him only on account of seeing him committing the crime and not on the basis of having seen him somewhere else or on the information that he had such and such marks. *Held*, that if the accused covered his two scars with pieces of paper of not more than 1" × 1" dimensions, it would not amount to a disguise and would not prevent his identification by the witnesses who had seen him committing the crime with which he had been charged. He should not be permitted to disguise or conceal his face in any other manner. There could be no objection to his bringing a number of men to stand near him in the Court-room, but he had no right to any assistance from the Court in collecting the men or in having their faces similarly covered with pieces of paper. Courts were open, the public or anyone could go inside a Court-room provided there was a space and he did not cause any disturbance or interruption in the proceeding going on in the Court: 1959 All.L.J. 252: 1959 Cr.L.J. 934: A.I.R. 1959 All. 504.

Only those marks which are prominent or noteworthy that they are likely to be recognised by a verbal description should be covered by slips of paper. If a suspect has a large number of prominent marks on his face, the marks should not be covered at all. Small-pox marks are usually so large in number that any attempt at concealing them with slips of paper would make the face totally unrecognizable. So the Magistrate should be sure that a number of innocent men in the parade bear similar pox marks. So also no concealment of bored ears is required and all that is necessary is that the Magistrate should make sure that the parade contains a number of innocent men with similarly bored ears. If the Magistrate comes to entertain good cause for the belief that in order to avoid recognition a bearded criminal after committing the crime got himself shaved or *vice versa*, it is open to him to defer the identification of the clean shaven suspect until he has grown a beard of the appropriate size, or to get the bearded suspect shaved. No violation of Art. 20(3) of the Constitution occurs if the Magistrate does so: I.L.R. (1960) 2 All. 488: (1961) 1 Cr.L.J. 340: A.I.R. 1961 All 153.

A correct identification consists in forming an accurate opinion as to identity after comparing the image which persists in the mind of a witness with the image actually seen at the time of the test identification. A test identification parade is a scientific experiment conducted in order to ascertain whether the evidence of identity to be given in Court by a witness is sufficiently reliable to form a basis of conviction for offence. In the process of identification of a face, certain parts of the face, such as the nose, the chin, the mouth, the eyebrows, often serve to indicate and fix those characteristics upon the mind which distinguish the face from others and enable its correct identification. If these very characteristics are concealed or given a false appearance the identification cannot be reliable: 1965 All.L.J. 166.

Where during the identification proceedings prominent parts of the face, like nose and chin are covered by slips, to hide distinctive marks, the appearance of the face is bound to be altered and the identification proceedings must necessarily be falsified and no convictions can be based upon identifications made in such proceedings: 1964 All.L.J. 866.

Where the accused had brown eyes and none with such brown eyes were mixed in the parade, *held*, even a hint about the colour of his eyes, given by some one interested in his identification, would be sufficient to pick him out from the parade; such identification is of no value: A.I.R. 1973 S.C. 1200: (1973) 3 S.C.C. 55: 1973 Cr.L.J. 926.

5. Identification of property.—No presumption attaches to identification proceedings to property. It is for the prosecution to establish affirmatively that every necessary precaution was taken to ensure fair identification. The most essential requirement is that the witnesses should not have had an opportunity of seeing the property after its recovery and before its identification before the Magistrate. For that purpose it is necessary to seal the property as soon as it is recovered and to keep it in a sealed condition till it is produced before the Magistrate. The Police Officers who take the sealed bundles to the thana after recovery and who take it to the Magistrate for identification proceedings should be examined to prove that sealed bundles were not tampered with in any way. The sealed bundles should be opened in the presence of the Magistrate conducting the identification proceedings and he should depose about it. The property to be mixed with the property to be identified should also be sealed some days before witnesses are called and the bundle containing it should also be opened in the presence of the Magistrate who should testify about it in Court. Further, the result of identification as well as the fact whether the property mixed was similar to the property identified should be entered in the memorandum by the Magistrate in his own hand: 1954 Cr.L.J. 1819: A.I.R. 1954 Vindh. Pra. 42.

Suit regarding land—Identification of land—Survey plot number is important—No mention or wrong mention of khata number makes a difference: A.I.R. 1965 Pat. 279.

Accused and articles not known to witnesses alone are put up for identification—The knowns are never put up for identification—Statements of witnesses who recognised them are judged from other circumstances: 1962 All.L.J. 748: I.L.R. (1962) 2 All. 843: (1964) 1 Cr.L.J. 78 (S.C.).

The rule of law laid down in Lalla Singh's appeal Cr. App. No. 291 of 1958, dated 15th December, 1959 (All.) is not applicable to the identification of property. In the identification of property frequently only two or three similar articles are mixed and although it is desirable that a larger number of similar articles should be mixed, still the identification of property is not disbelieved if the witnesses are credible and they have been subjected to a fair test, merely because the similar articles mixed were only two or three in number. This is only to illustrate that the identification of property stands on a different footing than the identification of person: I.L.R. (1961) 2 All. 32: 1961 All.L.J. 402: A.I.R. 1961 All. 614; I.L.R. (1971) 21 Raj. 52.

Identification of an article at the trial is substantive evidence and its identification at the time of test identification is only a corroborative piece of evidence: 1977 W.L.N. 227 (Raj.) (D.B.).

Identification of stolen articles — Test identification chart — Articles with which stolen articles were mixed up indicated—Non-mention of their number in the chart, *held*, was mere omission and did not make test identification unreliable in any way: 1960 B.L.J.R. 268: I.L.R. 39 Pat. 361.

Where witnesses identify the articles of their own daily use, it can be relied upon even without special identification marks thereon: 1981 Jab.L.J. 183: 1981 M.P.L.J. 457.

Facts establishing identify of things—Incriminatory article of common use—Rape case — Dhoti with blood-stains recovered from house of accused—No evidence to show that it belonged to accused or was put on by him when he took away the girl—Identification of dhoti is of no use: 1966 Cr.L.J. 318: 1966 All.W.R. (H.C.) 208: 1966 All. Cr.R. 132.

If the recovered stolen article to be identified at the identification parade possess a distinctive mark, the identification is insufficient to prove the charge. Where the hanslis on the body of girl, who is a victim of rape,

possessed a distinctive mark and if the witnesses could identify it by that distinctive mark, it could not lead to the conclusion that the witnesses identified the article because they had seen it earlier on the body of the victim and not because they had been able to identify it by that special mark: 1966 Cr.L.J. 318: 1966 All.W.R. (H.C.) 208: 1966 All.Cr.R. 132.

Where a lady witness identified her stolen ornaments and silk sarees before the trial Court which was sought to be assailed for want of prior test identification, *held*, it is common knowledge that ladies have an uncanny sense of identifying their own belongings, particularly articles of personal use in the family; the objection has no merit: A.I.R. 1983 S.C. 446: (1983) 1 S.C.C. 330.

Where gold and silver ornaments belonging to her parents are identified by none else than the daughter herself, such identification cannot be brushed aside merely on the ground of delay of about four months; the daughter knew which ornaments belonged to her father and which to her mother and she identified the same without hesitation both at the parade and in the Court. [(1967) 43 Cut.L.T. 38, Foll.]: (1981) 52 Cut.L.T. 126: 1981 Cr.L.J. 1452 (D.B.).

For conviction under S. 411 prosecution must prove that the articles recovered are stolen property—In the absence of distinguishing marks, no absolute inference could be drawn from the mere similarity of articles—Hence, accused should be given benefit of doubt: 1966 All.W.R. (H.C.) 481.

Prosecution must prove that article recovered was stolen article and this could be done only by mixing recovered article with articles of similar description at time of identification parade—*Held*, on facts that identification proceedings were a farce: 1966 All.Cr.R. 338.

To identify articles, the law requires mixing of similar articles, and not identical articles; two persons are never identical though it is possible to have machine made identical article but in such a case even the real owner cannot identity his lost article; the articles are required to be similar in the same sense as similar persons are mixed up with the accused in the test identification but there should be no prominent marks on the articles about which the identifying witness could be given a clue to identify it even if it does not belong to him: 1980 Cr.L.J. 571 (All.). *See* also 1977 W.L.N. 379 (Raj.).

The established position of law is that the evidence of Test Identification Parade cannot form the basis of conviction. That evidence is not a substantive piece of evidence. The purpose of T.I. Parade is to test the statement of the witness made in Court which constitutes substantive evidence. Where there is no such substantive evidence at all as to the identity of the stolen properties, the earlier identification parade cannot be of any assistance to the prosecution especially when there has been inordinate delay in holding the test identification: (1978) 46 Cut.L.T. 260.

Identification of alleged stolen property—Articles recovered such as are commonly used by villagers—Identification *held* valueless: 1954 Cr.L.J. 1819: A.I.R. 1954 Vindh. Pra. 42. *See* also 1977 B.B.C.J. (H.C.) 84.

Test identification of the articles wherein same type of articles were not mixed up but ink marks were put on the articles to be identified, *held*, cannot be relied on: (1976) 1 M.P.W.N. 267; 1983 M.P.W.N. 233; 1988 J.L.J. 505 (D.B.); 1992 Cr.L.J. 1150 (Madh. Pra.).

Statement as to recovery of the robbed property, *held*, has to be corroborated by an earlier test identification. [1979 Cr.L.J. 919 (S.C.); A.I.R. 1972 S.C. 283, Rel. on]: 1982 All.Cr.R. 165.

Identification of articles found in possession of accused alleged to have been in dacoity—Chits attached to articles—No chits on other articles mixed with those put up for identification — Articles of very ordinary type of every day use — No reliance, *held*, could be placed on such identification: 1952 All.L.J. 568: 1953 Cr.L.J. 705: A.I.R. 1953 All. 314. Women may identify their necklaces even without marks of identification if they are whole and unbroken, but they can never identify a piece of a necklace or ordinary type if it is made into several pieces each piece about 2 inches in length: I.L.R. (1957) Cut. 680: 24 Cut.L.T. 1: A.I.R. 1958 Ori. 51.

Where the complainant in a case of robbery had described his stolen watch as of H.M.T. make but the watch of H.M.T. make recovered from the accused was of 'citizen' brand, *held*, the identity of watch recovered from the accused as being the stolen property is not established beyond reasonable

doubt; such watches are commonly available in the market: 1985 Cr.L.J. 1700.

Watches recovered from accused given on superdari to identifying witnesses by Magistrate after identification before him—Non-production of Magistrate takes the wind out of the prosecution sails: (1983) 23 Del.L.T. 178: 1983 Rajdhani L.R. 146.

The contention that the identification of articles (recovered from dacoits) in Court cannot be believed because they were not put forth for identification under S. 9 which applies both to the identification of person and property, is not acceptable for the identification in Court assumes more importance. [A.I.R. 1950 All. 180 and A I.R. 1945 Pat. 161, Disting.]: 1959 Cr.L.J. 947: A.I.R. 1959 Andh. Pra. 387.

Money cannot be subjected to a test identification parade. [1978 Cr.L.J. 634 (All.), Foll.]: (1983) 23 Del.L.T. 178: 1983 Rajdhani L.R. 146.

Mere recovery of money in a bribery case, divorced from the circumstances of its payment, is not sufficient to convict the accused when other substantive evidence is not reliable. [I.L.R. (1974) 2 Del. 400, Reversed]: A.I.R. 1979 S.C. 1408.

6. Value of identification.—(*See* also Note 3(*b*) and Note 3(*e*), *supra*). Statement of witnesses in F.I.R. and before police and identification before Magistrate who held test identification parade, is not substantive evidence and no conviction could be based on such evidence—Evidence against accused must be evidence given by witness in witness-box: 1969 Pat.L.J.R. 21.

Where the description of a tall stout man with moustaches fitted three of the accused said to be the actual assailants, *held*, that the description was not particular description of any accused who was one of the accused to whom this description fitted in. The descriptions given were not such distinctive descriptions which might go a long way in supporting the identification of witnesses: 1955 All.L.J. 330: A.I.R. 1955 All. 138.

Whether a witness points out a suspect standing before him as the criminal or he placed his finger on the person as the criminal identified by him, *held*, is one and the same thing: 1992 Mah.L.J. 1106 (D.B.).

Even making allowance for the increase in the distance in tropical countries, the distance of moonlight recognition cannot go from 12 yards or 17 yards to 45 yards and 52 yards. *Held*, in the nature of this case and with due regard to the shadows of the cashewnut forest wherein the scene of stabbing was situated, identification of the accused at a distance of 45 and 52 yards did not appear to be possible. So even if the witness was speaking the truth when he said that he saw two persons attacking the deceased and then removing him, it was not possible to accept his identification of those persons as accused: 1963 M.L.J. (Cr.) 194: 1962 Ker.L.T. 120: (1963) 1 Cr.L.J. 175: A.I.R. 1963 Ker. 54.

When the witness who knew the accused for a long time saw him running past her when the moon was just set and she was enjoined by her mistress also accused as abetter to keep quiet and she identified the accused for the first time in the Committing Magistrate's Court. *Held*, that she could not be treated as an accomplice (accessory after the fact) as her silence till then was satisfactorily explained and when all the facts were known; she testified to the identity of the murderer and named him in Court of Committing Magistrate, her evidence may be held faultless and reliable. Having known him for long she could properly identify as he was running past her in the open roof: A.I.R. 1952 Him. Pra. 81: 1952 Cr.L.J. 1720; (1971) 1 Cut.W.R. 351. *See* also 1979 All.Cr.C. 498; 1974 Cr.L.J. 1212 (Ori.) (One can recognise a known person even in star light).

Where a witness had actually caught hold of the axe in the accused's hand and both tried to snatch it from each other, *held*, his evidence could not be treated as incredible merely because no test identification parade was held: A.I.R. 1971 Madh. Pra. 116: 1971 M.P.L.J. 64: 1971 Cr.L.J. 814: 1971 Jab.L.J. 165. *See* also 1992 Cr.L.J. 3251 (Him. Pra.) (D.B.).

Where the accused had no previous acquaintance with the witnesses and the occurrence happened on a dark night, *held*, in the absence of cogent evidence that the witnesses, due to visibility at the place of occurrence and proximity to the assilants had a clear vision of the role of each of the accused so that their features could get impressed in their mind to enable them to recollect and identify the assailants even after a long lapse of time, it would be hazardous to conclude that the accused were the real assailants,

especially when the identification parade was found to be not properly conducted: A.I.R. 1991 S.C. 1468.

Where all the accused were known as they belonged to the same village and also bore *animus* against the deceased and the occurrence had taken place towards the February end in an open field at about 5.30 p.m., *held*, it could not be so dark as to make the identification impossible: A.I.R. 1981 S.C. 2073.

Where rural witnesses deposed that they had seen the accused assaulting the deceased necessarily implies that there was sufficient visibility for them to recognise the assailants; in villages, people are well known to each other and can identify persons even from a distance in dark nights by their gait, stature and manner of movement: (1983) 55 Cut.L.T. 312.

Evidence as to identification—Weight to be attached: (1958) 2 M.L.J. (S.C.)113: A.I.R. 1958 S.C. 350.

'Statement of persons as to cause of his death or as to any circumstances of the transaction which resulted in his death'—Conviction based on identification: 1967 Ker.L.T. 466.

Witnesses identifying accused after a period of four months without committing single mistake—This by itself is a suspicious circumstance—Evidence, *held*, inadmissible: 1960 All.L.J. 414: 1960 All.W.R. (H.C.) 275: 1960 All. Cr.R. 193.

Fleat importance is attached to the evidence of identification in dacoity cases where dacoits are not arrested on the spot. Evidence of identification should be entirely above board and should command confidence—Investigating Officer getting accused photographed after arrest and before they were sent to jail—Evidence of identification becomes suspicious and cannot be relied upon: 1960 All.L.J. 414: 1960 All.W.R. (H.C.) 275: 1960 All.Cr.R. 193.

In a murder case involving several accused, holding of identification parade by the Investigating Officer for his 'personal satisfaction' without any attempt to get a Magistrate to hold a test identification is a grievous error of judgment on the part of the Investigating Officer. A conviction in a capital case cannot be based on the subjective satisfaction of the Investigating Officer but on evidence which satisfies certain well-recognised objective tests: 1960 Cr. L.J. 1402: A.I.R. 1960 Andh. Pra. 545.

Conviction can not be based on identification by a person who on his own admission was drunk: 1957 All.W.R. (H.C.) 802: 1957 All. L.J. 718.

The accused were unknown to the witnesses before the occurrence. Though there was bright moonlight, these witnesses had the opportunity of seeing these fleeing strangers for a very short time. These accused persons also had no distinctive appearance or infirmities which would fix their features indelibly upon the minds of these witnesses. The first information report and the dying declaration did not contain even a description of these accused. The identification parade had been held practically 15 months after the date of occurrence. *Held*, that in these circumstances, it would be unsafe to rest the conviction of the accused upon the identification evidence: 1959 M.L.J. (Cr.) 994: I.L.R. (1959) Mad. 1032: (1960) 1 M.L.J. 12: A.I.R. 1960 Mad. 125.

It is no doubt true that what a witness actually says about his having seen a particular witness at the time of incident in Court is the evidence regarding identification, but where the witness has an opportunity of seeing a particular accused at the trial and even earlier this identification loses much of its significance: 1959 M.P.L.J. (Notes) 150.

Villagers, not living in electrified villages, are accustomed to seeing things in the lantern light, their eyesight is conditioned; their power of seeing is not diminished because they witnessed the incident in the lantern, and not electric light; besides, identification poses no serious problem where the accused were also known to the witnesses: A.I.R. 1983 S.C. 957: 1983 Cr.L.J. 1457: (1983) 3 S.C.C. 470.

Merely because the fatal blow was given by one of the accused cannot negative the infirmities of the general nature affecting the veracity of the identification evidence; the benefit of a doubtful identification should also accrue to him equally if others had been acquitted on that very ground: A.I.R. 1992 S.C. 1871: 1992 Cr.L.J. 3140: (1992) 2 S.C.C. 455.

Where because of threat from the accused, the deceased slept with his family, with the lantern on, on the village chaupal platform,

the scene of occurrence, where three shots were fired, and the eyewitness, sleeping a few feet away sustained a gun shot injury, *held*, he could identify the accused without any difficulty; the burning lantern was produced before the Investigating Officer the moment he came to the scene; besides, the assailants used torches which enabled the witness to recognise the accused: A.I.R. 1978 S.C. 1605.

In a case of dacoity, where the only evidence is of identification, the question of light is of paramount importance. This should be approached in a careful and judicious manner and not in an unintelligent and wooden manner: (1961) 2 Cr.L.J. 744: A.I.R. 1961 All. 612.

While appreciating the identification evidence question of light and opportunity for identification assumes importance: 1982 All.Cr.R. 200: 1982 All.W.C. 329: 1982 All.L.J. 1061. *See* also 1980 All.L.J. 664 (Lantern burning in the room—No bright light—Dacoits covering their heads—Not basis for conviction); 1964 All.L.J. 866 (Midnight—Identification inside house too difficult and improbable); 1992 Cr.L.J. 3819 (All.) (D.B.) (Not sufficient light at the time when dacoity was committed—Identification unworthy of acceptance).

Where at least one eyewitness could reasonably be expected to have known some of the accused as residents of closeby villages and his co-students, *held*, his feigned ignorance of prior familiarity with their identity becomes irreconcilable with the incidents of ordinary human intercourse; the omission to disclose their identity in the F.I.R. raises a reasonable doubt about the accused's complicity: A.I.R. 1988 S.C. 345: 1988 Cr.L.J. 422: (1988) 1 S.C.C. 14: 1988 All.W.C. 374.

Where the suspects were already shown to the complainant before the identification parade, the evidence of identification can hardly be relied on: A.I.R. 1958 Tripura 40: 1958 Cr.L.J. 1549. But where an accused has been identified both at the identification parade and at the trial, *held*, the identification can be safely accepted. *See* 1977 Cr.L.J. 319 (Ori.) (D.B.).

Normally the result of identification proceedings in which a particular accused is put up must alone be taken into consideration in deciding the value of identification of a particular witness with respect to that accused. Other test identifications in which the accused in question was not put up may be taken into consideration for appraising the power of observation of witnesses only if those tests were held so soon after the test in which the particular accused was put up, that the intervening period may reasonably be said not to make any difference to the memory of the witnesses: 1958 All.W.R. (H.C.) 542: 1958 All.L.J. 431: 1958 All.Cr.R. 344.

The rule that the result of performance of each witness in different parades should be taken into account to judge him therefrom is not of universal application; the result of only those parades can be taken into account which are held simultaneously or within a few days of each other; there is no rule that the result of a parade held early should be rejected because the witness had made mistakes in the parades held several months thereafter; however, if the witness gives a much improved performance in subsequent parades, the result of the earlier may be taken into account: 1978 All.Cr.R. 146.

Failure to identify accused by eye-witnesses—Creates doubts about presence of accused: 1953 All.L.J. 720: A.I.R. 1953 All. 652.

Identification by seeing the back is at best a treacherous one: 1957 All.L.J. 718.

Where the entire case depends mainly on the identification in the test identification parade as well as before the trial Court and both the trial and the appellate Courts having assessed the evidence in the proper perspective attached much importance to the evidence of identification in finding the accused guilty, *held*, the Supreme Court will not interfere: A.I.R. 1990 S.C. 1180: 1990 Cr.L.J. 1183.

In a big riot by hundreds of persons, it is very easy even to mistake one person for another and implicate honestly really innocent persons and even to mistake persons seen elsewhere as having been seen in the riot: 1958 Cr.L.J. 97: A.I.R. 1958 Tripura 1.

Five out of eight persons identifying accused, but victims of dacoity failed to identify him, *held*, such an identification was unreliable: 1992 Cr.L.J. 3819 (All.) (D.B.).

Identification of accused by ocular witness at Police station—Weight of—Hit by

S. 162, Cr.P.Code — Identification is of no consequence: 1982 Cr.L.J. 1656 (Del.).

Mere mention of the accused's names before the Investigation Officer in statements under S. 161 of the Code of Criminal Procedure or during the trial is of no avail if their names were not mentioned in the F.I.R. and no test identification parade was held. [1977 Cr.L.J. 1788 (All.), Foll.]: 1982 All.W.C. 173: 1982 All.Cr.R. 131: 1982 All.L.J. 498. *See* also 1982 Cr.L.J. 2056 (Bom.).

Where the accused has been named and identified by only partisan witnesses, but not by the independent witnesses, it would not be safe to base the conviction on the testimony of the former: 1957 Cr.L.J. 1378: A.I.R. 1957 All. 809.

Identification made at night, and that too during an occurrence like dacoity, when blows are struck and people are terrorized, is regarded generally of very little value; as is so often said, such evidence is unreliable; it should, therefore, be approached in a careful and judicious, and not in an unintelligent and wooden manner; it should be entirely above board and command confidence: 1978 Raj.L.W. 239 (D.B.).

The only burning lantern in the house was alleged to have been overturned by the dacoits while entering the house for committing dacoity at mid-night. The identifying witnesses who were inside the house were not able to give any features of the dacoits or describe what any particular dacoit was doing and their evidence was also inconsistent with medical evidence. One of the identifying witnesses was not in a position even to see the looted house from the place where he was standing. *Held*, that the identification inside the house was too difficult and improbable and the identification evidence was worthless. When the lantern was overturned by the dacoits while entering the house, the witnesses inside the house could not be said to have seen the dacoits well enough. If the visibility had been good inside, the witnesses could not have given a version inconsistent with medical evidence: 1964 All.L.J. 866.

Where in case of dacoity the witnesses had mentioned features of the accused and identified them in the identification parade and money was also recovered at the instance of the accused, *held*, accused's participation in the crime was established: 1992 Cr.L.J. 1256 (Ori.).

Where an identification parade was conducted three and a half months after the dacoity and none of the identifying witnesses had in their earlier statement given description or identification mark or other particulars about the stature or colour or stoutness or thinness of the dacoits, *held*, the evidence was not sufficient to convict the accused: A.I.R. 1981 S.C. 1392.

Where in a case of bus dacoity, though none of the witnesses had acquaintance with, or had seen the accused earlier, but all of them had, even without any margin of error, identified the accused, *held*, it creates a lurking suspicion whether the identifying witnesses were identifying the accused put up in the parade because of the fetters on their legs: A.I.R. 1993 S.C. 931: 1993 Cr.L.J. 193.

Where dacoity was committed in the afternoon but the informants raised no hue and cry, there was admitted enemity between the informants and the accused and the identifying witnesses were inimical or on unfriendly terms with the identified dacoits, their co-villagers; moreover, neither precautions had been taken to conceal the accused's faces nor did the identifying witnesses disclosed as to how had they occasion to see the dacoits earlier and no local witnesses were examined, *held*, the trial Court should have insisted on the identifying witnesses' competence to recognise the accused: (1985-86) 90 Cal.W.N. 106.

Where in a case of dacoity and house breaking by night, the accused persons as well as the stolen articles were identified and there was no possibility of accused having been shown before the identification parade, *held*, their conviction on the basis of evidence of identifying witness was proper: 1995 Cr.L.J. 3178 (Ori.).

In considering the identification in a dacoity case, the existence of hostility in the form of mutual grudge or animosity cannot be wholly excluded from consideration as the same may influence an honest witness whose mind is always prepared to receive the suggestion that the act was of nobody else but that of his enemy. An honest witness can be a victim of false perception if his mind is labouring under some misconception that his enemy alone was likely to assablt and rob him of his belongings. The absence of such mental condition may afford a plausible ground to believe the witness's senses: A.I.R.

10. Things said or done by conspirator in reference to common design.— Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

Illustration

Reasonable ground exists for believing that *A* has joined in a conspiracy to wage war against the [1][Government of India.]

The facts that *B* procured arms in Europe for the purpose of the conspiracy, *C* collected money in Calcutta for a like object, *D* persuaded persons to join the conspiracy in Bombay, *E* published writings advocating the object in view at Agra, and *F* transmitted from Delhi to *G* at Kabul the money which *C* had collected at Calcutta, and the contents of a letter written by *H* given an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy and to prove *A*'s complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

---

1. Substituted for "Queen" by A.L.O. 1950.

1956 Pat. 39. The claim of identification by a witness who was terror-stricken due to the sudden attack by the dacoits and by the blows that he received should not be lightly brushed aside on the sole ground that he had reasons to be afraid and that he entertained fear of his safety. Fear, terror and pain are likely to produce mistakes on their own account, but it has to be judged in all such cases whether those were sufficient to create a condition which was equivalent to a morbid state. It has to be examined whether the witness was a victim of terror and his state of mind was wholly unsettled and unbalanced: A.I.R. 1956 Pat. 39. It is no doubt very difficult for a person who has seen a dacoit during dacoity to give detailed description unless he has conspicuous distinguishing marks. Normally only a general description is possible. Simply because any particular distinguishing marks are not deposed to by the witnesses it cannot be said that the identification is not reliable. One may form a general picture of a particular person in his mind and might be able to identify him when he is put up before him, but it is very difficult for persons, specially villagers and young boys, to be able to give detailed description of the persons whom they have seen for a short time during the commission of a dacoity. That does not, however, mean that those persons when placed before them cannot be identified by them: 1958 Raj.L.W. 527.

Where it was contended that the dead body, in an advance stage of decomposition, was not identifiable but the medical officer who had conducted the autopsy was not questioned about it and on the other hand, he had, from the marks of injuries on the dead body definitely opined about the cause of death; clearly, the decomposition was not so advanced as to defy identification; besides the clothes and shoes, found on the dead body, were also identified by some witnesses as being worn by the deceased on the day of his disappearance, *held*, the contention must be rejected: A.I.R. 1976 S.C. 2055: 1976 Cr.L.J. 1578: (1976) 2 S.C.C. 812.

Section 10—Synopsis.

1. Scope of English and Indian Law.
2. Evidence of conspiracy.

---

1. Scope of English and Indian Law.— S. 10 is wider than the English Law. As soon as it is shown with regard to an individual conspirator that he was privy with the combination and its objects and adopted the acts already performed, he as a conspirator becomes bound by the antecedent and consequent acts of his fellow conspirator: 28 I.C. 738: I.L.R. 37 Cal. 467: (1909-10) 14 Cal.W.N. 1114.

The section renders admissible in cases of conspiracy such evidence which is not ordinarily admissible under the English or Indian Law. The first thing for the prosecution in a case of conspiracy is to give satisfactory evidence to show a common purpose. The existence of the assent of minds which is involved in a conspiracy may be and from the secrecy of the crime usually, must be, inferred from the proof of facts and circumstances which taken together apparently indicate that they are merely part of a complete whole: A.I.R. 1939 All. 567.

There is a considerable inconsistency between S. 10 and the *Illustration* thereto: I.L.R. 37 Cal. 467: (1909-10) 14 Cal.W.N. 1114.

The principle underlying S. 10 is that a conspirator is an agent of his associates in carrying out the object of the conspiracy. His acts and declarations are, therefore, admissible against the other conspirators on the same principle as the acts and declarations of an agent are receivable against his principal. *Prima facie* proof of conspiracy and of the accused's connection with it must be given before giving evidence of the act, declaration or writing of a conspirator. It is not necessary that it should be established by direct evidence that the accused and the person whose acts, statements or writings are sought to be given in evidence against the prisoner entered into a formal consultation or agreement to commit offence as in a case of conspiracy direct evidence is seldom available. It may be proved by the surrounding circumstances or by the antecedent or subsequent conduct of the accused: A.I.R. 1958 Mad. 368. It is not necessary to establish by direct evidence that the accused persons did enter into an agreement to commit an offence to attract the operation of S. 10 against the accused: I.L.R. 37 Cal. 467; A.I.R. 1936 Nag. 97. The object of S. 10 is merely to ensure that one person shall not be made responsible for the acts or deeds of another until some bond in the nature of agency has been established between them and the acts, words or writing of another which it is proposed to attribute vicariously to the person charged must be in furtherance of the common design and after such design was entertained: 11 Pat.L.T. 45: A.I.R. 1929 Pat. 145 (F.B.); 1930 M.W.N. 1264.

Under S. 10, once the conspiracy to commit an illegal act is proved, the act of one conspirator becomes the act of others: A.I.R. 1980 S.C. 439: 1980 Cr.L.J. 386.

In cases of criminal conspiracy, S. 10 permits that the evidence of what one conspirator did or said or wrote in reference to their common intention is relevant evidence against other conspirators as well: A.I.R. 1988 Ker. 1: 1988 Cr.L.J. 107: (1987) 1 Ker.L.T. 928.

In cases of conspiracy better evidence than acts and statements of co-conspirators in pursuance of the conspiracy is hardly ever available: A.I.R. 1974 S.C. 898.

S. 10 mainly has two parts: (*i*) there should be a reasonable ground to believe that two or more persons have conspired to commit an offence or an actionable wrong; it is only on this condition precedent being satisfied that the second part comes into operation; the first part evidently has reference to S. 120-A of the Indian Penal Code which *inter alia* provides "when two or more persons agree to do, or cause to be done." There is a further safeguard under the proviso to S. 120-A that no agreement except an agreement to commit an offence shall amount as such to criminal conspiracy. It is, thus, necessary that a *prima facie* case of conspiracy has to be established before S.10 is attracted; and (*ii*) anything said, done or written by any one of such persons in reference to the common intention after the time such intention was first entertained by any one of them is a relevant fact against each of the other persons believed to be so conspiring for proving existence of the conspiracy as also that any such person was party to it; clearly the second part permits the use of evidence which otherwise was inadmissible; an exception has been carved out in the section. The second part operates only when the first part of the section has clearly been established: A.I.R. 1988 S.C. 1883: 1989 Cr.L.J. 1.

S. 10 means this: if two persons conspire together to commit an offence each is regarded as being the agent of the other and just as the principal is liable for the acts of the agent, so each conspirator is liable for what is done by his fellow conspirator in furtherance of the common intention which they had both entertained. First, you must find that there was a conspiracy, and, secondly, that the person to whom the doctrine is to apply should have joined the conspiracy before they can be made liable for anything said or done by others: (1929) 31 Bom.L.R. 515; A.I.R. 1944 Sind 1 (F.B.).

A general conspiracy is different from a number of separate conspiracies having a similar general purpose; when different groups of persons co-operate towards their separate ends, without any privity with each other, each combination constitutes a separate conspiracy: I.L.R. (1978) 1 Del. 327 (D.B.).

It is well settled that conspiratorial agreements are a matter of inference from the circumstances; it is seldom that direct evidence would be available; conspirators rarely proclaim about the conspiracy in advance. As repeatedly held, the gist of the crime of conspiracy is that two or more persons combine, confederate and agree together to carry out the object of conspiracy. The external act of 'conspiracy' is concert whereby mutual consent to a common purpose is exchanged; it is sufficient if the combination exists and is unlawful for it is the combination itself which is mischievous; and under S. 10, each conspirator is regarded as an agent of the other and is liable for what is done or said by the other conspirator: (1985) 1 Bom.C.R. 609.

A formal agreement for formation of a criminal conspiracy is not required; a mutual purpose or concurrence of sentiment and co-operative conduct in a criminal enterprise is sufficient which may be proved by direct or circumstantial agreement or by both; because of the secret nature of conspiracies, direct evidence may not even be available: 1979 Raj.L.W. 192.

It is difficult to get direct evidence of criminal conspiracy; different accused play their assigned roles at different stages and different places; new faces may join and old faces may drop out but the conspiracy continues unless broken up. That is why S. 10 embodies a special rule of relevance permitting the prosecution to lead evidence of isolated acts and omissions of different persons to establish conspiracy and complicity of different persons therein even if they had not met; to that extent, the section is based on the principle of agency and identity of interest between co-conspirators. [1970 Cr.L.J. 9 (S.C.) and 1957 Cr.L.J. 1325, Rel. on]: 1977 Cr.L.J. 1243 (Pat.).

Once a reasonable ground to believe that several persons have conspired to commit an offence exists, the acts and declarations of a particular person in reference to the common intention are relevant facts although that person may not so much as even know of the existence of many others engaged in the conspiracy or were utter strangers to him. A trial Judge may admit evidence under S. 10 of the Evidence Act where he has a reasonable ground to believe as is postulated yet he may reject it, if at a later stage of the trial that ground of belief is displaced by further evidence. It is not the true view that in a conspiracy charge, evidence once admitted remains admissible evidence whatever new aspect the case may assume whether in the original or in the appellate Court. The words 'in reference to their common intention' are words of wide import and if the acts and declarations of which evidence is given in the case can reasonably be said to have reference to the object of the conspiracy, they will be good evidence not only against the maker but also against others who are believed to be so conspiring: (1965) 2 Cr.L.J. 713: A.I.R. 1965 Cal. 598.

The section lays down that when concert and connection between the persons charged as conspirators have been sufficiently established, their statements, acts or declaration, in reference to their common intention, are admissible as evidence against the others; the rule is based on the principle that identity of interest exists between parties to the conspiracy; once concerted action is proved, the agency contemplated in S. 10 comes into operation making one conspirator an agent of the other: 1978 Ker.L.T. 963. *See* also 1970 U.J. (S.C.) 928.

Two matters, in relation to which the evidence of the type mentioned in S. 10 of the Evidence Act is made admissible are—(*1*) whether any conspiracy as alleged exists or not, and (2) whether and if so, which of the accused or which of the persons named as conspirators is or is not a member thereof. The main part of the section permits the use of anything said, done or written by anyone of the persons as against others for the proof of both or either of the points mentioned above subject to the stated condition that whatever is said, done or written has reference to the common intention of the conspirators. But before any such thing said, done or written can be admitted under S. 10, there must first be a reasonable ground to believe that any two or more of the persons named as conspirators have conspired together to commit an offence or a wrong by entertaining a common intention to do so.

The condition precedent to the admissibility of acts or words of one person against the other is that such acts or words have reference to the common intention. The probative value of these acts and words in the eyes of a Court is the assurance or guarantee of the truth which known and observed human conduct stamps these acts with; the said evaluation of human conduct is the very basis of the rule. The common intention survives or subsists so long as the conspiracy subsists. Once the conspiracy comes to an end either because its object has already been achieved or for any other reason the bond or the vinculum that would exist between one member and another member of the conspiracy and between the conspiracy as a whole and each one of those members ceases to exist. It has also been stated in some of the cases that S. 10 of the Evidence Act imports into criminal law the civil law idea of agency. Criminal conspiracy being regarded as a partnership with an illegal object just as during the subsistence of the partnership and in relation to the business of the partnership each partner is regarded by law as the agent of every other partner so as to bind the others by his acts and deeds in relation to the business acts and deeds of one conspirator are available for use against others only in so far as he acts as a conspirator in relation to the common intention of all the conspirators for the purpose of carrying out the conspiracy. As Lord Wright points out, it is receivable in evidence because it is a step in the proof of the conspiracy: 1967 M.L.J. (Cr.) 72: (1966) 8 Law Rep. 110.

The condition precedent for the application of S. 10 is that there should exist a reasonable ground to believe that two or more persons have conspired together to commit an offence; actual proof of conspiracy is not required; even some *prima facie* evidence leading to the reasonable belief is sufficient; and conspiracy need not be proved by direct evidence; it may be proved from the surrounding circumstances and the accused's conduct: 1981 All.L.J. 991; I.L.R. (1971) 2 Cal. 308; I.L.R. (1974) 1 Cal. 599; I.L.R. (1972) 1 Del. 536; 1989 Cr.L.J. (N.O.C.) 4 (Cal.).

An accused, a co-conspirator, voluntarily appearing as a defence witness, like any other witness, is subject to cross-examination; evidence brought out in the cross-examination incriminating his co-accused can be used against the co-accused; the co-accused so incriminated no doubt has the right to cross-examine the defence witness, but the evidence on the record would be relevant under S. 10: 1972 Cr.L.J. 1277: A.I.R. 1973 S.C. 450.

(Conspirator turning approver—Admissibility and value of his evidence). S. 10 is intended to admit in evidence all communications between the different conspirators while the conspiracy was going on with reference to the carrying out of the conspiracy. The statements made or acts done by others before the accused joined the conspiracy are equally relevant and admissible and any statement made by one conspirator to another indicating in any way the complicity of a third conspirator is a relevant fact and such statement may be admitted. Whether it should be believed or not is another question. Similarly, documents in the possession of a conspirator are admissible against co-conspirators in certain circumstances: 1958 Cr.L.J. 906: A.I.R. 1958 Mad. 368. The terms of S. 10 are very wide and apply to acts done in connection with the conspiracy and under the section an act done by third persons may in certain circumstances be treated actually as evidence of the existence of the conspiracy; as for instance when an act is done or something is said in the presence of the persons implicated. But mere statements of third parties made in the absence of the persons implicated form a class by themselves which, standing alone, have no probative value. The section does not permit attaching of any weight to mere statements of this kind made in the absence of the accused persons, and independent evidence required as corroboration of such statements must be something very much more than the evidence which may ordinarily be regarded as corroborating the evidence of an accomplice; it may be direct or circumstantial evidence; but it must be evidence which, standing alone, would be properly treated as evidence for a jury of a proved intention so that there would be evidence apart from the statements of the alleged fellow conspirators incriminating the persons charged. The evidence must be the proof of intention and not merely proof of a possible motive for the intention: A.I.R. 1938 Pat. 497.

The words of S. 10 are not capable of being widely construed so as to include a

statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The words 'common intention' signify a common intention existing at the time when the thing was said, done or written by one of them. Things said, done or written while the conspiracy was on foot, are relevant as evidence of the common intention once reasonable ground has been shown to believe in the existence. But it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference. Such statement is, therefore, inadmissible in evidence against co-conspirator. A.I.R. 1940 P.C. 170, followed in A.I.R. 1954 Ori. 23; A.I.R. 1956 Pat. 404; A.I.R. 1957 Bom. 226; A.I.R. 1941 Oudh 130; A.I.R. 1944 Mad. 302 (Letter written after failure of plot to carry out common intention not admissible).

Under S. 10, a statement made by one conspirator may be admissible against the other conspirators if it merely shows the existence of a conspiracy although it may not have been made with a view to furthering the object of the conspiracy as is the rule under the English law. The section, however, presupposes the existence of a conspiracy at the time the statement is made and does not contemplate confessional statements made after the conspiracy has come to an end and some of the conspirators have already been apprehended and are being or about to be prosecuted. Hence, a statement by a conspirator made after the conspiracy has come to an end is not admissible under S. 10: I.L.R. 25 Pat. 47: A.I.R. 1947 Pat. 90.

Voluntary statement made immediately after arrest, *held*, is undoubtedly admissible against its maker; but it also provides a strong link in the chain of circumstances relating to the conspiracy, and also against the other accused on trial: (1987) 35 B.L.J.R. 127 (D.B.).

The common intention is the intention existing at the time when the thing was said, done or written; anything said, done or written by one of them after the common intention or conspiracy is no longer operating, is not admissible against the co-conspirators: 1978 Ker.L.T. 963.

When S. 10 refers to the common intention of the conspirators, it refers to the common intention in the future not to common intention in the past: A.I.R. 1939 Sind 185. *See* 46 Cr.L.J. 667: (1944) 1 M.L.J. 91.

Anything said, done or written by one of co-conspirators must be in reference to the common intention and it is difficult to say, once the object of criminal conspiracy is carried out that any common intention existed with reference to the criminal conspiracy. Where the confessional statements made by accused are made after the object of criminal conspiracy is carried out, the confessional statements refer to past events and can have no reference to any common intention animating the co-conspirators: A.I.R. 1957 Bom. 226; 1989 Cr.L.J. (N.O.C.) 4 (Cal.).

A statement made by an absconding co-accused was made the basis by framing a charge against the accused under S. 120-B, Penal Code. The statement was made long after the period of alleged conspiracy was over and the purpose of the conspiracy had terminated. *Held*, the statement, although made by way of description of past events that happened during the period of conspiracy was a narrative or a statement made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist. Such statement was inadmissible in evidence against any party other than the maker of the statement: (1965) 2 Cr.L.J. 443 (Cal.).

Where from the dying declaration made by a person, who is alleged to have been murdered, it appears that there was clearly a conspiracy to wrongly implicate a particular person, the Court, before it would rely on the evidence of witnesses who have so conspired, and who have had such an influence over the deceased making a dying declaration that they could have induced him to make a particular dying declaration to suit their purpose, must have some other evidence before it which would enable it to distinguish the true from the false: 39 Cr.L.J. 545: A.I.R. 1938 Sind 94.

2. Evidence of conspiracy.—Possession of seditious literature by one member is evidence against the others for finding out of the object of the association, even where such

possession was obtained or such essays written before the association was formed or before other members joined the association: I.L.R. 46 Cal. 215: (1918-19) 23 Cal.W.N. 193. As to evidence of conspiracy, *see* also I.L.R. 30 Cal. 983; I.L.R. (1939) All. 736; (1899-1900) 4 Cal.W.N. 528; I.L.R. 25 Bom. 230; I.L.R. 28 Cal. 797; 7 Beng.L.R. 63 and 9 Beng.L.R. 36 App. 2; A.I.R. 1927 Oudh 369; A.I.R. 1936 Nag. 97.

The 16 accused in a case of conspiracy under S. 121-A were convicted on the evidence of documents and letters seized from them and proved to be in the handwriting of some of the accused by the Police witnesses who conducted the raids and searches and others of the Police force who had been kidnapped by the party accused. *Held*, the handwriting of the different accused proved by the prosecution witnesses acquainted with it is relevant under S. 47 of the Evidence Act; although the witnesses happen to be policemen that alone is not sufficient to set aside their evidence as to the identification of the handwriting. In a case of conspiracy (S. 121-A, I.P. Code), it is always difficult to secure outside and independent evidence. It can be proved by the conduct of the accused. The documents, letters, circulars, etc., are relevant under S. 10 of the Evidence Act to prove the existence of the conspiracy and to prove the complicity of the different accused in it. When a letter is found with a conspirator and its writer and addressee are known, it is admissible against the conspirators. Conspiracy can also be inferred from beliefs, associations, activities of the accused and even from the statements of the accused in Court. Statements, acts and declarations of a conspirator in reference to their common intention are admissible against others. Evidence of conspiracy makes statement of a conspirator, evidence against co-conspirators. The possession of a document creates an inference that the possessor is aware of its contents. To establish conspiracy the agreement may be inferred from circumstances raising a presumption of common concerted plan to carry out the unlawful design: A.I.R. 1952 Manipur 4.

Ciphers or cipher lists discovered at searches could not be treated as acts, words or deeds, of any particular person, but the fact that they existed and that the names and addresses of a number of persons who are alleged to be parties to a conspiracy as charged are mentioned in them, the fact that they are in peculiar forms, such as is not likely to be used for any lawful purpose, taken alongwith other matter brought out in evidence may give rise to a legitimate inference that the ciphers were prepared in connection with some unlawful purpose requiring secrecy; and in the absence of evidence that the matters appearing from the secret documents are associated with some legitimate or lawful purpose, the ciphers are themselves material for inferring that the names, addresses and other matters appearing in the ciphers are connected with the furtherance of the objects of the conspiracy and as such evidence under S. 10: A.I.R. 1937 Cal. 99 (S.B.). *See* also A.I.R. 1929 Pat. 145.

The finding of closed covers relating to the conspiracy in possession of one of the conspirators is relevant against the others under S. 10: 17 Punj. Re. (Cr.) 1915: 28 I.C. 738.

Confession of co-accused implicating co-conspirators—Admissibility: 106 I.C. 721: I.L.R. 2 Luck. 631. Whenever evidence is sought to be let in under S. 10, the accused is entitled to insist on strict compliance with its provisions, namely, proof of reasonable ground for belief that the persons named have conspired together: I.L.R. 42 Cal. 957: (1914-15) 19 Cal.W.N. 676. On a charge of conspiracy, particular facts are proved to show that one or more of the accused took part in it, after general evidence of the existence of conspiracy is first given: I.L.R. 42 Cal. 957: (1914-15) 19 Cal.W.N. 676.

In cases of forgery letter written by a third party to a stranger is not admissible against accused: (1923) 25 Bom.L.R. 248. *See* also I.L.R. 40 Cal. 783.

In a charge of conspiracy, evidence of gambling and cocaine cases prior to conspiracy charged are admissible in evidence: I.L.R. 46 Cal. 710: 54 I.C. 53.

The evidence of an Excise Inspector of raids on the dens is admissible as leading up to the omission made to him: I.L.R. 46 Cal. 710: 54 I.C. 53.

Confession of co-accused by itself not sufficient to base a conviction: A.I.R. 1926 All. 377.

Trial under S. 222, Penal Code—Accused warder in jail—Evidence of previous conduct about carrying negotiations was *held* admissible: A.I.R. 1929 Lah. 631: 119 I.C. 762.

'Anything said' would include the statement made, speeches delivered or declaration made. 'Anything done' must be some act done and not merely the intention or knowledge of the person. 'Anything written' would include a manuscript, signed or unsigned, written by the person and matter transcribed by him on a typewriter. But a document of which the writer is not known, found in the possession of a conspirator would not by itself be admissible for the purpose of proving the truth of its contents as against the other accused. The fact of possession would be evidence to show that the conspirator in whose possession it is found had received and preserved it: A.I.R. 1933 All. 690. *See* also A.I.R. 1937 Cal. 99 (S.B.).

Where some co-conspirators made statements to the Investigating Officers that they had concealed the dead body and the blood-stained weapon at a particular place, *held*, though the statements did not fall within the expression 'anything said', nevertheless, the acts of concealing the dead body and the weapons, appearing from their statements, were certainly relevant and could be used against the other co-conspirators: 1981 All.L.J. 991.

In order to establish that the accused were in correspondence with an individual going by the name of M.N. Roy in Berlin, it is not incumbent upon the prosecution to establish that any of the letters were, in fact, written by the particular M.N. Roy. It is enough to show that some person living in Berlin was in conspiracy with the accused and correspondence was passing between them: A.I.R. 1933 All. 690. A document written by a woman since deceased in which she described her conversations with a third person in which she said that he told her that among his revolutionary friends was the accused to whom he was accustomed to turn for guidance is admissible under S. 10 as the statement if proved is itself a relevant fact by virtue of S. 10. The statement by the writer is a relevant fact and being admissible under S. 10 is evidence against all the conspirators including the accused, to the effect that the third person made his statement concerning the accused: A.I.R. 1934 Cal. 221 (F.B.).

A confessional statement made by a deceased conspirator after he had rendered himself liable to criminal prosecution is admissible in evidence against a co-conspirator under S. 10, though not under S. 32 (3) when general evidence of a conspiracy has already been given: A.I.R. 1935 Cal. 26. *See* also A.I.R. 1936 Oudh 164.

Conspiracy — Evidence of: A.I.R. 1958 Tripura 1: 1958 Cr. L.J. 97.

A and *B* were convicted under S. 120-B read with S. 165-A, Indian Penal Code. The facts were: When the Inspector of Police was on his way to police station, both *A* and *B* approached him and requested him to hush up a criminal case pending investigation against *A*, for reward. The Inspector drew up the first information report of the offer of the bribe on his own statement and prepared a seizure-list of the money, thus offered, and at once arrested *A* and put him in the thana lock-up. After the usual investigations, *A* and *B* were placed on their trial, and were convicted. The question was whether the statement made by *A*, that he was sent by *B* with the money to be offered by way of a bribe to the Police Officer, was admissible against *A*.

Held, that the incident when both *A* and *B* approached the Inspector with the proposal that he should hush up the case against *B* for which he would be amply rewarded, was clear evidence of the two persons having conspired to commit the offence of bribing a public servant in connection with the discharge of his public duties. Therefore, the charge under S. 120-B had been properly framed against both of them. That being so, anything said or done by any one of the two, with reference to the common intention, namely, the conspiracy to offer bribe, was equally admissible against both of them. That statement was admissible not only to prove that *B* had constituted *A* his agent in the perpetration of the crime, but also to prove the existence of the conspiracy itself: A.I.R. 1958 S.C. 953.

Proof of criminal conspiracy—Scope and applicability of S. 10—Evidence Act: (1965) 1 Cr.L.J. 608: A.I.R. 1965 S.C. 682.

If the Court is satisfied that there is no trick photography and the photograph is above suspicion, the photograph can be received in evidence. It is, of course, always admissible to prove the contents of the document, but subject to the safeguards, to prove the authorship. This is all the more so in India under S. 10 of the Evidence Act to

prove participation in a conspiracy. But evidence of photographs to prove writing or handwriting can only be received if the original cannot be obtained and the photographic reproduction is faithful and not faked or false: A.I.R. 1968 S.C. 938.

The burden of proof for proving insolvency is on the applicant. Where the allegations as to insolvency made by the petitioner are denied by the company, which also fails to file balance-sheet and fails to furnish the particulars of its assets and liabilities and the petitioner does not rely on specific facts and does not even refer to the last balance-sheet published and distributed to shareholders, it cannot be said that the petitioner had discharged the burden of proof. Omission on the part of the Company to disclose the particulars cannot raise a presumption of commercial insolvency under S. 114, Evidence Act: 38 Comp. Cas. 82: (1967) 1 Comp.L.J. 172 (Cal.).

Evidence of co-conspirator not named in charge—No objection raised when evidence relating to his acts was produced at trial—*Held*, matter was covered by S. 537, Cr.P. Code and evidence could not be excluded from consideration: (1967) 69 Punj.L.R. (Del.) 168.

Connection of accused to separate acts of conspirators need not be proved—Connection with conspiracy must be proved: (1967) 69 Punj. L.R. (Del.) 168.

Abetment to marry during subsistence of first marriage by petitioners—Evidence not showing presence of petitioners amounting to commissioning of offence under S. 167—Charge of abetment is maintainable: 1981 Cr.L.J. 833 (Mad.).

Ss. 10 *and* 14: S. 10 of the Evidence Act must be construed in accordance with the principle that the thing done, written or spoken, was something done in carrying out the conspiracy and was receivable as a step in the proof of the conspiracy. In criminal trials on a charge of conspiracy evidence not admissible under S. 10 of the Evidence Act as proof of the two issues to which it relates, *viz.*, of the existence of conspiracy and of the fact of any particular person being a party to that conspiracy, is not admissible at all. In civil cases it is well settled that a principal is bound by the acts of his agent if the latter has an express or implied authority from the former and the acts are within the scope of his authority. Therefore, acts of an agent are admissible evidence as against the principal. An analogous principle is recognised in criminal matters in so far as it can be brought in under S. 10 of the Evidence Act. The principle underlying the reception of evidence under S. 10 of the Evidence Act of the statements, acts and writings of one co-conspirator as against the other is on the theory of agency. The rule in S. 10, Evidence Act confines that principle of agency in criminal matters to the acts of the co-conspirator within the period during which it can be said that the acts were 'in reference to their common intention' that is to say, 'things said, done or written, while the conspiracy was on foot' and 'in carrying out the conspiracy'. Where the charge specified the period of conspiracy, evidence of acts, of co-conspirators outside the period is not receivable in evidence. But in a conspiracy to commit criminal breach of trust all evidence which would go to show that certain transactions are bogus, is certainly admissible. The conduct in general of each individual co-conspirator including his acts writings and statements is evidence against himself. There can be no doubt that such conduct irrespective of the time to which it relates can be relied on by the prosecution to show the criminality of the intention of the individual accused with reference to his proved participation in the alleged conspiracy, that is, to rebut a probable defence which may normally arise in such a case, *viz.*, that the participation though proved, was innocent. Such evidence would come under S. 14 of the Evidence Act: A.I.R. 1957 S.C. 747: 1957 Cr.L.J. 1325.

Ss. 10 *and* 30: The confession of a person who is dead and has never been brought to trial is not admissible under S. 30 as the confession of a co-accused. Nor can it be admitted under S. 10, because S. 10 applies to acts done in furtherance of a conspiracy or which bear some relation to the conspiracy and does not apply to a confession made after the conspiracy and the acts done in pursuance thereof were at an end: S. 10 cannot be extended to cover the case of a confession of a person who was co-accused or who might have been a co-accused on the charge of conspiracy and the offences which were its purpose or committed in pursuance of it: 39 Cr.L.J. 545: A.I.R. 1938 Sind 94. A confession

11. When facts not otherwise relevant become relevant.—Facts not otherwise relevant are relevant—

(1) if they are inconsistent with any fact in issue or relevant fact;

(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations

(*a*) The question is, whether *A* committed a crime at Calcutta on a certain day.

The fact that, on that day, *A* was at Lahore is relevant.

The fact that, near the time when the crime was committed, *A* was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(*b*) The question is, whether *A* committed a crime.

The circumstances are such that the crime must have been committed either by *A*,*B*, *C* or *D*. Every fact which shows that the crime could have been committed by no one else and that it was not committed by either *B*, *C* or *D*, is relevant.

---

by a conspirator made to a Magistrate in Court implicating other conspirators is admissible in evidence under S. 30, but statements made by a conspirator to the police are not admissible in evidence if they are incriminating unless they can come under S. 27. For S. 10, Evidence Act, is not intended to remove those restrictions which the Evidence Act and the Cr. P. Code place upon the admissibility of statements made to the police. S. 10 does not avoid in appropriate cases the operation of either S. 25, Evidence Act, or S. 162, Cr. P. Code. It makes no difference if, because a man is deaf, these statements are written: A.I.R. 1939 Sind 185.

The confession of an accused can be admitted in evidence against him under certain circumstances but the confession of a co-accused cannot be admitted in evidence against his co-conspirators as the confessional statement refers to the past events and can have no reference to any common intention animating the co-conspirators: 1978 Ker.L.T. 963. But *see* Notes under S. 30.

S. 10 is more effective than S. 30 in the matter of considering evidence pertaining to one accused as against the others; but S. 10 can be invoked only where "there is reasonable ground to believe that two or more persons have conspired together to commit an offence"; a conspiracy is always hatched in secret; it is normally impossible to adduce its direct evidence; it can be proved largely from inferences drawn from acts committed by other conspirators in pursuance of a common desire: A.I.R. 1988 Ker. 1: 1988 Cr.L.J. 107: (1987) 1 Ker.L.T. 928 (F.B.).

Section 11—Notes.

[*See* also Ss. 13 and 106.]

Scope of section.—S. 11 attempts to state in popular language the general theory of relevancy and may, therefore, be described as the residuary section dealing with the relevancy of facts. The words of S. 11 are very wide, and it may be safely laid down that all evidence which would be held to be admissible by English Law would be properly admitted under this section of the Act. Collateral facts which, by way of contradiction are inconsistent with a fact in issue or another relevant fact, *i.e.*, which makes the existences of fact in issue or a relevant fact impossible or highly improbable or which, by way of corroboration are consistent, with existence of fact in issue or a relevant fact, *i.e.*, tend to render the existence of a fact in issue or relevant fact highly probable are themselves made relevant by the section: A.I.R. 1956 Mad. 226 [Overruled on another point in A.I.R. 1972 Mad. 154 (D.B.)].

S. 11 has been expressed in very wide language and, if construed widely, question of valuation, non-passing of consideration, absence of necessity for sale and matters of such nature will certainly be relevant. The section, however, does not admit of collateral facts which have practically no connection with the main fact. In considering only the

sole question whether a deed has been executed within the meaning of S. 35, Registration Act, questions like valuation, absence of necessity for sale, etc., cannot be relevant under S. 11, Evidence Act. It would appear that such questions do not come within the first part of the section as they cannot be said to be truly inconsistent with the fact in issue, which is the proof of execution of the document within the scope of Ss. 35 and 77, Registration Act. Under the second part of S. 11 in a suit properly framed and not under S. 77, Registration Act, such facts will be admissible as the question of validity of the document and the effect of the execution will be the fact in issue. For an enquiry in a suit under S. 77, Registration Act, these collateral facts are not so mediate as to render the issue of a mere execution highly probable or improbable: I.L.R. (1954) Pat. 861: A.I.R. 1954 Pat. 556. *See* also I.L.R. (1979) 1 Del. 545 (D.B.).

The expression highly probable or improbable is significant and indicates that the connection between the facts in issue and the collateral facts sought to be proved must be immediate so as to render the co-existence of the two highly probable: I.L.R. 55 All. 1040: A.I.R. 1933 All. 690: 13 M.L.T. 282: 18 I.C. 997.

The words 'highly probable' in S. 11(2) are of great importance. Only such facts are made admissible by this clause as would carry great weight with the Court in reaching a conclusion either way with regard to existence or non-existence of a fact in issue or relevant fact. It is not mere reasonable probability that is contemplated; on the other hand, a high degree thereof is envisaged. A recital by a third party relating to the ownership of a house in which he has admittedly no interest would not have much probative force about such ownership and it is idle to argue that it would render such ownership highly probable; this clause does not cover recitals of this type: A.I.R. 1971 P.&H. 9.

The words 'highly probable' mean more than normal standard of probability. Neither by canons of common sense nor by construction of the Evidence Act can it be said that one particular instance of bad faith and *mala fides* in a transaction can render the issue of bad faith and *mala fides* in a totally different transaction highly probable: A.I.R. 1957 Cal. 709.

In a suit for partition there was an arbitration. In finding out the extent of the estate the arbitrators excluded the deposits or investments made by others because those were not assets but liabilities of the estate. They, however, showed depositors and their sums in the Schedule annexed to the award. But as the depositors were not parties to the partition suit, no direction as to the repayment of those deposits was made in the decree made on award. On refusal by the Receivers to repay them, the depositors filed a suit on the basis of the award. On the question of its maintainability, *held*, that the award might not be an admission of the assets held by the executors. But the Schedule of the award and the circumstances under which it was prepared made the existence of the claim of the plaintiffs highly probable, and as such, was relevant under S. 11 (2) of the Evidence Act. Further, the award contained recitals showing that the plaintiffs had claimed the money before the arbitrators, making that fact a relevant circumstance under S. 13 (1) of the Evidence Act. Therefore, although the verbal and other documentary evidence, relied on by the plaintiffs, were disbelieved by the Court below, it could nevertheless proceed on the evidence contained in the award, unmistakably, supporting the plaintiffs' claim: A.I.R. 1959 Cal. 257.

Where a doctor was charged with criminal negligence, in order to show that a particular injection given by the doctor was too strong and to rebut the presumption that the death was due to an exceptional reaction to that injection in that case, the prosecution tendered evidence of the symptoms, illness and death of nine other children. *Held*, that the evidence was admissible not as evidence of a course of conduct or the carelessness or negligent conduct of the doctor in injecting too much of a proper mixture, but as evidence of the reaction to children who were similarly injected at the same time and place so as to prove that too strong a preparation was used for the injection: 44 Cr.L.J. 569: A.I.R. 1943 P.C. 72 (P.C.). Proof of custom opposed to personal law. *See* 8 I.C. 897.

Section to be liberally construed. The illustrations do not go beyond cases familiar in English Law. There is a difference between the existence of a fact and a statement as to its existence; S. 11 makes the existence of facts admissible, and not statements as to such

existence unless the fact of making that statement is itself a matter in issue. Hence, if a statement does not fall within S. 32, it cannot be admissible even under S. 11: A.I.R. 1934 All. 406 (F.B.); A.I.R. 1960 Bom. 78.

S. 11 only refers to certain facts which are either themselves inconsistent with, or make the existence or non-existence of the fact in issue or a relevant fact highly probable or improbable and has no reference to opinions of certain persons in regard to those facts. It does not make such opinions to be relevant and judgments, after all of whatever authority are nothing but opinions as to the existence or non-existence of certain facts. These opinions cannot be such facts as would fall within the meaning of S. 11 of the Act unless existence of these opinions is a fact in issue or a relevant fact: A.I.R. 1945 Lah. 23 (F.B.).

S. 11 is controlled by S. 32 where the evidence consists of the statements of persons who are dead or cannot be found. But this rule is subject to certain exceptions. The test whether the statement of a person who is dead or cannot be found is relevant under that section, presuming that it is in other respects within the intention of the section although, it would not be admissible under S. 32 is this: It is admissible under S. 11 when it is altogether immaterial whether what that dead man said was true or false, but highly material that he did say it. In these circumstances no amount of cross-examination could alter the fact, if it be a fact, that he did say the thing, and if nothing more is needed to bring the thing said under S. 11, then the case is outside S. 32. There is a difference between the existence of fact and a statement as to its existence. S. 11 makes admissible the existence of facts and not statements as to such existence unless the fact of making that statement is in itself a matter in issue: A.I.R. 1960 All. 339. *See* also A.I.R. 1928 Cal. 893; A.I.R. 1940 Mad. 273; 1976 Hindu L.R. 185.

Statements of living persons who had not been examined as witnesses are inadmissible under S. 11 or S. 32: A.I.R. 1929 Oudh 113. A statement is included in the definition of fact and statements can, therefore, be relevant under S. 11: A.I.R. 1938 Oudh 26. On this section, *see* also A.I.R. 1925 Pat. 68; A.I.R. 1924 Cal. 1067; A.I.R. 1924 Mad. 537.

S. 3 defines 'fact' as anything capable of being perceived by the senses; *Illus.* (*c*) shows "that a man said certain words is a fact." 'Statements' can be excluded from the purview of S. 11 by a very restricted interpretation which need not be followed; if the Legislature intended to exclude all statements from the purview of the word 'fact', there was no need for *Illus.* (*a*) in S. 6 which makes it unambiguously clear that a statement made by the deceased shortly before or after his murder, is a relevant fact in certain circumstances; there may be statements which are inadmissible under S. 32 but admissible under S. 6; at any rate S. 6 is not controlled by S. 32; if the scope of S. 6 cannot be whittled down like that, the scope of S. 11 cannot be curtailed by dragging it under S. 31. Nothing in S. 11 suggests that it is controlled by any other section; rather its language indicates that the provision is an exception to the other general provisions. [A.I.R. 1928 Cal. 893; A.I.R. 1934 All. 406; A.I.R. 1940 Mad. 273; A.I.R. 1960 All. 339, Dissent. from; A.I.R. 1938 Oudh 26, Rel. on]: (1992) 1 Ker.L.J. 491: 1992 Cr.L.J. 2860 (F.B.). *See* also 1982 Cr.L.J. 173 (Ker.) (D.B.) [It is for the Court to consider that how much of statement is worth acceptance].

S. 11 is based on the premise that facts not otherwise relevant are relevant under this section; thus, if a fact is relevant under S. 32, S. 11 is not attracted; the section operates only when other sections, including S. 32, are not attracted: (1992) 1 Ker.L.J. 491: 1992 Cr.L.J. 2860 (F.B.).

Entry in butwara papers. *See* 87 I.C. 694: A.I.R. 1926 Cal. 115. Entry in Hospital Register—Indoor patients in a hospital—Admissible to prove that the person mentioned in the entry was in the hospital on a certain date: 56 P.L.R. 1918: 43 I.C. 429. Statement of wounded person on the day of occurrence to a Magistrate to the effect that it was the accused who had attacked herself and her co-wife. *Held*, S. 11 does not justify the admission of the contents of the statements: 54 I.C. 887: (1918-19) 23 Cal.W.N. 933.

Copies of printed newspapers containing an account of some proceedings, found in possession of one accused, are evidence of the fact of the publication of such an account in that paper but are not by themselves evidence of the truth of the facts stated therein, unless in connection with other facts they make the existence or non-existence of the facts mentioned 'highly probable or improbable': A.I.R. 1933 All. 690.

A letter written by the accused where it is self-condemnatory is *prima facie* evidence against him and is admissible in evidence; it is enough if it can be traced to the writer. It is admissible though it was intercepted or surreptitiously detained and opened: I.L.R. 41 Cal. 545: (1913-14) 18 Cal.W.N. 386.

Where a suit was instituted by a partner of a registered firm claiming to be a tenant as proprietor of the firm but later on he sought an amendment in the plaint so as to substitute the firm as the plaintiff tenant, which application was dismissed, the admission fell under S. 11(2) and was relevant for making probable or improbable the existence or non-existence of the fact in issue, that is, the plaintiff's tenancy; whether the admission amounts to an estoppel or not, it certainly is evidence but not 'conclusive proof'. [A.I.R. 1956 S.C. 593, Rel. on]: A.I.R. 1972 Del. 221.

Facts disclosing similar fraudulent transactions are admissible to prove intent: I.L.R. 39 All. 273: 39 I.C. 673: 15 All.L.J. 241.

Horoscope, *see* 21 I.C. 298; 48 I.C. 400. Police report, *see* 30 I.C. 292.

The previous activities of the accused against the complainants are admissible under S. 11: A.I.R. 1928 Rang. 118.

Deed inadmissible by reason of S. 49, Registration Act is admissible under S. 11 if it is inconsistent with fact in issue: A.I.R. 1930 All. 130.

If in a suit for arrears of rent the defendant denies the oral lease and says that the sale deed executed by him in favour of the plaintiff is bogus, the evidence about the nature of the sale deed is relevant on the question of the existence or non-existence of the oral lease under S. 11(2): A.I.R. 1943 Nag. 265.

Where the same owner in respect of different areas of land, has executed one sale deed in favour of one person and thereafter executes another sale deed in favour of another vendee, the sale deed prior in time must be given preference over the subsequent sale deed. *See* A.I.R. 1982 Del. 149.

Although the falsity of a statement made by an accused in a criminal case does not necessarily show that the prosecution case is true, if the Court has used the order rejecting the accused's claim in a previous claim case, as an independent evidence on the question of the possession of the disputed lands, the use cannot be said unwarranted by law: A.I.R. 1956 Ori. 212.

Contents of will left by the deceased are admissible under Ss. 11 and 21(2) to prove religion of executant: A.I.R. 1930 Rang. 42.

Where the precise date of the death of the last holder is in question, a statement in a copy of the application for probate of his Will that the deceased died on a particular date is admissible in evidence under S. 11, if not under S. 32 (5), where it is shown that the application was filed by a person who was admittedly the testator's nephew and claimed also to be his adopted son and, therefore, was in a position to know the date of his death and the application was filed about one year after the testator's death: A.I.R. 1931 Pat. 224.

Where the question in issue was whether *B* had predeceased *K*, a statement made by a party in his own favour in an objection petition filed in previous land registration proceedings that *B* had predeceased *K* was *held* admissible in evidence under S. 11, Evidence Act: A.I.R. 1955 Pat. 292.

Where a plaintiff derives his rights from the recitals of a deed executed between his predecessor-in-interest and a stranger, which amount to admissions by his predecessor in his own, and therefore, in favour of the plaintiff, *held*, the deed is not admissible either under S. 11 or S. 13: A.I.R. 1975 Karn. 179: (1975) 1 Karn.L.J. 105.

Where question as to dedication to religious endowment is in issue, the gift of property to the institution is admissible: 1930 All.L.J. 964.

A statement by a person that certain parties are governed by a particular school of Hindu Law is admissible in evidence under S. 11 only if he is a member of a connected family (*i.e.*) a family which had descended from the same stock from which those parties descended and not when he is neither an agnate nor a relative of theirs: (1938-39) 43 Cal.W.N. 395.

S. 11 has no application in determining the question as to whether the recitals as regards the boundaries in documents between strangers are admissible. *See* A.I.R. 1976 Karn. 75; A.I.R. 1935 Pat. 167 (F.B.).

Recitals as to boundaries in a document not *inter partes* are not admissible under S. 32: 1910 Mad.W.N. 668; A.I.R. 1915 Mad. 746; A.I.R. 1940 Mad. 450; A.I.R. 1924 Cal. 1067

(D.B.); A.I.R. 1924 Cal. 948 (D.B.); A.I.R. 1927 Cal. 918; A.I.R. 1927 Lah. 448; A.I.R. 1934 Lah. 750; A.I.R. 1927 Cal. 1; A.I.R. 1958 Raj. 206; A.I.R. 1962 Ori. 40; A.I.R. 1961 Mys. 160; A.I.R. 1972 Mad. 154 (D.B.) [Overruling A.I.R. 1956 Mad. 226]; A.I.R. 1976 Kam. 75. But *see* A.I.R. 1933 Pat. 636; A.I.R. 1936 Lah. 114; A.I.R. 1936 Lah. 1005; I.L.R. 23 Bom. 63; A.I.R. 1927 Cal. 230; A.I.R. 1923 Nag. 22; A.I.R. 1930 All. 209.

Possession of instrument of offence—Recovery from house of joint family—Presumption. *See* A.I.R. 1957 Andh. Pra. 758.

Consideration — Question as to — Late production of pronote has no relevancy to decide question: (1965) 67 Punj. L.R. 12.

Question whether particular sale was sham — Burden of proof put on wrong party—Irrelevant matters taken into consideration—Finding *held* was vitiated in law: A.I.R. 1964 Guj. 174.

Where the question is whether after *B* has separated with his share from the joint family consisting of four brothers, *A*, *B*, *C* and *D* the remaining three brothers *A*, *C* and *D*, continued to remain joint, a statement in a mortgage-deed recited by *A*, long before the present suit by *A*, in which the question of the three brothers remaining joint has been claimed by *A*, to the effect that the property to be mortgaged belonged to him by reason of a complete partition between all the brothers, is relevant under S. 11 (2), Evidence Act, as the fact involved in this statement renders the fact in issue as alleged by *A* improbable: A.I.R. 1966 Pat. 168.

Income-tax documents—Suit to recover business dues—Plaintiff claiming defendant to have transacted through intermediaries—Income-tax assessment order against a plaintiff's witness produced to show dealings by defendant through intermediary—*Held*, cannot be used as evidence against the defendant: 1967 Ker. L.J. 237.

Assessment of market-value — Evidence —Sale deed between two private parties in nature of willing purchaser and willing vendor in open market and land in it also very close to suit lands—*Held*, sale deed could be accepted as sound basis for assessing market value of suit lands: (1968) 1 An.W.R. 348.

Where in respect of sale of shares of a company a complaint was filed on the basis that there were hidden losses in previous year, *held*, finding of Board for Industrial and Finance Reconstruction that there was no such loss is relevant under S. 11: 1992 Cr.L.J. 1448 (Cal.).

Facts having merely probative force cannot be offered in evidence under S. 11: 1968 Cr.L.J. 1584: A.I.R. 1968 Bom. 400.

Standard of proof in regard to the plea of *alibi* as well as in regard to prosecution evidence should be a reasonable standard: 1957 All.W.R. (H.C.) 48.

Evidence of *alibi*—Onus of proof is on accused: A.I.R. 1970 Bom. 438. *See* also 1977 Raj.L.W. 336 (It has to be proved to the satisfaction of the Court).

An *alibi* not set up at the very earliest stage is in most cases unconvincing, but that is no reason why the Courts should fail to give due weight to the public documents filed before them; and afford reasonable facilities for the accused to call his evidence. Usually a request to call an *alibi* witness at the very end is vexatious and dilatory, unless the *alibi* has been indicated at the earlier stages: A.I.R. 1954 Vindh. Pra. 6.

The uncorroborated oral evidence of one witness of *alibi* cannot be relied upon specially when he gave no reason for being able to remember the exact dates on which the accused was alleged to have come to village of the witness and to have left it: A.I.R. 1954 Vindh. Pra. 36.

The standard of proof required for establishing the plea of *alibi* is the same as for the evidence on behalf of the prosecution. Further, the failure on the part of the accused to substantiate the plea of *alibi* would not and cannot give rise to an inference that the accused was at the place of occurrence at the time when the offence is said to have taken place. This would have to be proved by the prosecution as any other matter: A.I.R. 1956 Hyd. 99. *See* also A.I.R. 1979 S.C. 1019 (Evidence in support of plea of *alibi* found to be untrustworthy).

Simply because plea of *alibi* failed at the trial, *held*, no adverse inference can be drawn against the accused: 1992 Cr.L.J. 861 (S.C.).

Where a factory worker felt humiliated because the brother of the rich girl had foiled his attempt to ensnare her to marry him and the worker, accused of murdering the brother, had set up the plea of *alibi*, *held*, he succeeds only if it is shown that the accused

was so far away from the scene of offence that he could not be present there when the offence was committed; where the defence evidence of *alibi*, as such, was consistent with the accused's presence at the factory at 8.30 A.M. and at the scene of offence at 9.00 A.M. since workers punch their cards when they enter the factory and not when they leave; the accused in all probability punched his card and then left the factory immediately and killed the brother; and he did not go back to his work for that involved the risk of the time of his re-entry being punched again; he was loitering when he was arrested at about 2.30 P.M. The plea of *alibi* failed: A.I.R. 1981 S.C. 911: (1981) 2 S.C.C. 166. *See* also 1992 Cr.L.J. 648 (Pat.) (D.B.).

Where though the plea of *alibi* set up by the accused was supported by the Block Development Officer and Sarpanch, he evaded his arrest for two months and only thereafter came forward with his plea of *alibi*, *held*, his conduct being highly suspicious, his plea was false:1990 Cr.L.J. 2777 (Ori.).

Where plea of *alibi* was not proved: 1984 Cr.L.J. 209 (Bom.); 1992 Cr.L.J. 1872 (Mad.) (D.B.); A.I.R. 1989 S.C. 2004: 1989 Cr.L.J. 2167; 1989 All.L.J. 454: 1990 Cr.L.J. 839 (D.B.).

Where though information lodged by chaukidar at the Police Station was recorded in the Station diary, but same was not produced in the Court, *held*, an adverse inference has to be drawn against prosecution: 1992 Cr.L.J. 2122 (Pat.) (D.B.).

Statement of persons as to cause of his death or as to any circumstances of the transaction which resulted in his death—Conviction based on identification: 1967 Ker.L.T. 466.

F.I.R. may be relevant under S. 11: 1988 Cr.L.J. 428 (Gau.) (D.B.). Omission of some important facts in the F.I.R., affecting the probabilities of the case, are relevant under S. 11 in judging the veracity of the prosecution case: A.I.R. 1975 S.C. 1026; 1989 Cr.L.J. (N.O.C.) 25 (Ori.). However *see* A.I.R. 1981 S.C. 1036.

In a case where the charge is of collusion and conspiracy, sometimes it may be difficult to obtain direct evidence; but all the same it is well settled that the conclusion reached can be justified and supported by probabilities and circumstantial evidence alone: I.L.R. 46 Pat. 744: 1969 Lab. I.C. 49.

Ss. 11 and 13: Judgment not inter partes—How far admissible.—A judgment in civil suit is relevant under S. 11: I.L.R. 37 Mad. 238: 23 M.L.J. 447. Although at one time it was held that a judgment not *inter partes* could not be admitted in evidence under any circumstances, the tendency in recent years is to admit such judgments under certain circumstances and for limited purposes under S. 43, read with Ss. 11 and 13: A.I.R. 1934 Cal. 788.

Although a judgment not *inter partes* may be used in evidence in certain circumstances as a fact in issue, or as a relevant fact, findings of fact in or reasons for that judgment are not admissible in a litigation between other parties. The fact that there was a litigation or that as a result of that litigation the then plaintiffs recovered possession of the lands may be relevant under S. 11 of the Evidence Act. The judgment in that case will be evidence only to the extent of showing the existence of these facts. Assuming that a suit is a transaction within the meaning of S. 13 (*a*) of the Evidence Act, the existence of the suit itself will be a relevant fact and for this purpose the judgment will be evidence to show the factum of the suit as also to show its nature and scope so as to enable the Court to see whether or not it can be said that by it the right in question was claimed, recognised, asserted or denied. The suit might be an instance in which certain rights might have been claimed or recognised, etc., within the meaning of S. 13(*b*) of the Evidence Act. Even then the judgment will be admissible in evidence only for the limited purpose of the clause namely, to prove 'the instance': A.I.R. 1944 Cal. 57. *See* also A.I.R. 1945 Cal. 492 (Map prepared in previous suit between defendant and another person—Maker of map not examined—Admissibility).

A judgment not *inter partes* in land acquisition reference and relating to land situate near the land in question is not admissible in evidence either as an instance or one from which the market-value of the land in question can be inferred or deduced. Such a judgment cannot obviously fall under Ss. 40 to 43 or under S. 11 or S. 13 of the Evidence Act: A.I.R. 1960 Bom. 78. However *see* A.I.R. 1981 Karn. 26: (1980) 2 Karn.L.J. 441 (D.B.).

Court judgments about comparable land is relevant in determining compensation in land acquisition cases. [A.I.R. 1976 S.C. 2403, Rel. on]: A.I.R. 1982 N.O.C. 165 (Del.).

12. In suits for damages, facts tending to enable Court to determine amount are relevant.—In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded, is relevant.

Judgments, not *inter partes*, if not admissible under Ss. 40, 41 or 42 may be admissible under other sections of the Evidence Act, read with S. 43 of that Act, under certain circumstances and for certain limited purposes. Where the lands in a previously decided case not *inter partes* and the lands in the case to be decided were contiguous, similarly, situated and were acquired under the same notification and for the same purposes.

Held, that the judgment in the previously decided case, though not *inter partes* was relevant and admissible in evidence under S. 11 of Evidence Act for determining market value of the land in the case to be decided: A.I.R. 1965 Him. Pra. 18. *See* also S. 3, Note 10, *supra*.

Ss. 11, 14 and 15.—Except as evidence of intention, evidence of similar transactions is inadmissible in evidence under Ss. 14 and 15: 17 Mys.L.J. 238. The first information report besides its use as a corroborative or contradictory piece of evidence under Ss. 147 and 145 of the Evidence Act, becomes a relevant fact within the meaning of S. 11 (2) of that Act when duly proved and as such retains some evidential value even after being sworn against by the author thereof: 190 I.C. 322.

A rent receipt in respect of the suit lands granted by the landlord to the plaintiff describing the plaintiff as the daughter of the deceased tenant is not admissible in evidence under S. 32, Evidence Act, when the landlord is still alive and there is no explanation on behalf of the plaintiff for his non-examination. The statement in the receipt as to the relationship of the plaintiff with the deceased tenant not being admissible under S. 32 cannot be held relevant under S. 11. Nor can such statement be admitted under S. 13 because the determination of an alleged relationship between the two persons was neither a question of any right nor of custom within the meaning of that section: A.I.R. 1963 Pat. 450.

Recitals in a document not *inter partes* are not 'facts' as mentioned in S. 11 unless the existence of those recitals is itself a matter in issue. Ss. 11 and 32 cover different fields and there is no question of any overlapping if properly construed. In brief S. 11 deals with 'facts' while S. 32 deals with 'statements'. S. 32 is an exception to the rule of hearsay and it is not proper to read S. 11 as an exception to S. 32. The several sub-sections of S. 32, in a measure taken in portions of a few other provisions contained in the Evidence Act. This is indicative of the fact that S. 32 exhaustively deals with law relating to relevancy of statements made by persons mentioned therein: A.I.R. 1962 Mys. 53.

Suit for compensation for short delivery and deterioration of goods — Assessment and damage certificate by Railway Inspector marked without prejudice—How far admissible as admission of liability or proof of damages — Absence of evidence *aliunde* — Effect: A.I.R. 1965 Cal. 636.

Where an alleged offence has been committed and the prosecution accuses a person of having committed the same, it would be a complete answer to the accusation for that person to plead that he was at that time elsewhere. And if that person succeeds in establishing that plea, technically called the plea of *alibi*, he will be entitled to an acquittal. Of course for the purpose of arriving at that conclusion, namely, the conclusion that the plea of *alibi* has been established not only the defence evidence in support of the plea but also the prosecution evidence in support of the accusation should be examined. Where an accused pleads *alibi* it would be taking things in their natural sequence to examine the defence evidence relating to that plea first. Where the accused sets up a plea of *alibi* that he was on duty at another town on the date of occurrence, the burden of proof lies on him under S. 103, Evidence Act, to establish the plea and it is not for the prosecution to prove that the accused was absent from duty on the date of the occurrence. A mere allegation in an application without any evidence in support of that allegation is of no consequence whatsoever: A.I.R. 1958 All. 746.

Section 12—Note.

See I.L.R. 47 Cal. 671: 24 Cal.W.N. 501: 58 I.C. 929; 164 I.C. 385: A.I.R. 1936 Rang. 332. *See* also A.I.R. 1967 S.C. 465.

---

13. Facts relevant when right or custom is in question.—Where the question is as to the existence of any right or custom, the following facts are relevant—

(*a*) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence;

(*b*) particular instances in which the right or custom was claimed, recognized, or exercised, or in which its exercise was disputed, asserted or departed from.

Illustration

The question is, whether *A* has a right to a fishery. A deed conferring the fishery on *A*'s ancestors, a mortgage of the fishery by *A*'s father, a subsequent grant of the fishery by *A*'s father, irreconcilable with the mortgage, particular instances in which *A*'s father exercised the right, or in which the exercise of the right was stopped by *A*'s neighbour's, are relevant facts.

Section 13—Synopsis.

1. Scope of section.
2. Judgments.
3. Proof of custom.
4. Clause (*a*).
5. Documents admitted under this section.

---

1. Scope of section.—S. 13 makes relevant only certain transactions and instances for the purposes of establishing the existence of any right or custom. A case in which all that the Court has to determine is the alleged relationship of father and son between two persons, does not come within the ambit of that section, as neither a question of any right nor any custom is involved: A.I.R. 1952 Pepsu 76. S. 13 is nothing more than a declaration of the common rule of evidence in England, but it has been given wider construction in this country and it is not confined as it is confined in England, to the proof of incorporeal rights. But although that be the case in India, its application cannot be extended to allow judgment to be used in evidence in cases which are definitely excluded by Ss. 40 to 44 of the Evidence Act.

The statement made by the ancestor of a party as recorded in some of the previous judgments, orders and decrees to which he was a party are admissible under S. 35 and also under S. 13: I.L.R. (1959) Cut. 602.

The judgment and decree in the suit wherein a party had made certain admissions that the family was joint which admissions are against his interest are admissible under S. 13 of the Evidence Act as an instance in which there was assertion that the family was joint: 1959 M.P.L.J. 1018.

S. 13 applies to all kinds of rights whether rights of full ownership, or falling short of ownership, *e.g.*, rights of easement, etc. A right may be public, or general, or private. Further a right may be incorporeal, *e.g.*, a right of way or corporeal, *e.g.*, a right of ownership: A.I.R. 1956 Mad. 226 [Overruled on another point in A.I.R. 1972 Mad. 154 (D.B.)].

Section not confined to public rights, but also applies to private rights: A.I.R. 1924 Cal. 991.

The word 'right' in S. 13 includes a private land; thus, where the dispute pertains to adverse possession and the adjoining land owners orally testify and produce sale deeds, *held*, the deeds have a corroborative value; being admissible under S. 157, the question of their relevancy is not material at that stage: A.I.R. 1972 Gau. 52.

A right in dispute cannot be proved on the basis of the finding in respect of that right in a previous suit not *inter partes* as a judgment recording a finding recognising certain right cannot be used as evidence to prove that right in another suit not between the same parties. Moreover, it is inherent in the scheme of S. 13 that only a judgment which has become final can be said to be a transaction evidencing the recognition of a right or an instance in which that right has been recognised. If the suit in which the judgment was given is still continuing in the shape of an appeal in the High Court and it will not be known as to what would ultimately be decided in that suit that derogates from its character of being a transaction recognising a

right or an instance recognising that right: A.I.R. 1964 All. 302.

Entries in Riwaj-i-am are presumed to be correct—Proof of custom—Oral and documentary evidence of mutations and other transaction recognising custom, are material: A.I.R. 1966 S.C. 1555.

Question as to whether applicant's mark is identical or deceptively similar to trade mark of opponent — Judgments in other cases—Admissibility of in evidence: A.I.R. 1969 Cal. 80.

Dispute regarding possession of immovable property—Magistrate mainly relying upon affidavits of parties for coming to conclusion as to possession—Finding of High Court regarding possession of disputed property given in a previous case also relied upon—*Held*, that finding can be used as a piece of evidence of possession quantum valebat in the case: 1969 Cr.L.J. 1197: A.I.R. 1969 Pat. 317.

Where the question is whether the suit lands were the bakasht of the plaintiff, a waqf estate, or they had been settled with the defendants, Kabuliyats, executed in favour of the plaintiff, indicating that the lands were taken on settlement by different persons from time to time who were recognising the right of the proprietor, the wakf estate, to settle those lands with them, are admissible in evidence; but as to what weight should be attached to the statements contained therein is absolutely a different matter depending on the facts and circumstances of each case: 1968 B.L.J.R. 52.

Where a suit is brought for possession by way of redemption by plaintiffs as heirs of deceased mortgagor they, in order to establish their right to redeem, are entitled to produce a copy of judgment given in another suit and an order in mutation proceedings whereunder plaintiffs' right to succeed to the estate of the deceased mortgagor is recognised. The order in the mutation proceedings and the judgment are relevant under Ss. 13 and 43 and their probative value is very high. It is not necessary for the plaintiffs to prove that the order and the judgment has been correctly passed. The fact that the order and the judgment have not been challenged or set aside in any proceedings, goes to prove that they were correctly made: (1969) 71 Punj.L.R. 735.

Scope — Judgment not *inter partes* — Is admissible in evidence only in proof of fact that the right was asserted on a previous occasion—But the reasons on which it is founded cannot be treated as part of the transaction—So also any finding of fact therein other than the transaction itself is not relevant in the subsequent case: 1969 Ker. L.R. 326: 1969 Ker. L.T. 110.

Complaint under Ss. 426, 447 and 506, I.P. Code—Rent note executed by tenant of complainant in respect of land in question and copy of judgment of Nyaya Panchayat in rent recovery case filed by complainant—Documents are not irrelevant, but are admissible to prove the offences: 1970 Cr.L.J. 360: A.I.R. 1970 Manipur 23.

S. 13(*a*) only refers to the admissibility of any transaction by which a right is asserted. It would be a farfetched application of the section to say that if in a deed of partition between two persons rights are alleged with reference to the property which either has or has not any reference to the right to partition, these allegations should be considered as a transaction by which the right is asserted: A.I.R. 1932 Cal. 398. *See* also A.I.R. 1927 Cal. 1; A.I.R. 1942 Cal. 445 (Document by tenant describing nature of tenancy—Landlord not party to it—Is inadmissible). Assertions of permanent rights, continuing over a long period of years in various documents of transfer executed by tenants, are admissible under S. 13, though the weight to be attached to these recitals in the documents depends upon the circumstances of each case: A.I.R. 1945 Cal. 283.

Ordinarily and in the absence of special circumstances, a judicial decision in recognition or denial of a custom is good evidence in proof thereof. There may be cases in which the judicial decision relating to a custom may not be of great value; but where it is arrived at in a well contested case in which there is no reason to suppose that the parties could not, or did not, produce all evidence available to them the value of the decree as a piece of evidence is great: A.I.R. 1939 All. 626.

It also covers rights of ownership and also incorporeal rights: I.L.R. 10 Bom. 439; I.L.R. 15 Mad. 12; I.L.R. 12 All. 1. But *see* A.I.R. 1933 Pat. 636. Recitals in a document, which is not *inter partes*, are not admissible in evidence: A.I.R. 1946 Nag. 401.

Entries in a kabala which shows the purchase of the suit land by the plaintiff's predecessor-in-interest and on which the plaintiff bases his title are admissible in evidence under S. 13 against the defendant landlord, although they are not binding on him: A.I.R. 1946 Cal. 450.

Section is applicable also to transaction being inconsistent with existence of right in dispute and is not confined merely to assertion of such a right: (1967) 69 Punj.L.R. 119.

Statement by deceased person relating to purchase of shops by him in name of someone else—*Held*, statement was admissible in evidence since it did contain assertion of right: (1967) 69 Punj.L.R. 119.

A statement of a Kulkarni of a village as to the existence of a tenancy right in the village is admissible: A.I.R. 1940 P.C. 192. *See* also (1940-41) 45 Cal.W.N. 590 (Statement in deed of transfer about nature of tenancy). A map prepared in a previous suit is not relevant under S. 13 in a subsequent suit, when the land in dispute in the two suits is different: A.I.R. 1940 Lah. 309. *See* also A.I.R. 1945 Cal. 492. Documents of transfers and sub-leases dating from 1879, in all of which there is an assertion that the lease is permanent, are admissible in evidence under S. 13 for the purpose of proving that the lease is permanent: A.I.R. 1940 Cal. 393.

It is well settled that an award made by a Land Acquisition Officer is not an admission binding on Government for the purposes of a reference under S. 18 of the Land Acquisition Act. The Land Acquisition Officer occupies no better position than that of an agent of Government for the purpose of making an offer. That offer may be accepted or rejected by a claimant, who if dissatisfied with it may ask for a reference. The award, thus, being a mere offer, it cannot become evidence in another case in which different parties and different properties are concerned. Besides, an offer is at best opinion evidence, which cannot become admissible, unless the person making the offer gives evidence about it: A.I.R. 1960 Bom. 78. However *see* (1974-75) 79 Cal.W.N. 378 (D.B.).

A land acquisition award, not accepted by the owner or the person interested, is no evidence for the Government of the market value of the land in a different land acquisition proceeding; the award contains only an unaccepted offer of compensation on behalf of the Government; unless it is accepted or upheld by the Court in a reference, the money offered thereunder is not the market value of the acquired land. But a claimant in a different proceeding can very well rely on the unaccepted award as evidence of the market value and the Government is precluded from asserting that the money offered in the award is not the market value of the acquired land: A.I.R. 1973 Cal. 284: (1971-72) 76 Cal.W.N. 584 (D.B.). *See* also I.L.R. (1979) 1 Del. 545 (D.B.).

Statement of a third party made in a document executed in favour of defendant about the boundaries of land in suit—Such third party not proved to be dead nor examined in the case—Statement is inadmissible in law against the plaintiff: A.I.R. 1962 Pat. 273.

Statement in will executed by deceased that certain property was joint property of three brothers *held* admissible under S. 32 (7) read with S. 13(1) as the deceased executor was disinterested persons being a common aunt of three brothers: I.L.R. (1961) Cut. 635.

Words 'transaction' and 'right' in S. 13 to be construed liberally—Right of person as adopted son of another is right within S. 13—Judgment not *inter partes* recognizing any right is transaction or instance within S. 13—Judgment upholding right of defendant as adopted son is relevant though plaintiffs not parties to that judgment: I.L.R. (1965) 15 Raj. 529: 1965 Raj. L.W. 168.

Estate impartible by custom devolving by premogeniture—Incidents of—Junior members — Rights of — Acquisitions of accretions—Doctrine of incorporation—Principle if applies to movable property (Jewels)—Holders powers of alienation—Restrictions on—Position in Madras—Proof of family custom to treat movables as impartibles—Abolition of Zamindari—Effect on family custom to treat movable property as impartible: (1964) 2 S.C.R. 403: A.I.R. 1964 S.C. 118.

Recitals of boundaries in documents between third parties are inadmissible to show that any party to the suit is or is not the owner of an adjoining land which has been mentioned as one of the boundaries in such documents: 1961 B.L.J.R. 396: A.I.R. 1961 Pat. 460.

Existence of graveyard established—No presumption that it is public wakf—For over

50 years land used by defendants family exclusively for burying their dead—Fact is conclusive circumstance against land being public wakf: 1965 All. W.R. (H.C.) 296.

Suit challenging the validity of dedication of property to deity—Judgments in previous litigation, where all the parties in present suit were not parties, though may not operate as *res judicata* on the question of dedication yet would be admissible under S. 13 to show that whenever an attempt was made by the owners of the property to claim the property as their private property the Courts refused to accept that contention and referred to the fact that the Thakurji was necessary party in view of the deed of trust: A.I.R. 1966 Pat. 235.

Assertion of right by husband of plaintiff in written statement in previous suit—Written statement *held* admissible in partition suit filed after husband's death: A.I.R. 1966 Pat. 110.

S. 13 (*a*) and (*b*)—Suit under S. 92, C.P. Code—Allegation that tank was public trust—Earlier decree granted to defendant for evicting trespassers from tank can be relied upon as transaction or instance under S. 13 (*a*) and (*b*): A.I.R. 1967 Andh. Pra. 181.

Entry in list of tenants—Not conclusive of rights of parties—It is merely a piece of evidence to be taken into consideration when title to property is in question: A.I.R. 1967 Bom. 190.

Dispute about market value in land acquisition case — Applicant under S. 14, Hyderabad Land Acquisition Act (IX of 1309-F), relying on extract from deposition of claimant found in another judgment relating to other land acquisition proceedings—*Held*, extract could not be relied upon as relevant: A.I.R. 1959 Andh. Pra. 52, Rel. on—Hyderabad Land Acquisition Act (IX of 1309-F), Ss. 14, 19—Land Acquisition Act (1894), Ss. 18, 23: (1968) 1 An.W.R. 348. *See* also (1974-75) 79 Cal.W.N. 378 (D.B.).

The appellant-firm applied in a tax reference case (High Court), to which it was not a party, for inspection of and grant of copies of certain proceedings, for use in some other connected proceedings. There were certain observations in the judgment of the Division Bench in the tax reference which were quoted *in extenso* in the affidavits in the present proceedings to show that a lease though it stood nominally in the name of the appellant-firm, really belonged to the assessee in the tax reference proceedings. The single Judge before whom the matter came up, permitted the appellant-firm to have a scrutiny of the judgment in the tax case, but declined the request for inspection of the documents filed in the case or for grant of copies of such documents. The appellant-firm appealed to the Division Bench.

Held, that the appellant-firm will be permitted, to inspect the documents in the tax reference proceedings. With regard to the grant of the copies of documents, the appellant-firm are referred to remedies that should be available in the appropriate pending proceedings.

The appellant-firm has a conceivable interest in repelling the effect of the remarks of the Division Bench in the reference proceedings in regard to the leases. That appeal necessarily implies, quite apart from any review or appeal in the tax reference itself, which the appellant-firm may or may not seek to file from the judgment in the tax case, that the firm will equally have an interest in knowing the nature of the material adduced in that case, upon which those observations happened to have been made: (1967) 80 Mad. L.W. 595.

Sisters and brothers, co-owners of certain property—Sisters claiming adverse possession and ouster of brothers—Cist receipts in favour of brothers relating to period after dispute—They are of no evidentiary value to show non-ouster of brothers: A.I.R. 1963 Andh. Pra. 121.

The complainants' case was that they were in possession of the disputed property and that the accused attacked them after forming unlawful assembly. A counter report was lodged in which the accused set out their own version. The difference between the two versions was that each side claimed to be in possession of the house in dispute and each side alleged that the aggression came from the other side. The Sessions Judge relied upon the judgment of the Civil Court against which second appeal was pending which was instituted as a result of the incident and which showed that the possession of the house was with the complainants and convicted the accused.

Held, that the provisions in Ss. 40 to 42 and 43 only excluded judgments as pieces of

conclusive evidence but did not bar the admission of judgments as proof of the fact of litigation or its results and effect upon the parties which made a certain course of conduct probable or improbable on the part of one of the parties: A.I.R. 1965 All. 511.

Customary right—Claim for—Facts to be taken into consideration—Mode of proof—Ss. 13, 32 (4) and 48 of Evidence Act (1882) are relevant: 1965 Raj.L.W. 242: A.I.R. 1965 Raj. 217.

Mortgage executed by *A* and *B*—In it *A* admitting that *B* was adopted son of his deceased brother *C*—Admission of *A* is relevant under S. 32 (3) being against his pecuniary interests inasmuch as he would lose his share in property of *C* if *B* was his adopted son—Admission relevant also under S. 32 (5)—Admission binding on grandson of *A* under S. 18 (2)—The words 'during the continuance of the interest' only meanwhile the interest was subsisting and before that interest was parted with—Document also constituted evidence of B's assertion of the right that he was adopted son of *C* and was relevant under S. 13 read with S. 32 (7) *B* being dead—Under S. 21 (1) admission of *B* in his own favour as adopted son of *C* was relevant: I.L.R. (1962) Cut. 422: A.I.R. 1963 Ori. 45.

Competent Court—Order of Superintendent of former Mandi State during settlement operations—Right of villagers of certain villages to graze their cattle in disputed land recognised — Relevancy for proving customary right: A.I.R. 1962 Him. Pra. 28.

Different items of properties mortgaged—Liability to contribute towards payment of mortgage-debt—Fixation of price of mortgage properties to be with respect to date when properties were mortgaged: A.I.R. 1962 Pat. 23.

Decisions in other acquisition proceedings are relevant in considering the market value of land in subsequent acquisition cases: I.L.R. (1960) 2 All. 71.

Custom—Evidence: A.I.R. 1968 S.C. 142; A.I.R. 1958 Ker. 35 (F.B.).

2. Judgment.—Question as to validity of adoption—Previous judgment in which person concerned was adopted son—Judgment holding that he was adopted son and legal heirs of the properties of his adoptive father—This judgment is admissible for the purpose of showing that there was an assertion and denial with regard to the adoption and that it was ultimately found that the person was the adopted son: (1963) 2 An.L.T. 214: A.I.R. 1964 Andh. Pra. 109. *See* also A.I.R. 1964 Ori. 174.

Judgment not *inter partes* in which an adoption was upheld is admissible: 114 I.C. 616. *See* also A.I.R. 1939 Bom. 313.

A judgment given by the French Courts in Pondicherry in regard to the validity of an adoption by a Hindu widow would be admissible in evidence under S. 13 in proceedings in Courts in British India even though one of the parties to such proceedings was not a party to the proceedings in the French Courts. The weight to be given to it must depend on all the circumstances and it cannot be said that it must be followed. As it is a judgment of the Court of the domicile in relation to the validity of the adoption both in law and as regards the facts necessary to its validity in Pondicherry it is cogent evidence of the French Law itself and ought in such circumstances to be given great weight in all the matters with which it deals: A.I.R. 1950 P.C. 34.

Right of an adopted son—Suit by adopted son against trespassers—Factum of adoption — Proof — Judgment not *inter partes* — Order in an earlier revenue case directing impleading of plaintiff as the adopted son of one of the defendants in the case—Evidence of order *held* admissible to show that right as an adopted son was claimed and recognised, even though the judgment was not *inter partes*: A.I.R. 1964 Andh. Pra. 53.

Judgment—If and in what respect conclusive—Facts proving guardian's negligence endorsed in judgment — Admissibility of judgment: A.I.R. 1958 Pat. 477.

Recitals in a criminal case judgment are no proof of the averments made therein; the judgment, however, is admissible under S. 13 as an instance wherein the right was claimed; it can be considered alongwith other evidence in the suit. [A.I.R. 1960 Ori. 29: 25 Cut.L.T. 366, Rel. on; A.I.R. 1955 S.C. 566: (1955) 2 S.C.R. 270, Disting.]: A.I.R. 1973 Gau. 38.

Proceedings or judgments of a criminal Court constitute no evidence in civil proceedings; plaintiff alleging fraud and collusion has to independently plead with

requisite particulars and prove by evidence, oral and documentary: (1991-2) 108 Mad. L.W. 436.

It is well settled that the proceedings in the criminal Court are not evidence in the suit for malicious prosecutions and the civil Court must go into evidence and decide for itself whether want of reasonable and probable cause or malice existed or not. The judgment of the criminal Court is admissible in evidence in the civil suit, only for the limited purpose of establishing the fact that the prosecution had ended in the plaintiffs favour and not for the purpose of ascertaining the grounds on which the judgment had proceeded: A.I.R. 1959 Manipur 32.

Where, therefore, what the plaintiff in a suit seeks to establish through a judgment is not a right or custom but a fact—a fact which was presumably proved in a previous action to which the defendant in the suit was not a party, the case comes neither under Ss. 40 to 44, nor under S. 13 of the Evidence Act, and the judgment not *inter partes* is not admissible in evidence: A.I.R. 1938 Pat. 103; A.I.R. 1940 Lah. 309; A.I.R. 1937 Lah. 347. A judgment in a suit between *A*, and his grantee, *B*, that the mineral rights in one of the villages comprised in the grant did not pass to the grantee and that the title of *A* to the mineral rights had not been extinguished by adverse possession, is not binding on the lessee of *B*, who had acquired his interest in the village under leases before the suit, and was not a party to the suit. The judgment is also not admissible against the lessee of *B* in a suit between him, lessee of *B* and successors in interest of *A* where the same question is agitated: (1956-57) 61 Cal.W.N. 970. A judgment not *inter partes* is admissible under S. 13 as mere evidence of a transaction in which the nature of the property in suit was asserted and recognised. The reasons upon which the judgment is founded and the findings of fact there come to cannot be regarded as part of the transaction and are, therefore, not relevant under the section. [I.L.R. 58 Cal. 1187 (P.C.), Rel. on]: A.I.R. 1949 East Punj. 233. The assertion or the denial of rights contemplated by S. 13 is evidently the assertion or the denial by parties and not by Courts, for Courts merely find for the one or the other of the contestants. It cannot, therefore, be said that the judgments themselves are transactions which negative certain rights and so are admissible under S. 13: A.I.R. 1957 Cal. 59.

The Courts below upheld the right of the plaintiff to take water from the spring through an artificial channel to the fields and for that purpose admitted the judgment in an earlier civil appeal.

Held, that the aforesaid judgment, though not *inter partes*, was admissible in evidence under S. 13 of the Evidence Act. It has been repeatedly held in several cases following the decisions of the Privy Council in 22 I.A. 60 and 29 I.A. 24, that judgments not *inter partes* though not conclusive were admissible like any other fact to be weighed in the balance to prove the value of the claim made in the previous suit as an instance of a right claimed asserted or denied. The judgment was also admissible under S. 42 as it related to matters of a public nature, namely, a village custom, relevant to the enquiry: 1964 M.P.L.J. (Notes) 31.

A judgment other than a judgment referred to in Ss. 40 to 42 may be admissible to prove that a right was asserted or denied under S. 13, or to explain or introduce facts in issues or to explain the history of the case. It is now too late to say that a litigation or a suit is not a transaction and that the word 'right' as used in S. 13 must be interpreted in some what narrow sense in which it was construed in I.L.R. 6 Cal. 171 (F.B.).

In a prior suit for partition a specific issue was raised as to whether *K* died in 1939 as claimed by his widow *S* or in 1933 as pleaded by other co-defendants. The trial Court found that *K* died in 1939. The suit was, however, dismissed on the main plea that there was already previous partition and consequently no relief was granted to *S*. In the subsequent suit brought by *S* for partition claiming her share on the assertion that *K* died in 1939 that is after the passing of Hindu Women's Right to Property Act, 1937, the lower Courts, in view of the circumstance of the prior suit accepted the oral evidence produced by *S*. On contention that the finding given in the previous partition suit as to the date of death of *K* should not have been taken into consideration by the Court in supplementing the merit of the evidence given by the plaintiff's witnesses, *held*, that the finding in regard to date of *K*'s death could not be held as altogether inadmissible in law. The Court could accept it at least as an instance of the fact that the right was claimed and asserted and finally recognised in the

previous suit. Hence, the prior judgment though not admissible under Ss. 40 to 42, was not barred from admissibility under S. 13: A.I.R. 1964 Pat. 66.

A judgment in another suit which is not inter partes is not evidence to establish the truth of the matters decided in that judgment. The findings of fact arrived at on the evidence in one case are not evidence of that fact in another case: A.I.R. 1961 Bom. 169.

In a suit to recover business dues, judgments in earlier suits filed by the defendant against some of the plaintiff's witnesses are admissible under S. 13 of the Evidence Act and can be used to corroborate the evidence of such witnesses.

A judgment *inter partes* which is not a judgment *in rem* or one relating to public matters is not admissible in a subsequent suit either as *res judicata* or as a proof of the particular point which it decided. But it is admissible under S. 13 and can be used to corroborate the oral evidence to such witnesses asserted a right based on what they have deposed: 1967 Ker. L.J. 237.

Previous suit for maintenance by widow of joint Hindu family—Maintenance asked to be charge of joint family property—Amount of maintenance to depend on extent of joint family property—Issue as to extent of property actually framed—Judgment in suit *held* admissible as an instance in which there was assertion that certain properties belonged to joint family, in subsequent suit for partition in which those properties are claimed to be self-acquired properties: A.I.R. 1954 S.C. 379.

When a custom has been repeatedly brought to the notice of the Courts and judicially recognised, it becomes a part of law of the locality where it prevails and it is not necessary to prove its attributes in each individual case. Indeed, the judicial recognition of a custom means nothing more nor less than the recognition of a valid custom and such recognition would be meaningless if a party were to be allowed to impeach its validity each time a custom is put in issue in a Court of law: A.I.R. 1955 Cal. 419.

An *ex parte* judgment of the High Court whether it is an instance of custom or opinion on a question of law, does not become less valuable merely on the ground of the absence of a respondent: A.I.R. 1952 Punj. 356. Although a judgment based upon a compromise cannot be placed on the same footing as that in which after contest a custom of pre-emption was held to be proved or negatived, yet it cannot be said that it is of no value whatsoever. It does show the assertion of the right to pre-empt and acceptance of the same by the defendant, whatever be the reason, for such acceptance: A.I.R. 1952 Punj. 356.

Court judgments about comparable land is relevant in determining compensation in land acquisition cases. [A.I.R. 1976 S.C. 2403, Rel. on]: A.I.R. 1982 N.O.C. 165 (Del.).

Judgment not *inter partes* in previous cases in which the right involved in the present litigation was asserted are admissible: 60 I.C. 142. *See* also A.I.R. 1927 Nag. 19; A.I.R. 1926 Oudh 211: I.L.R. 1 Luck. 489; A.I.R. 1926 Cal. 194; A.I.R. 1924 Cal. 1046; A.I.R. 1928 Sind 132. (Proceedings under S. 145, Cr. P. Code); A.I.R. 1926 Oudh 19; I.L.R. 11 Cal. 745; I.L.R. 15 Cal. 233; I.L.R. 13 Cal. 352; I.L.R. 12 Mad. 9; I.L.R. 15 Mad. 12: 22 I.A. 60: I.L.R. 22 Cal. 43 (P.C.); 24 I.A. 10: I.L.R. 19 All. 277 (P.C.); 29 I.A. 24: I.L.R. 29 Cal. 187 (P.C.); A.I.R. 1930 Pat. 231; 125 I.C. 115: I.L.R. 12 Luck. 155: 1936 O.W.N. 375; A.I.R. 1942 Pat. 372; A.I.R. 1960 Ker. 123.

It is fairly settled that a judgment in a previous suit not *inter partes* is admissible in proof of a transaction or instance wherein a relationship asserted was admitted or denied; though not conclusive, it is admissible in evidence like any other fact to be weighed in the balance; it does not establish the correctness but only the factum of the previous decision; a finding of fact arrived at on the evidence in one case is evidence of that fact in another case: A.I.R. 1980 Ori. 54: 49 Cut.L.T. 215: I.L.R. (1979) 2 Cut. 542.

The recognised rule of law is that previous decisions, though not *inter partes*, are not only relevant but have a high probative value; they are in a way good precedents to be followed in subsequent litigation. Thus, in a suit for possession, the defendant relied upon a registered will proved in a previous litigation between him and a third party, *held*, the will being directly and substantially involved in the previous litigation, the previous judgments had a high probative value: A.I.R. 1979 P.&H. 234 (D.B.).

Judgments not *inter partes* are admissible to show the existence of custom of a public nature. *See* 7 W.R. 210: 7 M.H.C. 306: I.L.R. 12

Mad. 9; 163 I.C. 924: A.I.R. 1936 Lah. 929; A.I.R. 1960 Bom. 78. A judgment not *inter partes* together with the plaint which preceded it and the steps in execution which followed, are admissible as evidence of an assertion of right but cannot alter the burden of proof as between rival claimants: A.I.R. 1937 P.C. 69. *See* also A.I.R. 1937 Lah. 437; A.I.R. 1937 Cal. 373; A.I.R. 1944 Cal. 57; A.I.R. 1945 Pat. 211 (Pleadings and judgment in previous suit are admissible).

A judgment on a question of custom is relevant not merely as an instance under S. 13 but also under S. 42 as evidence of custom. But its value depends upon the nature of the inquiry and the evidence produced: A.I.R. 1938 Lah. 309. A question as to what the custom is on a particular matter in a locality or a class of people or a family is a question of public nature and judgments as to the existence or non-existence of the custom would be relevant both under S. 13 and S. 42: A.I.R. 1950 Lah. 6.

Judicial decisions recognising a custom are relevant and admissible even without being *inter partes*: A.I.R. 1971 Guj. 188 (D.B.).

A decision in a custom case is not a judgment *in rem*. It is only relevant under S. 13 as a judicial instance of the custom being recognized. It may be that, owing to faulty prosecution one decision may be arrived at between certain parties while there may be another decision in a suit arising between other persons: A.I.R. 1934 Lah. 861; A.I.R. 1933 Lah. 553.

It is doubtful whether a judgment recognising a custom is relevant under S. 13. Even if it is, far from having the same importance as a clear cut instance of custom recognised by the parties themselves: A.I.R. 1937 Lah. 223.

Judgments subsequent to the suit in which they are relied on as evidencing as the particular transaction or instances in dispute are not admissible in evidence: A.I.R. 1939 Lah. 152.

The Evidence Act does not make finding of fact arrived at on the evidence before the Court in one case, evidence of that fact in another case, where parties are not the same: A.I.R. 1929 P.C. 99; A.I.R. 1960 Ker. 123.

Where a judgment is not *in rem* nor relating to matters of public nature, nor between the parties to a subsequent suit, the fact that the Court by that judgment decides a point in a particular way is not relevant for the purpose of the decision of the same point in the subsequent suit: A.I.R. 1930 Nag. 1 (F.B.). Decrees: A.I.R. 1928 Cal. 472; A.I.R. 1929 Pat. 749.

In a rent suit, decree by another co-sharer landlord is admissible: A.I.R. 1928 Cal. 355, *contra* A.I.R. 1929 Cal. 353.

Judgment referring to illegitimacy of a person is admissible as establishing an instance in which the legitimacy of the person was denied: A.I.R. 1928 Oudh 233. A judgment in which the purchase at a revenue sale by the plaintiff's predecessor is recited is admissible in evidence as evidence of a transaction within the meaning of S. 13 though the defendants were not parties thereto: A.I.R. 1933 Cal. 222. *See* also A.I.R. 1939 Bom. 313.

The purpose of S. 13 is to enable a right which may be constituted by a number of acts by the exercise of the right itself *animo domini*, on numerous occasions, to be proved by transactions or particular instances in which the right or custom in question was asserted or denied but by evidence otherwise admissible. A judgment is admissible because it is the evidence or integration of a litigation or a judicial proceeding, a transaction within the meaning of S. 13 for the purpose of ascertaining the parties to the dispute and the contention of the parties, the subject of the dispute and the final decision of the Court, but not for the purpose of proving the reasons for the Court's decision and for using its findings of facts as evidence of those facts in another case: A.I.R. 1938 Sind 132; 1939 All.L.J. 708: A.I.R. 1939 All. 626. *See* also 73 Cal.L.J. 76.

Although a finding in a previous suit *inter partes* does not operate as *res judicata*, it is the paramount duty of the party against whom it is given to displace that finding: 73 Cal.L.J. 76. *See* also 1944 All.W.R. (Rev.) 293: 1944 R.D. 550; A.I.R. 1960 Ker. 123.

(But this rule of onus of proof cannot be extended in respect of a previous judgment not *inter partes*). The recitals in a judgment are no evidence whatever to prove the exact admissions made by a party or witness unless the whole of the statement is recited therein: A.I.R. 1960 Ker. 123.

Previous proceedings on the question of the existence of the right to the office and

property are very relevant as being transactions by which the right was recognised. When documents are official records of undoubted authority which may assist the Court to decide rightly the issue before it, leave should not ordinarily be refused even though they are produced late: A.I.R. 1940 Mad. 540.

Judgment not *inter partes* is admissible for certain purposes: A.I.R. 1934 Cal. 788. *See* also 1940 R.D. 623: 1941 All.W.R. (Rev.) 433. Judgment not *inter partes* is admissible to prove motive of transaction alleged to be *benami*: A.I.R. 1929 Pat. 739.

Where in the previous representative suit the non-compliance of O. 1, R. 8 of the Code of Civil Procedure was not inadvertent, and it was not shown that the defendants had thereby suffered no injury, *held*, the plaintiff in the later suit could derive no benefit of *Explanation* VI to S. 11 of the Code; but the judgment in the previous suit, though not conclusive, is yet relevant under S. 13 as evidence of a prior instance when the right presently claimed by the plaintiff was successfully asserted: A.I.R. 1974 Raj. 144: 1974 Raj.L.W. 136.

A civil Court's decree for possession in favour of a tenant is admissible as presumptive proof of his possession; the tenancy rights having become more valuable than the proprietory right, no tenant would surrender the possession of his tenancy land; there is a strong presumption of his continuing in possession: I.L.R. (1985) Him. Pra. 823.

Where in a suit for ejectment the question was whether or not one '*A*' was the erstwhile owner of the premises in question, *held*, the pleadings in an earlier suit filed by the karta of *A*'s family for ejectment of another tenant showing *A* as the owner of the portion (which was in dispute in subsequent litigation), was admissible in evidence: A.I.R. 1978 All. 292.

In a suit for eviction against *A*, *B*, *C* and *D* on the basis of a prior decree for ejectment obtained only against *A* and *B*, *C* was the brother of *A* and *B* and *D* was the wife of *C*. *C* and *D* contended that the previous decree was not binding on them. *Held*, that the decision in the previous suit may not be *res judicata* against *C* and *D* but it was good evidence of the fact that the plaintiff got a declaration of his rights as against *A* and *B*. *C* and *D* being merely in occupation at the instance of *A* and *B* or as members or dependants of the family they could not claim any better right to question the validity of the decree in the earlier suit: A.I.R. 1956 Assam 115.

A plaintiff is entitled to rely upon a judgment in a prior suit filed by his transferor against the defendant and in which his transferor had proved his title as against the defendant: A.I.R. 1956 Bom. 625.

In a suit for perpetual injunction to restrain the defendant from interfering with the plaintiff's possession, the judgment of the President of the Municipal Council is relevant under S. 13 or S. 43 for establishing the transaction that permission to raise new construction was accorded by the Municipal Council; but the reasons and the finding of fact set out in such judgment are not relevant: 1975 Raj.L.W. 561: I.L.R. (1975) Raj. 959: A.I.R. 1976 Raj. 91.

Judgment not *inter partes* throwing light on title of landlord in respect of other villages is not admissible: 31 Bom.L.R. 335. A pedigree given in a previous judgment is not relevant under S. 13 of the Evidence Act, when it is not known who propounded that pedigree and the judgment does not proceed on the pedigree: A.I.R. 1952 Punj. 301.

Where certified copies of the decree and of two pedigrees found with it are produced, the Court may presume that the two pedigrees, found with the decree were the two pedigrees filed in the suit. Both pedigrees should be admitted as pedigrees filed by the respective parties to the suit and not as evidence of relationship under S. 32 (5). The statement in the decree that the pedigrees were filed is evidence under S. 35 as an entry in a public record or under S. 13, as evidence of the course of proceedings in a suit: A.I.R. 1934 P.C. 157.

A judgment not *inter partes* holding that a partition of a certain estate was proved is only admissible as establishing a particular transaction in which the partibility of the estate was asserted, and recognised. The reasons upon which the judgment is founded are no part of the transaction and cannot be so regarded nor can any finding of fact there come to, other than the transaction itself, be relevant to prove partition in a subsequent suit: 58 I.A. 125: A.I.R. 1931 P.C. 89: 61 M.L.J. 9, followed in A.I.R. 1949 East Punj. 233. *See*

also A.I.R. 1939 Lah. 152; 1944 All.W.R. (Rev.) 293.

A judgment not *inter partes* holding that a partition of a certain estate was proved is only admissible under Ss. 13 and 43 of the Act, as establishing a particular transaction in which the partibility of the estate was asserted and recognised. A judgment is admissible because it is the evidence or integration of a litigation or a judicial proceeding or a 'transaction' within the meaning of S. 13, for the purpose of ascertaining the parties to a dispute, their contentions and the subject of the dispute, and the final decision of the Court, but not for proving the reasons for the Courts decision and for using its findings of fact as evidence of those facts in another case: A.I.R. 1945 Sind 57.

In order to prove the existence or non-existence of a particular custom it is only judgment that can be produced as an instance. But if such judgment is not produced a Judge's recitals about such judgment cannot be relied on: A.I.R. 1939 Lah. 152. Statement made in prior litigation is admissible in subsequent suit: A.I.R. 1929 All. 561.

3. Proof of custom.—It is incumbent on a party setting up a custom to allege and prove the custom on which he relies and it is not any theory of custom or deductions from other customs which can be made a rule of decision but only any custom applicable to the parties concerned that can be the rule of decision in a particular case. Custom cannot be extended by analogy and it cannot be established by *a priori* methods. Oral evidence as to instances which can be proved by documentary evidence cannot safely be relied upon to establish custom, when no satisfactory explanation for withholding the best kind of evidence is given: 1953 S.C.R. 939: A.I.R. 1953 S.C. 201.

The burden of proving a custom in derogation of the general law being heavily on the party who sets it up, it is incumbent on him to prove by clear and cogent evidence that there is a family custom excluding the females from taking as heirs. A statement as to custom from a person of the age of twenty-two cannot command much weight, as that must largely depend on his means of knowledge: A.I.R. 1956 S.C. 548.

It is unnecessary to probe into the question as to how a custom originated. All that is necessary is to make out that a particular class of people was consistently adhering to such a custom for a fairly long period of time so as to give it the force of law. If there is nothing immoral or opposed to public policy in such a custom it will be recognised and enforced by Courts of law: A.I.R. 1956 Trav.-Co. 167 (F.B.).

A custom to be valid must not be contrary to justice, equity or good conscience. It must not have been declared to be void by any competent authority nor would contravene any express provision of the law. It must also be ancient, certain and invariable. A custom may either be general or special. It may be proved or disproved in any of the following ways: (*1*) By the opinions of persons likely to know of its existence or having special means of knowledge thereof. (*2*) By statements of persons who are dead or whose attendance cannot be procured without unreasonable delay or expenses, provided they were made before any controversy as to such custom arose, and were made by persons who would have been or likely to have been aware of the existence of such custom if it existed. (*3*) By any transaction by which the custom in question was claimed, modified, recognised, asserted, or denied or which was inconsistent with its existence. (*4*) By particular instances by which the custom was claimed, recognised, or exercised, or knowledge of its exercise was disputed, asserted or departed from. The English rule that a custom in order that it may be legal and binding must have been used so long that the memory of man runneth not to contrary should not be strictly applied to Indian conditions. In the case of a negative or prohibitive custom, it depends rather on the obedience of the custom than on any disobedience thereof, and, therefore, it would be difficult to find out numerous instances of a custom of that nature.

Where the custom alleged is a prohibitory custom, that is to say, a prohibition from doing an act which involves sacrilege to the temple itself one cannot get innumerable instances in which such an attempt was made and was frustrated. The general rule that where a customary right is alleged several instances of the assertion of the right and its due recognition should be proved will not, therefore, apply in view of the peculiar facts and circumstances of this case: A.I.R. 1958 Ori. 26.

A custom must be ancient, invariable, certain and continuous; though instances of custom have some evidentiary value, but it must further be established that where such instances were proved to be in derogation of the personal law, they did not result from the parties agreement but were in exercise of customary rights; in other words, the claim was made as well as succeeded on the basis of custom: A.I.R. 1973 J.&K. 28. *See* also A.I.R. 1971 Cal. 405.

It need not be proved that the right is being exercised from time immemorial; it is enough to prove that the right is reasonable, ancient and has been exercised openly, peaceably and without interference, and not stealthily; it will then assume the character of a customary right enforceable in a Court of law: A.I.R. 1980 Cal. 10: (1978-79) 83 Cal.W.N. 901.

The rules of custom must always prevail; if any aberration therefrom requires to be corrected, the Court's endeavour should be towards re-establishing the rule: A.I.R. 1973 S.C. 268: (1973) 1 S.C.C. 14. *See* also 1974 Rev.L.R. 409 (Rule of custom cannot override a statutory rule of law).

It is well established that a custom must be specifically pleaded and proved, and a custom not pleaded cannot be proved. Thus, where the plea was that the Kanikkara tribe was governed by Marumakkathayam law and no family custom was set up when there was no uniform customary law of inheritance governing that tribe, *held*, the family custom could not be proved; the property will thus devolve under the general law of inheritance upon the deceased's son: A.I.R. 1971 S.C. 1398.

Custom must be alleged in precise terms and must by evidence be established as pleaded: I.L.R. (1953) Punj. 669: A.I.R. 1953 Punj. 202.

Ordinarily, custom is a mixed question of law and fact first, certain facts have to be proved and from those facts an inference of the existence of a valid custom is drawn. The inference is a legal inference: A.I.R. 1954 Pat. 408 (F.B.).

Mohammedans, according to the law in force in Kashmir State, have to be governed by the Mohammedan Law unless the relevant provision of the Mohammedan Law is modified or abrogated by custom. It would, therefore, lie very heavily upon a person, who pleads a custom in derogation of the Mohammedan Law to prove its existence: A.I.R. 1957 J.&K. 3.

Where the defendants, Muslim migrants from Afghanistan and governed there by personal law, set up a 36 years' old custom that in the matter of inheritance, daughters were governed by custom and got no share in their parental property but failed to prove a single instance where such customary right was exercised as a matter of right, *held*, the custom not having been acted upon for a long time did not outweigh the personal law; the practice of excluding daughters from inheritance had started with some exceptions, but it was yet in infancy and not ripened into a custom: A.I.R. 1973 J.&K. 28.

Where the plaintiff had averred that he had made demands for pre-emption necessary under the Muslim law, *held*, even assuming that the customary law of pre-emption did not require making of any such demand, he was estopped from contending in the second appeal that the law of pre-emption required no such demand: A.I.R. 1982 All. 98.

Custom—Proof: A.I.R. 1958 Manipur 7.

If a custom of adopting a married male having children amongst the *khateeks* is proved to prevail for 20 to 30 years, it is deemed as ancient, certain and reasonable; the burden lies on the other side to lead evidence to prove the contrary. [A.I.R. 1966 S.C. 605, Foll.]: 1981 Raj.L.W. 61.

Custom in derogation of Hindu Law—Proof of. *See* A.I.R. 1960 Andh. Pra. 412.

Custom at variance with Hindu Law—Nature of proof required: A.I.R. 1968 Mad. 105.

Custom opposed to decency or morality —Reddiars of South India—Custom allowing person to marry one's own daughter's daughter—Validity: A.I.R. 1957 Mad. 97. *See* also (1972) 1 Cut.W.R. 74 (Concubinage).

Party setting up custom—Strict proof of custom necessary—Long usage essential for establishment of custom: A.I.R. 1967 Him. Pra. 15.

Custom in Androth Island of Laccadive Islands totally prohibiting alienation of tarwad properties—Custom recognised by Courts in several instances—Parties in general instances proceeded under a conviction that such custom existed — Custom *held* proved: A.I.R. 1967 Ker. 259.

The *Dastoor-e-Dehi* or *Wajib-ul-Arz* mentions a village custom as to when a *'riyaya'* sells a house, the Zamindar gets one-fourth of the consideration, called *zare chaharum*; it is a custom lost in antiquity and exercised as a matter of right throughout; apparently as the law then stood prior to the enforcement of the U.P. Abolition of Zare Chaharum Act, 1951, the Courts did not decline to grant decrees based on such custom on the ground of its unreasonableness; its unreasonableness is to be judged in the light of the notion of law as it then stood and not as it stands today. The *'riyaya'* had no saleable interest in the house; such a right was given to him on the understanding that the Zamindar will receive one-fourth of price; after the agricultural *'riyaya'* left the house or abandoned the village, it was the Zamindar alone who could settle that house to any other agricultural tenant which would entail investments by the Zamindar; the right to realise *zare chaharum* is, thus, neither unreasonable nor opposed to law; even the inclusion of the village in Municipal limits will not destroy such right: A.I.R. 1973 All. 162. [*Held* no longer good law in 1981 All.L.J. 1111].

In appreciating evidence of proof of a custom or usage, no general rule about the quantum of evidence can be laid down. Each case will depend on its own circumstances. [34 I.C. 875, Rel. on].

Where the question is whether there was a custom in regard to particular Math and its subsidiary maths to nominate different chellas as successors to different subsidiary Maths, the proof that during the tenure of the predecessor Mahants at least on two occasions nomination of different chellas to different Maths had taken place without any objection, amounts to the existence of a usage permitting nomination of different chellas to different Maths for the time being under the control of one Mahant: (1970) 36 Cut.L.T. 229.

4. Clause (*a*).—*Transaction—Meaning.*—A transaction is a business or dealing which is carried on or transacted between two or more persons: it is something which has been concluded between persons by a cross or reciprocal action, and in the largest sense, it means that which is done: A.I.R. 1956 Mad. 226; A.I.R. 1957 Pat. 293.

'By which'.—On account of the governing qualification 'by which' in regard to any transaction if it is a case which is sought to be made admissible on the ground of the right being created, claimed, modified, asserted or denied, then it must be shown to be not apart from the transaction by which it was created, claimed, etc. Instance of creation or modification of a right would be inconceivable apart from the transaction by which it was created or modified: A.I.R. 1956 Mad. 226 [Overruled on another point in A.I.R. 1972 Mad. 154 (D.B.)].

When amounts to assertion of right.—There is a fundamental distinction between a mere recital and an assertion. A right is not asserted simply because it is recited in a certain document. It is asserted only when the transaction concerned is itself entered into in exercise of the right. Where in a transaction of usufructuary mortgage the executants were entitled to grant a usufructuary mortgage of the lands whether they held them under a revenue free title or not, the mere fact that in the document of mortgage a revenue free title was recited, would not constitute an assertion of such title within the meaning of S. 13: 81 Cal.L.J. 274: A.I.R. 1947 Cal. 209. Under S. 13(*a*) a transaction in which the right was directly asserted may be admissible; but one in which it was casually referred to would not be admissible. Where the omission of the recital from the paper or document would make no difference on the effect of the transaction or document it cannot be said that it is a transaction in which a particular right was 'asserted' and therefore, it would be inadmissible: A.I.R. 1952 Vindh. Pra. 36.

S. 13(*a*) makes certified copies of decrees recognising third party interest in the disputed property admissible in evidence: A.I.R. 1982 Cal. 294.

5. Documents admitted under this section.—Where a custom is pleaded under

which the ryots are entitled to sell their houses in the village, copies of sale deed produced to prove the instances of such a custom are admissible in evidence: A.I.R. 1940 All. 535. Under this section maps: I.L.R. 5 Cal. 287: 164 I.C. 277; A.I.R. 1936 Pat. 462; maps and chittas: I.L.R. (1946) 1 Cal. 149; A.I.R. 1945 Cal. 492; rent receipts: I.L.R. 16 Mad. 194; entries in taluq maps, 22 I.C. 645; A.I.R. 1936 Pat. 462; old maps, 16 Cal.W.N. 116: 13 I.C. 332; sale deeds: 23 W.R. 293: 1956 B.L.J.R. 197: A.I.R. 1957 Pat. 293; zamindari papers; A.I.R. 1927 Cal. 576; documents under which title to land is devised, when title is in question, have been admitted: (*Ibid*) Patwari papers: 1936 R.D. 479. *See* also A.I.R. 1937 Bom. 307. As to chittas by Government, *see* A.I.R. 1927 Cal. 189.

Muchilika executed by tenant in favour of landlord — Landlord described as adopted son of one *D* in descriptive portion of document — *Held*, description of landlord as adopted son of *D* was not superfluous recital but had been made in assertion of right that tenant was taking lease of land of *D* which the landlord could lease out on theory that he was adopted son of *D*—Document *held* admissible under S. 13. [A.I.R. 1951 Pat. 641; (S.) A.I.R. 1956 S.C. 305; A.I.R. 1947 Cal. 209, Rel. on]: A.I.R. 1963 Ori. 45.

Way-bill issued by public carrier and its transfer by endorsement—In the absence of uniform and definite usage would not amount to pledge of goods: A.I.R. 1968 Mys. 133.

Question whether there was some construction upon land in dispute at time of filing of suit—Plan prepared long before dispute between parties got prepared by defendant showing that property had been built upon—Plan filed by defendant—It would be relevant piece of evidence: A.I.R. 1968 Punj. 60.

Ss. 13(*a*) *and* 32(7).—The expression 'any right' in S. 13 of the Evidence Act includes the right to be maintained from the joint family. If there is any statement in the Will which is inconsistent with the existence of such a right, it would undoubtedly fall within the last limb of S. 13 (*a*). Thus, under S. 13 (*a*) of the Evidence Act read with S. 32 (7) of the Evidence Act, the statement made in the Will that the plaintiff was paid Rs. 500 and thus her right of maintenance was settled, becomes admissible in evidence.

The word 'agreement' used in S. 25 of the Hindu Adoption and Maintenance Act is applicable to all kinds of agreements but it is difficult to accept that it would include the agreement under which the right of maintenance is relinquished in lieu of a fixed sum. Where a person entitled to be maintained compromises and accepts a definite sum in lieu of her right to be maintained from the joint family property and relinquishes her right, S. 25 will not apply to such a case.

The entries of the Census Register are inadmissible in evidence under S. 15 of the Census Act: (1968) 1 An.W.R. 429.

Admissibility of genealogies depends upon: (*a*) their falling within the four corners of S. 32(5) or S. 13; (*b*) their not being hit by the doctrine of *post litem mortam*; (*c*) they or the claims thereunder cannot be proved by recitals, depositions or facts narrated in the judgment but held inadmissible by a long course of decisions; and (*d*) oral evidence to prove genealogies must clearly indicate the witness's special means of knowledge about them and his exact source and the time and circumstances under which he had acquired that knowledge, and such evidence must be sufficient to clearly and conclusively prove the genealogies: (1983) 3 S.C.C. 118: A.I.R. 1983 S.C. 684.

Genealogies admitted or proved to be old and relied on in previous cases are relevant, and sometimes even conclusive; but before accepting or relying on them, the Courts must consider (*a*) their source and dependability; (*b*) their admissibility as evidence; (*c*) their proper use in earlier decisions or judgments relied upon; (*d*) their age; and (*e*) earlier litigations where they were accepted or rejected: (1983) 3 S.C.C. 118: A.I.R. 1983 S.C. 684.

Where genealogy is the very basis of a suit, the interested party would tend to establish its claim by concocting, fabricating or procuring a false genealogy; the Courts should, therefore, try to do justice on the materials on record, uninfluenced by extraneous circumstances: (1983) 3 S.C.C. 118: A.I.R. 1983 S.C. 684.

Recitals in sale deed are not evidence of title and cannot be used to prove a grant. It is,

however, permissible to use them, to show the nature of the title that was being asserted and as transactions relevant under S. 13 by which a right was claimed or asserted on some past occasion: A.I.R. 1933 Pat. 656. *See* also A.I.R. 1938 Lah. 795; 1973 W.L.N. 981 (Raj.). Report submitted by a local Agent upon an enquiry made by him under the provisions of Bengal Regulation XIX of 1810, whether particular temple is a private or public temple is admissible under S. 13 of the Evidence Act, when the question of the nature of the temple, is under consideration: A.I.R. 1958 Ori. 183.

Where a plaintiff derives his rights from the recitals of a deed executed between his predecessor-in-interest and a stranger, which amount to admissions by his predecessor in his own, and therefore, in favour of the plaintiff, *held*, the deed is not admissible either under S. 11 or S. 13: A.I.R. 1975 Karn. 179: (1975) 1 Karn.L.J. 105.

A sale certificate is admissible in evidence under S. 13 as a transaction by which the right to possession of certain plots of land as constituting the tenancy-lands was recognised: A.I.R. 1940 Cal. 539. A certified copy of a plaint filed in a prior suit containing an assertion of the existence of a custom in dispute, is relevant under S. 13. Its probative value is, however, negligible if it is not known what happened later in the case: A.I.R. 1949 Ajmer 2. 'Instances in which the right was claimed, recognised or exercised'—Meaning of: I.L.R. 15 Pat. 260; A.I.R. 1936 Pat. 543. *See* also A.I.R. 1938 Lah. 635; A.I.R. 1939 Lah. 105; (1940-41) 45 Cal.W.N. 590.

A long series of instances in which a custom has been recognised is not the only mode of proving a custom; a custom of succession to properties of math, may be proved by showing a clear, distinct and positive tradition in the math, or by a long series of instances in which the custom has been recognised: A.I.R. 1954 Pat. 86.

The word 'asserted' in S. 13(*b*) includes both a statement and enforcement by Act. The evidence tendered under this section need not necessarily be evidence of the acts done, but a verbal statement not amounting to and not accompanied by, any act, would also be admissible if it amounted to a claim: A.I.R. 1939 Mad. 432.

A statement made when there was some dispute, though its details are obscure becomes absolutely useless either under S. 32 (4) or under S. 13(*a*) of the Evidence Act: A.I.R. 1952 Vindh. Pra. 36.

Under S. 13 instances in which the right or custom is claimed, recognised or exercised etc., must be instances prior to the suit in question. Post items instances are inadmissible: A.I.R. 1939 Lah. 105; A.I.R. 1939 Lah. 152. *See* also A.I.R. 1938 Cal. 763 (Recitals in decree); A.I.R. 1937 Lah. 223; 1944 All.W.R. (Rev.) 193. Also as authoritative statement of facts as found by the Court: 94 I.C. 694; A.I.R. 1926 Nag. 109; A.I.R. 1926 Nag. 129; A.I.R. 1926 Oudh 578. Also as evidence of transactions but not as proof of title: (1931-32) 36 Cal.W.N. 866: A.I.R. 1930 Cal. 21.

Instances which take place subsequent to the controversy in any particular case are admissible and show that the custom which is alleged to have existed before was still in continuance and that there was no variation relating to it: A.I.R. 1956 Raj. 51.

A judgment *inter partes* is relevant in so far as it throws light on the conduct of parties and reproduces admissions made by the parties or their ancestors: A.I.R. 1952 Nag. 271. In a suit where succession to the office of *K* the late mahant is in dispute a judgment in a suit by *K* challenging a certain alienation of property as mahant, is admissible as a transaction in which *K* from whom one of the parties to the present suit purports to derive his title, asserted his right as a spiritual collateral of *M* and on that footing got decree: A.I.R. 1954 S.C. 606.

Assertion of right under Cl. (*b*) need not be successful assertion: A.I.R. 1926 Cal. 727. *See* also A.I.R. 1938 Lah. 846. As to family custom, *see* 82 I.C. 886: 40 Cal.L.J. 331.

A kabala reciting that holding was homestead land is admissible although it is not *inter partes*: A.I.R. 1928 Cal. 315. Also discharged mortgage bond to prove rate of rent: A.I.R. 1928 Cal. 703 (2): Also the statement of agent that his principal was a bastard: A.I.R. 1928 Oudh 233.

Will containing recital as to permanent tenancy where question related to nature of tenancy is admissible: A.I.R. 1929 Cal. 473; A.I.R. 1942 Cal. 445.

Dispute regarding nature of land—Recitals in the sale deeds in favour of one party to suit showing nature of same land—Admissible both under S. 13(*b*) and S. 32: A.I.R. 1930 All. 299. *See* also A.I.R. 1937 Lah. 688; A.I.R. 1938 Lah. 846.

Where an ancient registered gift deed showed that the property was debutter, which supported the entry in the much later finalised C.S. Khatian to the same effect, *held*, the presumption of dedication to deity arises; it is then for the other party to rebut the presumption; recitals in the gift deed are admissible: A.I.R. 1980 Cal. 255.

Recitals in mortgage-deed—Evidentiary value against third party: 57 I.A. 339: I.L.R. 58 Cal. 858: 60 M.L.J. 142 (P.C.); A.I.R. 1937 Lah. 688. Recital in Zarpeshgi deed describing the land as a zirat—Extent of admissibility: 150 I.C. 884: A.I.R. 1934 Pat. 81. *See* also A.I.R. 1939 Sind 209; I.L.R. (1937) Bom. 307: (1937) 39 Bom.L.R. 288; I.L.R. (1942) 1 Cal. 510: A.I.R. 1942 Cal. 445; A.I.R. 1940 Mad. 273.

Recitals as to the character of the lands in dispute made in the mortgage bonds executed by the plaintiff are admissible in evidence under S. 13 of the Evidence Act. Note—However, it was *held* in this case, that these recitals in themselves were not sufficient to establish that the lands in question were zirat within the meaning of S. 120 of the Bihar Tenancy Act: A.I.R. 1954 Pat. 326.

Description in a mortgage-deed by the mortgagors of the land mortgaged as properties 'in our Sir and khas possession' may not be regarded as admissions by the mortgagees as the deeds were executed by the mortgagors; but they are certainly admissible under S. 13 of the Evidence Act as assertions of title, and when it is under these documents that the mortgagees claim, their probative value as against them and as against their lessees who claim under them is high: A.I.R. 1956 S.C. 305.

Documents of title not *inter partes*, can be relevant and be admitted in evidence as transactions in which the party concerned or his predecessor-in-interest 'claimed' his right which is questioned. 'Claimed' cannot be narrowly read as importing that the claim should necessarily be made in the presence and to knowledge of the party to be affected thereby. A claim may very well be made in the absence of and without the knowledge of the person affected: A.I.R. 1951 Pat. 641.

A recital in a document as to the ownership of adjoining lands is not admissible in evidence as against persons who are not parties to the document. But if the executant of the document is examined as a witness, the recital is admissible in evidence to corroborate him under S. 157, Evidence Act: A.I.R. 1950 Pepsu 7.

Batwara papers are undoubtedly admissible under S. 13 as instances in which the right in question was claimed and recognised. The section does not say that they are admissible only where the documents are *inter partes*. They are admissible to show that a particular right was asserted or recognised, irrespective of who the parties may have been at the time. They are, of course, not binding against tenants who were not parties in the batwara proceedings. They also carry no presumption of correctness: A.I.R. 1947 Pat. 475.

A map or plan attached to or referred to in a document of title, is a part of the document and is necessary to understand or explain the document itself, and is, therefore, admissible in evidence. [29 I.A. 24, Applied]: (1949-50) 54 Cal.W.N. 671.

In a suit for a declaration against the landlord that plaintiff has a rent-free title to the land, a kabala, which is a title deed of plaintiff is admissible in evidence, at least, to explain the nature of his possession: A.I.R. 1933 Pat. 685. Suit to establish right as mahant—Papers containing recognition of rights by revenue officers and residents of villages—Admissible: 1930 All.L.J. 964. *See* also A.I.R. 1942 Pat. 140. (Village note as evidence of custom).

Copies of Income-tax returns filed by the tenant to prove payment of rent, *held*, are not admissible under S. 13: 1979 U.P. (R.C.C.) 78.

The opinion expressed by the Law Committee of a Municipality by its resolution is not admissible in evidence when the members of the Committee have not been examined: A.I.R. 1931 All. 499 (S.B.).

Reference to a work of history and social customs at the appellate stage of a case in proof of a custom which has not been pleaded is irregular and must be avoided. Such a work by an author who is alive and available as a witness to the custom set up is inadmissible in evidence when the author is not called as a witness and no reason is adduced for not calling him: A.I.R. 1941 Pat. 146.

Settlement proceedings before a Settlement Deputy Collector are not judicial proceedings within the meaning of S. 33 so as to make statements made therein as to the existence of a custom admissible in a subsequent civil suit between the parties. But the statements cannot at the same time be excluded. Though they may not be admissible as evidence of the custom, they can be looked into to assess the value of the Deputy Collector's report and order; these are admissible under S. 13, as recognizing a custom in dispute: A.I.R. 1935 All. 187; A.I.R. 1937 Lah. 223.

An *amalnama patta* in which a predecessor of a co-sharer makes a statement in derogation of his own interest is certainly admissible for the purpose of showing the existence of a *pesgunnah* custom: A.I.R. 1944 Cal. 419.

An order under S. 145, Cr. P. Code, declaring a party to be in possession is admissible in evidence under S. 13, Evidence Act, as an instance in which a right in dispute was claimed and recognised: and statements therein relating to the facts relevant to the case are admissible under S. 35: A.I.R. 1950 Ori. 19.

It is true that Inam Fair Register is entitled to great weight as the preparation of Inam Register was a great act of State and its preparation and the contents were the subject of much consideration under elaborately detailed reports and minutes. But that is not to say that the entries therein would override or nullify the effect of registers prepared long before. It is only in the absence of authentic evidence that utmost importance will be given to the Inam fair register, but it will not displace earlier documents the authenticity of which could not be questioned: (1958) 1 An.W.R. 343.

Record of rights—Conclusiveness—Conclusiveness attaches to character of land and not to nature of title: A.I.R. 1957 Pat. 482.

Recitals as to boundaries in a document not *inter partes* are not admissible under S. 32: 1910 Mad.W.N. 668; A.I.R. 1915 Mad. 746; A.I.R. 1924 Cal. 1067 (D.B.); A.I.R. 1924 Cal. 948 (D.B.); A.I.R. 1927 Cal. 918; A.I.R. 1927 Lah. 448; A.I.R. 1927 Cal. 1; A.I.R. 1934 Lah. 750; A.I.R. 1935 Pat. 167 (F.B.); A.I.R. 1940 Mad. 450; A.I.R. 1958 Raj. 206; A.I.R. 1961 Mys. 160; A.I.R. 1962 Ori. 40; A.I.R. 1972 Mad. 154 (D.B.) [Overruling A.I.R. 1956 Mad. 226]; A.I.R. 1976 Karn. 75. But *see* A.I.R. 1933 Pat. 636; A.I.R. 1936 Lah. 114; A.I.R. 1936 Lah. 1005; I.L.R. 23 Bom. 63; A.I.R. 1927 Cal. 230; A.I.R. 1923 Nag. 22; A.I.R. 1930 All. 209.

Recitals of boundaries relating to adjacent lands are not admissible: A.I.R. 1928 Cal. 893. *See* also A.I.R. 1940 Mad. 273 (Description of land as being situate in a particular village); A.I.R. 1945 Cal. 492.

(Map and Chitta relating to disputed land prepared by defendant before suit—Admissibility in evidence as assertion of right). A mere statement of boundary cannot be classed with any of the verbs in S. 13: 'created, modified, recognized, asserted or denied' and is, therefore, not admissible under S. 13 (*a*): A.I.R. 1928 Mad. 105(2).

The correct legal position as to recitals of boundaries in documents is that where a recital has been made in a document '*inter partes*', it would be a joint statement made by the parties to the document, and, therefore, rele-vant against them as an admission. Again, where the recital occurs in a document between a party and a stranger, it would be relevant against a party as an admission but not admissible in his favour. Where, however, the recital is in a document between strangers, it is not a particular instance in which a right was claimed, recognized or exercised or a transaction by which a right was claimed or asserted within the meaning of S. 13 and they are inadmissible to show that any party to the suit is or is not the owner of an adjoining land which has been mentioned as one of the boundaries in such documents. The principal reasons for this

are, in the first place, it will not be right to hold a party bound or affected by a recital as to the making of which he could have no control whatever and which has been made completely behind his back and secondly such third parties have no particular reason to be accurate as to who is the owner of the land adjoining their own, and, therefore, a mistake may easily creep in, in the mentioning of such boundaries. Boundaries may often be mentioned on imperfect knowledge or merely on hearsay information: A.I.R. 1958 Raj. 206.

Documents clearly asserting rights of plaintiff regarding cultivation and enjoyment of disputed lands—*Held*, documents were admissible under S. 13(*b*) read with S. 21 (3): 34 Cut. L.T. 1131: I.L.R. (1968) Cut. 673.

Ss. 13 *and* 32(3).—Evidence in probate proceedings given by a widow holding a life-estate under the will as to the necessity for an alienation by her by way of mortgage is not admissible in evidence against her successor-in-interest in a suit against the latter by the mortgagee: A.I.R. 1938 Pat. 301.

Ss. 13, 35 *and* 74.—Printed copies of an index register, containing the general index of lands given on lease in a particular city with certain particulars and maps of the survey numbers situated in the different wards of the city, are public documents and admissible in evidence under S. 74, being records of the acts of public officers. They are also relevant under Ss. 13 and 35 and admissible: A.I.R. 1942 Bom. 161.

Delay in issue of certificate to practise as a Notary Public signed much earlier—No inference that Government acted *mala fide* deliberately with a view to deprive Notary Public of his right to practise as a Notary: A.I.R. 1969 All. 195.

Ss. 13 *and* 40 *to* 43.—Where a specific provision deals with admissibility of a document, the Court cannot resort to the general provisions to determine its admissibility; thus, if a judgment was not admissible as it did not fall under Ss. 40 to 42 and did not fulfil the conditions of S. 43, it is not relevant under S. 13; the words "other provisions of this Act" do not cover S. 13 which does not deal with judgments: A.I.R. 1983 S.C. 684: (1983) 3 S.C.C. 118.

Ss. 14 *and* 15.—Accused charged under S. 302 read with S. 34, Penal Code—Accused pleading exercise of right of private defence—Accused producing doctor's certificate to prove injuries on his body—Assessment of value of doctor's evidence—What doctor did in granting certificate in another criminal trial irrelevant and not taken into account: 1969 Cr. L.J. 1273 (All.).

In finding out the intention of a corporate body, the Courts will have to look to the resolutions passed or acts done by it. What the Courts are concerned with is the intention of the body as a whole. The same rule is applied when they try to find out the legislative intention in enacting any particular statute or any provision therein.

Thus, where the Court has to determine the intention of the Standing Committee of certain Municipal Corporation in passing certain resolution, the facts stated in the corner-affidavit filed by the Commissioner of the Corporation becomes irrelevant. The only thing relevant for its purpose are the facts mentioned in the resolution passed by that Committee: A.I.R. 1962 Mys. 92.

A previous judgment in a criminal case whereby the accused were convicted for an offence punishable under S. 379, Penal Code, for harvesting and removing paddy from the land in the possession of the complainant is relevant and admissible in evidence to prove dishonest intention of the same accused who is being tried for the same offence committed in respect of the same land: A.I.R. 1961 Manipur 43.

Association for habitually committing dacoities—Proof—Evidence relating to specific dacoities for which individual accused were charged previously — Admissibility: A.I.R. 1961 Pat. 260.

Proof of—*Mens rea*—Applicability of the maxim *"actus non facit reum nisi mens sit rea"*: A.I.R 1957 Mad. 675: 1957 Cr. L.J. 1279.

Paternity—Acknowledgment—Effect of: (1958) 1 An.W.R. 1: A.I.R. 1958 Andh. Pra. 195.

Proof of motive: A.I.R. 1958 Mad. 27.

14. Facts showing existence of state of mind, or of body or bodily feeling.—Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feeling, is in issue or relevant.

Section 14—Synopsis.

1. Scope.
2. Mental or bodily state—Medical examination.
3. Evidence of previous crime—Admissibility.
4. Miscellaneous.

---

1. Scope.—*See* A.I.R. 1968 Bom. 400: 1968 Cr.L.J. 1584. S. 14 applies only to cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it, not to cases where the question of guilt or innocence depends upon actual facts, as it does in a trial for the offence of arson: A.I.R. 1941 Rang. 324. A letter from the respondent to the co-respondent in a divorce proceeding is good evidence under S. 14 of the respondent's feelings towards the co-respondent at the time it was written: A.I.R. 1943 Cal. 146.

The mental capacity of a party cannot be said to be irrelevant when upon the contractual relations entered into by the party, his property is sought to be made liable and the contract is in English, a language of which the party is said to be ignorant; and, when he is shown to be lacking in mental capacity, the party should establish that the party liable has signed the contract with an understanding mind: A.I.R. 1942 Sind 17.

Evidence of character, conduct and state of mind is admissible under Ss. 8, 14 and 32: 1980 M.P.L.J. 300 (D.B.).

Evidence of similar transactions not the subject of any charge, relevant to the charge of abetting an offence as showing an intention to aid the commission of the offence and an intentional omission to put a stop to an illegal practice, which was an 'illegal omission' would be admissible to prove intention under S. 14: (1946-47) 51 Cal.W.N. 900: (1947) 49 Bom. L.R. 688: (1947) 2 M.L.J. 328 (P.C.).

Illus. (*b*).—*See* 75 I.C. 67: I.L.R. 46 Bom. 958. *See* also I.L.R. 8 Bom. 223; 11 B.H.C. 90 (93); 61 I.C. 647: 22 Cr.L.J. 407.

Illus.(*c*).—*See* I.L.R. 13 Bom. 532.

The recitals in the document exhibited in the case can be taken as relevant evidence as it shows the clear intention of the parties: (1984) 97 Mad.L.W. 365.

Relation of Ss. 14 *and* 15.—Evidence of the opinions of the other Judges on other documents written or attested by the accused in proceedings to which he is not a party is not admissible to prove his intention or knowledge in his trial for giving false evidence in respect of a document: 38 I.C. 723: 13 Nag.L.R. 35.

Ss. 14 and 15 have to be read together inasmuch as S. 15 is only an application of the general rule laid down in S. 14: A.I.R. 1956 Mys. 9.

S. 15 must be read as subject to S. 14 so far as evidence of knowledge and intention is concerned: 38 I.C. 723: 13 Nag.L.R. 35. It is settled law that under neither of Ss. 14 and 15 can the evidence of facts similar to but not part of the same transaction as the main fact be received for the purpose of proving the occurrence of the main fact which must be established by evidence directly bearing on it. But when the existence of that fact has been so established and a question arises as to the state of mind of the person who did it, or whether the act in question was done accidentally or with a particular knowledge or intention evidence of similar acts may, under certain conditions, be admitted. S. 14 is wholly inapplicable to a case where the state of mind or feeling of the accused is not a fact in issue or a relevant fact: A.I.R. 1928 Lah. 382.

Evidence of a collateral offence cannot be received as substantive evidence of the offence on trial, though, under S. 14, evidence may be given of intention and such matters where the factum of such intention or like matters is relevant: A.I.R. 1945 Bom. 152.

Though the evidence of similar unconnected acts of the accused may not be

[1][*Explanation* 1.—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

Explanation 2.—But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact.]

Illustrations

(*a*) *A* is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that at the same time, he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

[2][(*b*) *A* is accused of fraudulently delivering to another person a counterfeit coin which, at the time when delivered it, he knew to be counterfeit.

The fact that, at the time of its delivery, A was possessed of a number of other pieces of counterfeit coin is relevant.

The fact that *A* had been previously convicted of delivering to another person as genuine a counterfeit coin knowing it to be counterfeit is relevant.]

---

1. Substituted for the original *Explanation* by the Amendment Act 3 of 1891, S. 1(1).

2. Substituted for the original illustration by S. 1(2), *ibid*.

---

admissible to probabilise the commission of the offence with which he stands charged in another case, yet such evidence will be admissible under Ss. 14 and 15 as evidence of intention or knowledge on the part of the accused and in cases where it is necessary to rebut even an anticipated defence of accident or mistake or other innocent condition of mind, and it is no objection that the similar facts are the subject of separate indictments still to be tried: A.I.R. 1956 Mys. 9.

It is a general rule of law that when there is *prima facie* evidence that an accused is guilty of the act charged, evidence of 'similar acts' is admissible. The evidence of previous acts of a series of 'similar occurrences', in each of which the person doing the Act was concerned, is admissible under S. 15: A.I.R. 1956 Pat. 404.

Previous conviction—Evidence not admissible to show state of mind: 60 I.C. 331: 5 P.L.J. 706; A.I.R. 1928 Lah. 382; 8 Mys.L.J. 385. But *see* 146 I.C. 1064: A.I.R. 1933 Oudh 355, where it was held admissible to prove habit and association.

Conspiracy — Past transactions unconnected with conspiracy—Transactions not admissible in evidence, even if true: A.I.R. 1965 Cal. 38.

Conspiracy—Conduct in general of each individual co-conspirator including his acts, writings and statements, etc., is evidence against himself. *See* (1978) 2 Cal.L.J. 214 (D.B.).

Inference of intention—Order placed for printing of prize competitions and results thereof after the Prize Competitions Act, 1955, came into force—Denial that order was placed with intention of conducting a prize competition—Such orders placed and distributed in the past inviting entries—Intention to run a competition after the Act came into force can be inferred from previous conduct: A.I.R. 1964 All. 572.

Explanation 2 only means that if the prosecution brings forth the evidence of a prior offence as being relevant under this section, then it may also prove the conviction, which would make the evidence of previous offence more effective in its being accepted. It is also true that the general tendency of an accused cannot be proved as that would amount to proving his bad character but the facts offered in proof must show the state of mind in reference to a particular matter in question: A.I.R. 1968 Bom. 400.

(*c*) *A* sues *B* for damage done by a dog of *B*'s which *B* knew to be ferocious.

The facts that the dog had previously bitten *X*, *Y* and *Z*, and that they had made complaints to *B*, are relevant.

(*d*) The question is whether *A*, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that *A*' had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant, as showing that *A* knew that the payee was a fictitious person.

(*e*) *A* is accused of defaming *B* by publishing an imputation intended to harm the reputation of *B*.

The fact of previous publications by *A* respecting *B*, showing ill-will on the part of *A* towards *B*, is relevant, as proving *A*'s intention to harm *B*'s reputation by the particular publication in question.

The facts that there was no previous quarrel between *A* and *B*, and that *A* repeated the matter complained of as he heard it, are relevant, as showing that *A* did not intend to harm the reputation of *B*.

(*f*) *A* is sued by *B* for fraudulently representing to *B* that *C* was solvent, whereby B, being induced to trust *C*, who was insolvent, suffered loss.

The fact that, at the time when *A* represented *C* to be solvent, *C* was supposed to be solvent by his neighbours and by persons dealing with him is relevant, as showing that *A* made the representation in good faith.

Affidavits—Sufficiency of as evidence: A.I.R. 1967 Guj. 229. *See* also S. 1, Note 5, *supra*.

'Statement of person as to cause of his death or as to any circumstances of the transaction which resulted in his death'—Conviction based on identification: 1967 Ker.L.T. 466.

Under S. 15, Evidence Act when the acts in question form part of series of similar occurrences, evidence of similar acts is admissible to prove the intention or knowledge of the person and to rebut the defence of accident, mistake or the same having been done without the required knowledge or intention. The principle on which evidence of similar acts is admissible is not to show because the accused has committed already some crimes, he would, therefore, be likely to commit another, but to establish the animus of the act, for which he is charged and rebut by anticipation the defence of ignorance, accident, mistake or innocent state of mind.

Thus, where the accused is charged with embezzling certain amounts from Government Treasury and falsifying the accounts to cover up those defalcations during a particular period, evidence relating to similar entries or falsification of the accounts made previous to the charge period are clearly admissible under S. 15 of the Evidence Act. In a prosecution under S. 477-A, Penal Code it is not sufficient for the prosecution to prove that the entries which are the subject-matter of the charge are wrong entries and that they were made by the accused, the prosecution must go further and prove that those entries are false entries and the accused made those entries wilfully and with intent to defraud the State. Therefore, the prosecution can prove similar instances to prove that the accused made the entries in question wilfully and with intent to defraud the State. Those instances can also be proved to rebut the accused's plea that he innocently made those entries at the behest of his superiors. But that evidence cannot be used to show that the accused was guilty of temporary misappropriations in past or to probabilise the charge levelled against him by proving his past bad conduct, if any: A.I.R. 1965 Mys. 128.

Where a medical practitioner is tried for causing death of his patient by administering a lethal dose of dhatura and the prosecution has shown that even a man of no education in the country side is aware of the extremely poisonous nature of dhatura, but the defence is that there are in the record of medical experience cases in which the drug had been

(*g*) *A* is sued by *B* for the price of work done by *B*, upon a house of which *A* is owner by the order of *C*, a contractor.

A's defence is that *B*'s contract was with *C*.

The fact that *A* paid *C* for the work in question is relevant, as proving that *A* did, in good faith, make over to *C* the management of the work in question, so that *C* was in a position to contract with *B* on *C*'s own account, and not as agent for *A*.

(*h*) *A* is accused of the dishonest misappropriation of property which he had found, and the question is whether when he appropriated it, he believed in good faith that the real owner could not be found.

The fact that public notice of the loss of the property had been given in the place where *A* was, is relevant, as showing that *A* did not in good faith believe that the real owner of the property could not be found.

The fact that *A* knew, or had reason to believe, that the notice was given fraudulently by *C*, who had heard of the loss of the property and wished to set up a false claim to it, is relevant, as showing the fact that *A* knew of the notice did not disprove *A*'s good faith.

(*i*) *A* is charged with shooting at *B* with intent to kill him. In order to show *A*'s intent, the fact of *A*'s having previously shot at *B* may be proved.

(*j*) *A* is charged with sending threatening letters to *B*. Threatening letters previously sent by *A* to *B* may be proved as showing intention of the letters.

(*k*) The question is, whether *A* has been guilty of cruelty towards *B*, his wife.

Expressions of their feeling towards each other shortly before or after the alleged cruelty, are relevant facts.

---

successfully administered for curing the disease, it is open to the prosecution to show that the previous experiment carried out by the accused himself in exactly similar circumstances had shown him that far from being a cure, the drug was a certain killer. Even if the accused had been ignorant of the effect of dhatura on the human system or the fatal consequences of administering it in such doses, he has altogether no excuse to continue to be ignorant or to be optimistic after the death of the earlier patient after the administration of the dose: A.I.R. 1963 Madh. Pra. 102.

2. Mental or bodily state — Medical examination.—S. 14 does not prohibit medical examination of mental or bodily state; exposure to such examination, aided by scientific data, does not amount to deprivation of personal liberty in violation of Art. 21 of the Constitution: A.I.R. 1985 Andh. Pra. 1: (1985) 1 Hindu L.R. 698: (1985) 1 An.W.R. 28.

Where potency of either of the spouses is disputed, the Court can appoint a Commissioner-Doctor for scientific investigation to decide whether or not the spouse is impotent and able to consumnate the marriage and S. 14 does not exclude this appointment. [A.I.R. 1921 Cal. 459 and (1954) 67 Mad.L.W. 676, Foll.; A.I.R. 1963 Guj. 250 and A.I.R. 1972 Mys. 157, Dissent. from]: A.I.R. 1985 Andh. Pra. 1: (1985) 1 An.W.R. 28: (1985) 1 Hindu L.R. 698.

3. Evidence of previous crime—Admissibility.—When a person is charged with an offence, evidence of his participation in an independent crime cannot be received as substantive evidence of the offence on trial but evidence may be given to prove the elements mentioned in S. 14, such as intention, etc.: 22 I.C. 187: 18 Cal.L.J. 578. In a prosecution under S. 209, I.P. Code, evidence relating to other suits by the accused against other persons may be admissible under Ss. 14 and 15 to show the animus of the accused, and a systematic course of fraud and to rebut the plea of good faith or mistake: (1917-18) 22 Cal.W.N. 494: 19 Cr.L.J. 776.

But the evidence relating to similar suits by other persons is not admissible unless those suits form part of the same transaction or the result of a conspiracy between them: (1917-18) 22 Cal.W.N. 494: 19 Cr.L.J. 776. *See* also 6 B.H.C. 90.

The evidence of what happened in respect of the transfer of shares of third persons is

(*l*) The question is, whether *A*'s death was caused by poison.

Statements made by *A* during his illness as to his symptoms, are relevant facts.

(*m*) The question is, what was the state of *A*'s health at the time when an assurance on his life was effected.

Statements made by *A* as to the state of his health at or near the time in question, are relevant facts.

(*n*) *A* sues *B* for negligence in providing him with a carriage for hire not reasonably fit for use, whereby *A* was injured.

The fact that *B*'s attention was drawn on other occasions to the defect of that particular carriage, is relevant.

The fact that *B* was habitually negligent about the carriages which he let to hire, is irrelevant.

(*o*) *A* is tried for the murder of *B* by intentionally shooting him dead.

The fact that *A*, on other occasions shot at *B* is relevant, as showing his intention to shoot B.

The fact that *A* was in the habit of shooting at people with intent to murder them, is irrelevant.

(*p*) *A* is tried for a crime.

The fact that he said something indicating an intention to commit that particular crime is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class is irrelevant.

---

not admissible on the point of bad faith and *mala fides* in respect of a subsequent transaction in respect of the transfer of shares to the plaintiff which is in issue in the case. Any Court would hesitate long and much to condemn a transaction as one of bad faith when (*1*) the transaction is not in issue, (2) when all the interested parties in the transaction are not before the Court and (*3*) when the most material evidence of the persons whose transaction is condemned is not available to the Court: A.I.R. 1957 Cal. 709.

Series of similar acts involving forgery is evidence of intention but not forgery itself: I.L.R. 43 Cal. 783: (1915-16) 20 Cal.W.N. 262; 8 Mys. L.J. 385.

There are, of course, many cases in which evidence of a succession of incidents may properly be admissible to help to determine the truth of any one incident, for instance, to prove identity, intent, guilty knowledge or to rebut a defence of innocent association. On such issues evidence of a succession of incidents may be very relevant, but they have no relevance to determine whether a particular meeting or occasion for an incident ever occurred at all. Evidence that an offence of indecent assault was committed by a school master accused against a boy at *C* could not be any evidence, that the accused met another boy at *D* and committed an offence there: (1959) 2 W.L.R. 522.

In a prosecution under S. 304-A, I.P.Code, for rash driving of motor-car, evidence regarding similar occurrence previously is inadmissible under S. 14 or 15: 1929 Mad. W.N. 395.

In a charge under S. 409, I.P.Code, for embezzling specific sums, evidence of embezzling other sums is not admissible: A.I.R. 1928 Lah. 382; A.I.R. 1933 Cal. 136.

Conspiracy to commit criminal breach of trust—Evidence relating to acts outside period of conspiracy. *See* A.I.R. 1957 S.C. 747, cited under S. 10, *supra*. Where proceedings under S. 108(*b*), Cr.P.Code, are started against a person in order to prevent him from delivering speeches likely to create communal tension, in the inquiry, speeches delivered by the same person on prior occasions are admissible in evidence under S. 14. They serve to show the existence of a particular state of mind or intention. *Illus.* (*e*) to the section is very similar to the facts of the case: A.I.R. 1940 Nag. 134.

15. Facts bearing on question whether act was accidental or intentional.—When there is a question whether an act was accidental or intentional, [1][or done with a particular knowledge or intention,] the fact that such act formed part of a

1. Inserted by the Amendment Act 3 of 1891, S. 2.

Previous attempts.—Previous attempts to commit the offence and preparation to commit it are closely allied; attempts are a step further and nearer to the commission of the offence though both fall short; their probative value manifestly rests on the presumption that the intention to commit the offence was there in the accused's mind and it persisted until power and opportunity came his way to execute it; such evidence is admissible both under S. 8 and S. 14: (1971) 2 M.L.J. 53: 1971 Cr.L.J. 615: A.I.R. 1971 Mad. 194.

Previous dacoities.—In a charge of dacoity evidence of other dacoities committed by the accused is admissible either under S. 14 or S. 15: 1912 Mad.W.N. 49: 13 I.C. 781.

Where a man has been tried and acquitted on a charge of being in dishonest possession of property stolen in a dacoity knowing or having reason to believe that the property was stolen in a dacoity, it is open to the Crown to prove that he actually took part in the dacoity, for the latter was not the offence of which he was acquitted. Even if he was acquitted on a charge of dacoity, it is open to the Crown to prove that the day before the dacoity he was seen in the neighbourhood of dacoity: A.I.R. 1930 Oudh 455.

In a case where the offence for which the accused are being tried is the particular one of belonging to a gang of dacoits, simple theft or bad livelihood in which the order for giving security is based on evidence merely that the accused habitually commits thefts (as opposed to dacoity and possibly robbery) is not evidence indicating an intention to commit the particular crime of which the accused is charged: A.I.R. 1930 Bom. 157.

Previous cheating.—The accused was charged under S. 420, I.P.Code, for having borrowed money on mortgage, representing himself to be major, though he was minor, *held*, that the evidence of transactions which took place on the occasion of the loan was relevant to show the intention or knowledge or otherwise of the accused: L.R. 1 All. (Cr.) 103.

Where a licensed clerk was charged with cheating by collecting 2 annas more than what was due, from each licensee, evidence of similar action with others is not admissible under S. 14 or 15: I.L.R. 34 All. 93: 8 All.L.J. 1269. *See* also 17 Mys. L.J. 238.

4. Miscellaneous.—*Counterfeit coins and instruments.*—In the trial of a person for being in possession of counterfeit coins and instruments and materials for counterfeiting in his house in the district where he is tried, evidence of such possession in his house in another district is admissible: 61 I.C. 647: 23 Cr. L.J. 407.

Possession of stolen cattle.—In Sind possession of stolen cattle three or four months after theft is sufficient to raise presumption of guilt under this section; but the accused may set up title by lawful origin to rebut the presumption: 38 I.C. 271: 10 Sind L.R. 167.

Offence under S. 124-A, *I.P. Code.*—*Speeches.*—Previous speeches forming part of a series of speeches or lectures delivered within a short period of time are admissible. Period of six months not long: A.I.R. 1930 Lah. 867. Other newspaper articles written by the accused at the same time are admissible: 8 Mys.L.J. 49. A writing made some time after the committing of an offence under S. 124, I.P.Code, is admissible in evidence under S. 14. But the writing should be within a reasonable time of the particular occurrence: A.I.R. 1928 Bom. 78. A Court has no concern with the justice or otherwise of the claims of the accused or with the rectitude of his political views; but the Court may take cognizance of the fact that he does hold certain views, for as a guide to his conduct and intentions these views are most relevant consideration: A.I.R. 1933 All. 498.

Section 15—Synopsis.

1. Scope.
2. Similar transactions.
3. Hearsay evidence.

---

series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

Illustrations

(*a*) *A* is accused of burning down his house in order to obtain money for which it is insured.

The facts that *A* lived in several houses successively, each of which he insured in each of which a fire occurred, and after each of which fires *A* received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

(*b*) *A* is employed to receive money from the debtors of *B*. It is *A*'s duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive.

The question is, whether this false entry was accidental or intentional.

The facts that other entries made by *A* in the same book are false, and that the false entry is in each case in favour of *A*, are relevant.

(*c*) *A* is accused of fraudulently delivering to *B* a counterfeit rupee.

The question is, whether the delivery of the rupee was accidental.

The facts that, soon before or soon after the delivery to *B*, *A* delivered counterfeit rupees to *C*, *D* and *E* are relevant, as showing that the delivery to *B* was not accidental.

---

1. Scope.—*See* A.I.R. 1968 Bom. 400. S. 15 is applicable to all cases where the question is whether an untruthful statement is 'accidental or intentional' or made with particular knowledge or intention: I.L.R. 39 All. 273: 15 All.L.J. 241.

S. 15 is not applicable where there was no question of the act being accidental or intentional or forming part of a series of similar transactions: I.L.R. 47 Cal. 671: (1919-20) 24 Cal.W.N. 501 (F.B.).

S. 14 would not also apply where the defence was a complete denial and no question of the character contemplated in S. 14 did or could possibly arise: I.L.R. 47 Cal. 671: (1919-20) 24 Cal.W.N. 501 (F.B.).

S. 15 admits the production of any evidence which would determine the construction to be placed upon acts which in themselves might or might not be the preparation for dacoity and evidence that one or more members of the gang had been concerned in previous and similar offences committed at the same place is admissible in evidence for this purpose: 71 I.C. 360: 24 Cr.L.J. 136 Pesh.).

Evidence of a single act is admissible and in this sense one evidentiary fact can form a series within the meaning of S. 15 with the act to be proved. The acts of which evidence is tendered must be of the same specific kind as that in question: A.I.R. 1941 Rang. 324. There is a presumption of user as of right from open user for a long time: A.I.R. 1926 Lah. 522.

Subsequent occurrence.—S. 15 covers both previous and subsequent similar occurrences: 46 I.C. 696: (1919-20) 24 Cal.W.N. 494.

2. Similar transactions.—Evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment is not admissible except upon the issue whether the acts charged against the accused were designed or accidental, or except to rebut a defence otherwise open to him. Where the charge against the accused is that he administered dhatura to a certain person at a certain place with intent to rob him, evidence of other incidents may be admissible with a view to rebutting any defence that the administration of dhatura at the place was accidental. But before such evidence is admissible the presence of the accused at that place has to be established. The fact that he had dhatura in his possession months afterwards cannot help the prosecution, because it cannot be possibly inferred from that fact that he was in possession of dhatura when he was at that place on the date of occurrence: A.I.R. 1942 Pat. 291. *See* also 9 I.C. 731: 32 P.L.R. 1911; A.I.R. 1923 Nag. 248; A.I.R. 1943 P.C. 72.

Evidence of similar acts may be received to prove a party's knowledge of the nature of

16. Existence of course of business when relevant.—When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

---

the main act or transaction and of his intent with respect thereto: (1914-15) 19 Cal.W.N. 676: I.L.R. 42 Cal. 957.

The acts tendered must also have been proximate in point of time to that in question: I.L.R. 42 Cal. 957: (1914-15) 19 Cal.W.N. 676.

In a case of criminal misappropriation evidence of similar acts in the previous year is admissible: A.I.R. 1928 Lah. 880; A.I.R. 1939 Sind 209.

The accused who was entrusted with collection of money from debtors of a Bank, collected a certain amount from a debtor and did not credit it in the cash book of the Bank or otherwise account for the same. To a charge under S. 408, I.P. Code his defence was that there was no misappropriation but that owing to pressure of work he forgot to credit the amount in the cash book. To prove dishonest intention on his part evidence was let in of another instance of a similar omission by him to credit an amount collected from another debtor. *Held*, that such evidence was inadmissible as one instance could not constitute 'a series of similar occurrences' within the meaning of S. 15: A.I.R. 1946 Cal. 440.

In order to become relevant under S. 15, an act has to form part of a series of similar occurrences. A solitary act or a single instance is the very antithesis of the expression 'part of a series of similar occurrences': A.I.R. 1957 Cal. 709.

It is a general rule of law that when there is *prima facie* evidence that an accused is guilty of the act charged, evidence of 'similar acts' is admissible. The evidence of previous acts of a series of 'similar occurrences', in each of which the person doing the Act was concerned, is admissible under S. 15, Evidence Act: A.I.R. 1956 Pat. 404.

Under S. 15 of the Evidence Act the prosecution may adduce evidence of criminal acts other than those charged without waiting for the accused to set up the specific defence calling for rebuttal and defence of similar acts to show intention. When the act in question forms part of a series of similar occurrences evidence of similar facts is admissible to prove intention or knowledge of the person and to rebut the defence of accident, mistake, etc. The principle on which evidence of similar acts is admissible is not to show that because the defendant has committed one crime, he would, therefore, be likely to commit another but to establish the *amicuo* of the act, and rebut by anticipation, the defences of ignorance, accident, mistake or other innocent state of mind: (1963) 2 Cr.L.J. 92 (Ker.).

Similar facts which were subject of prior indictments can be taken into consideration as relevant under S. 15. This applies also to separate indictments still to be tried. There is no warrant for the view that the other instances cannot be used in regard to the accused's knowledge of the nature of the main fact for which specific charges have been framed, simply because those other instances form the subject of separate indictments which were tried simultaneously. The evidence that the accused were connected with similar cases of user of forged chalans is admissible to prove their knowledge and intention in regard to the cases for which specific charges have been framed against them under Ss. 471/467 and 420 of the I.P.Code: A.I.R. 1961 Pat. 451.

3. Hearsay evidence.—The words of S. 15 are not so wide as to admit hearsay evidence of the evidence of facts alleged to have been discovered by the investigating officer in the course of his investigation and not properly proved: A.I.R. 1939 Sind 209. The report of a Naib Tahsildar which is based on the statements of unknown persons who happened to be present at the time of his inspection, is purely hearsay evidence and is not legally admissible: 1940 All.W.R. (B.R.) 152.

Section 16—Notes.

[*See* also S. 114, *Illus.* (*e*) and (*f*).]

According to the entry in the peon book of a firm, a letter was despatched on a certain date. No date was put under the signature on the receipt column but the peon stated in his evidence that the invariable practice followed by him was to despatch a letter either on the day on which he received it or the next day or else to return it to the office. *Held*, that the Court was justified in holding that the

Illustrations

(*a*) The question is, whether a particular letter was despatched.

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place are relevant.

(*b*) The question is, whether a particular letter reached *A*. The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant.

---

letter in question was served on the date of despatch or at least the next day: A.I.R. 1952 Cal. 455.

Where in the Minutes of meetings of a Corporation there is a statement to the effect that the consideration of a case had been postponed to a later date for the presence of the petitioner who had been invited to attend, and in addition there is an entry in the Register of letters sent by the Corporation to the parties to the effect that a letter was sent to the petitioner under a certificate of posting and the necessary postage stamps covering all the letters are affixed in the Register itself there is a presumption under the provisions of Ss. 16 and 114, *Illus.* (*f*) of the Evidence Act, that the letter was duly received by the petitioner: A.I.R. 1952 Cal. 467.

Illus. (*b*) to S. 16 only means that each of the facts, namely, posting of a letter and the non-return of the original from the Dead Letter Office is relevant. It cannot be read as indicating that without a combination of these facts no presumption as to receipt of the letter can arise. Indeed that section with the illustrations thereto has nothing to do with presumption but only with relevance: A.I.R. 1957 S.C. 857.

The presumption of the postal endorsement of 'refusal' being correct can be drawn with the aid of Ss. 16 and 114: A.I.R. 1981 Madh. Pra. 76: 1980 Jab.L.J. 285.

The endorsement 'refused' on the registered cover containing the notice raises the presumption under S. 114(*e*) and (*f*) and S. 16 that the notice was sought to be delivered to the addressee; such presumption is no doubt rebuttable but if no such reliable evidence is produced, *held*, the addressee's mere denial is not sufficient to rebut the presumption; he must be deemed to have constructive notice of its contents: A.I.R. 1974 Raj. 112: 1973 Raj.L.W. 611. *See* also (1981) 1 Cal.H.N. (H.C.) 229.

When a notice bearing the endorsement of refusal is produced, the Court has to deem that its service was properly effected at the time when the letter would have been delivered in the ordinary course of post; it is then for the addressee to prove to the contrary: A.I.R. 1981 Madh. Pra. 76: 1980 Jab.L.J. 285.

If the presumption of correctness of the postal endorsement of 'refusal' remains unrebutted, *held*, failure to examine the Postman as a witness was of no effect: A.I.R. 1981 Madh. Pra. 76: 1980 Jab.L.J. 285.

Proving the fact that a letter was posted raises a presumption that it reached its destination, and the fact it was not returned to the sender, that it was received by the addressee. That presumption is based on the principle that the Court may ordinarily presume that the employees of the post office duly observe the regular course of business of the post office. An examination of the rules contained in Post and Telegraph Guide show that a registered article with an acknowledgement due when refused by the addressee will be returned with an endorsement to that effect to the sender. Therefore, there is no reason why the presumption should not be drawn that the above regular course of business was followed by postal employees when an acknowledgement due registered letter is received back by the sender with an endorsement 'refused' even if the author of the endorsement 'refused' is not examined as a witness in the case. No doubt, the presumption is one of fact and it is not obligatory on the Court to raise it. The Court may refuse to raise it if the material on record or the circumstances of the cases raises any doubt: A.I.R. 1959 Bom. 81.

An endorsement made on an envelope by a postman can be admitted in evidence even without examining the postman. It is *prima facie* evidence of the fact endorsed. But it is open to the party who disputes the truth of the statement in the endorsement to rebut the *prima facie* evidence furnished by the endorsement, and he is entitled to ask the Court to take into consideration all the proved circumstances in the case for deciding the question whether the endorsement is true or false: A.I.R. 1957 Ker. 33.

The presumption of service of a notice sent under registered post is available under Ss. 16 and 114(*e*) of the Evidence Act as well as S. 27 of the General Clauses Act only when the plaintiff proves that the letter was properly addressed and put into the Post Office; but the full address given in the body of the notice raises no presumption that the envelope was also correctly addressed; at any rate, such presumption is rebuttable; thus, when the addressee appears before the Court and denies on oath the service of notice, the presumption stands rebutted; and here the evidence of the Postman becomes necessary: A.I.R. 1978 N.O.C. 112 (Gau.).

Service of notice by post—Presumption—Postal peon's endorsement of refusal on registered letter—Value of. *See* A.I.R. 1957 Punj. 284. Refusal of a registered letter sent by post precludes the person refusing from pleading ignorance of its contents: 16 W.R. 223. *See* also I.L.R. 15 Cal. 681; I.L.R. 9 All. 366. But there must be evidence of posting and of proper address. *See* S. 114, *Illus.* (*f*).

The post marks of the places of posting and destination, on the invitation cards, *held*, are sufficient to infer that they were posted and received by the addresses in the normal course; they are, thus, admissible in evidence: A.I.R. 1994 Andh. Pra. 102.

The evidence of a general clerk, whose duty was to make over the covers containing drafts to a peon of the office for posting, that the particular letter was brought to him in an envelope, that he had the envelope sealed in his presence and made it over to the peon for posting, is not sufficient to prove the posting of that letter, in the absence of the evidence of the peon. If the peon had been called and he had said that though he had no recollection of posting of this particular letter, he invariably carried to the post office all the letters made over to him by the clerk, that might have been considered to be satisfactory if the peon was not disbelieved: A.I.R. 1960 Cal. 475.

It is extremely doubtful if the act of placing a bundle of circulars in the custody of an office peon is equivalent to putting it in a certain place within the meaning of the illustration; but assuming it to be so the presumption under the illustration cannot arise in a case where the particular peon who was said to be entrusted with the duty of posting the bundle of circulars could not be named: A.I.R. 1958 Cal. 644.

S. 16, *Illus.* (*a*) and S. 114, *Illus.* (*f*) apply to the course of business followed in public offices as well as in private offices. The effect of sending a letter to the post office will, in general, be regarded as presumptively proved, if the letter be shown to have been handed to or left with the person whose duty it was in the ordinary course of business to carry it to the post office: A.I.R. 1958 Punj. 440.

The presumption of a delivery of a money order, which arises under S. 114, on the production of the acknowledgment form containing the endorsement 'refused' is not, in law, automatically displaced by the addressee's statement on oath denying its receipt and hence the Court can disbelieve the denial and hold that the presumption stands unrebutted.

The combined effect of Ss. 16 and 114 is to raise a presumption that a communication sent by post was received in the ordinary course by the addressee and if it was returned to the sender with the endorsement 'refused' the postman must have tendered it but delivery could not be made because of the refusal of the addressee. These presumptions are based on common sense. The argument that the addressee's own statement on oath that he never received the money order was sufficient in law to defeat the presumption based on normal experience and the onus must shift on the sender to prove delivery cannot be accepted. Before the addressee can claim that the presumption stands rebutted he must convince the Court that he is telling the truth: 1963 All.W.R. (H.C.) 472.

Neither S. 16 nor S. 114 compel the Court to draw a presumption. The presumption may or may not be drawn. On the facts and circumstances of a case, the Court may refuse to draw the presumption. On the other hand, the presumption may be drawn initially but on a consideration of the evidence the Court may hold the presumption rebutted and may arrive at the conclusion that no letter was received by the addressee or that no letter was ever despatched, as claimed. After all, there have been cases in the past, though rare, where postal certificates and even postal seals have been manufactured: A.I.R. 1981 S.C. 1191: 1981 Cr.L.J. 889: (1981) 3 S.C.C. 317.

Where of the two registered notices by the landlord to the tenant, detained in jail, one

ADMISSIONS

17. Admission defined.—An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

---

addressed to him in jail was returned as refused and the other addressed to the tenant's home address was redirected to the jail and acknowledged by its Superintendent, *held*, the presumption was that initials under the refusal were those of the postman and the notice acknowledged by the Superintendent of Jail had been served on the tenant; the presumptions not having been rebutted by the tenant, *held*, the notice had been properly served on him: A.I.R. 1973 All. 24: 1972 All.W.R. (H.C.) 628. *See* also (1969-70) 74 Cal.W.N. 647.

Presumptions arising under S. 28 of the M.P. General Clauses Act, 1957 are mandatory; the Court is bound to draw it; but presumptions under Ss. 16 and 114 of the Evidence Act are optional: A.I.R. 1981 Madh. Pra. 76: 1980 Jab.L.J. 285.

Common course of business — Postal business—Insurance policy sent to appellant by post at his proper address—Law presumes that it must have reached him: (1967) 69 Punj.L.R. 578. *See* also 1979 Kash.L.J. 334 (D.B.).

S. 16, *Illus.* (*a*) and (*b*).—Notice under S. 106 of the T.P. Act—Notice sent by registered post—Notice returned with endorsement 'Inkari Wapas Hai'. *Held*, notice, served: 1968 All.W.R. (H.C.). 507.

Section 17—Synopsis.

1. Scope.
2. Admission to be clear and unambiguous.
3. 'Statement'—Meaning of.
4. Admission by conduct.
5. Admission regarding landlord-tenant relationship.
6. Income-tax proceedings/records.
7. Entries in account books [*See* also S. 34, *infra*].
8. Admission in First Information Report [*See* also S. 21, Note 6; S. 24, Note 3; S. 25, Note 3; S. 27, Note 8, *infra*].
9. Admission and confession.
10. Admission on points of law.
11. Admission regarding contents of document [*See* also Ss. 61 and 90, *infra*].
12. Section 17 *vis-a-vis* section 145.
13. Miscellaneous.

---

1. Scope.—Admission may be verbal or contained in documents (as) maps, bills, receipts, pleadings, letters, books and other entries or even horoscopes: 23 W.R. 325: 11 Cal.L.J. 22; I.L.R. 5 Cal. 864; 22 W.R. 220; 7 W.R. 249; 9 W.R. 162; 23 W.R. 27; A.I.R. 1924 Oudh 19: 73 I.C. 428; 28 M.L.J. 266; 28 M.L.J. 92: 26 I.C. 899.

S. 17 does not make it necessary that a particular statement for being used as an admission should either be on oath or contained in a plaint or application only, nor that if it is contained in a written statement or in any other pleading by way of a denial it would not amount to an admission: 1980 Mah.L.J. 477.

Per *Beg, J.*—An admission is concession or voluntary acknowledgment made by a party or someone identified with him in legal interest of the existence of certain facts which are in issue or relevant to an issue in the case. The predominant characteristic of this type of evidence consists in its binding character. Admissions are broadly classified into two categories: (*a*) judicial admissions; (*b*) extra-judicial admissions. Judicial admissions are formal admissions made by a party during the proceedings of the case. Extra-judicial admissions are informal admissions not appearing on the record of the case. Judicial admissions being made in the case are fully binding on the party that makes them. They constitute a waiver of proof (*vide* S. 58, Evidence Act). They can be made the foundation of the rights of the parties. Extra-judicial or informal admissions are also binding on the party against whom they are set up. Unlike judicial admissions, however, they are binding only partially and not fully, except in cases where they operate as or have the effect of estoppel in which case again they are fully binding and may constitute the foundation of the rights of the parties: 1957 All.L.J. 350: I.L.R. (1956) 2 All. 399: A.I.R. 1957 All. 1 (F.B.).

Per *Beg, J.*—(*1*) An admission constitutes a substantive piece of evidence in the case and, for that reason can be relied upon for proving the truth of the facts incorporated therein. (2) An admission has the effect of shifting the onus of proving to the contrary to the party against whom it is produced with the result that it casts an imperative duty on such party to explain it. In the absence of a satisfactory explanation, it is presumed to be true. (3) An admission, in order to be competent and to have the value and effect referred to above should be clear, certain and definite, and not ambiguous, vague or confused: 1957 All.L.J. 350: I.L.R. (1956) 2 All. 399: A.I.R. 1957 All. 1 (F.B.).

An admission or a concession by a party should be strictly construed: 1976 All.W.C. 720.

The admissions are substantive evidence of facts admitted: (1989) 1 Hindu L.R. 125: (1989) 1 Rev.L.R. 145 (P.&H.).

An admission is the best evidence against the party making the same, and unless it is shown that it is untrue and is made under circumstances which does not make it binding on the party, must be presumed to be true. The weight of the admission increases with the knowledge and deliberation of the speaker or the solemnity of the occasion on which it is made: (1933-34) 38 Cal.W.N. 861. *See* also (1937) 39 Punj.L.R. 876.

An admission, it is well settled, is the best evidence that an opposite party can rely upon; though not conclusive, it is nevertheless decisive on the point unless proved erroneous or is validly allowed to be withdrawn. [A.I.R. 1954 S.C. 355; A.I.R. 1977 S.C. 1724; I.L.R. 11 Cal. 588; A.I.R. 1946 Pat. 278 and A.I.R. 1976 Raj. 249, Foll.]: 1985 R.D. 135; A.I.R. 1971 Pat. 363 (D.B.); A.I.R. 1978 Karn. 25 (D.B.); (1982) 1 Cal.L.J. 279.

Admissions being self harming have significant relevance: 1982 M.P.W.N. 236.

There cannot be a better evidence than the admission of a party made by him against his own interest: (1989) 1 Hindu L.R. 125: (1989) 1 Rev.L.R. 145 (P.&H.); 1984 M.P.L.J. (N.O.C.) 71.

An admission, unless explained away, constitutes the best evidence. [(1965-66) 70 Cal.W.N. 199, Reversed]: A.I.R. 1981 S.C. 2085: (1981) 1 S.C.C. 80: (1981) 1 S.C.R. 899.

Admission is substantive evidence, but its weight is a matter for the Court to determine. Admission must be clear and unambiguous; it is conclusive unless explained. The value of admissions must depend upon its circumstances; possible motives for incorrect statement by interested persons should not be ignored: 1981 B.L.J.R. 649.

An admission by a party cannot be treated as conclusive and it is permissible for him to meet it by acceptable explanation, but at the same time it must be recognised that an admission is an important piece of evidence carrying considerable weight: A.I.R. 1989 S.C. 879.

The proposition of law that admissions can be explained by the party concerned, *held*, cannot be applied where it was not contended that the statements made by the plaintiff were either inadvertently made or that there was a wrong recording by the trial Court: (1994) 1 M.L.J. 205 (D.B.).

True, there can be no better evidence than one's own admission; but it is not safe to act upon it if it is denied and is said to have been extracted by coercion: 1982 Lab.I.C. 1745 (Andh. Pra.). However, a bare denial is not sufficient to avoid an admission: 1983 W.L.N. 629 (Raj.).

If admissions conflict with other evidence, Court could come to a different conclusion: (1971) 2 Mys.L.J. 619.

When an admission of a party is satisfactorily proved, it can reasonably be presumed to be true, unless that presumption is satisfactorily rebutted by other evidence: 1956 Nag.L.J. 427: A.I.R. 1956 Nag. 257: I.L.R. (1956) Nag. 659.

Admissions are of no evidential value once they are proved untrue: I.L.R. 49 All. 707.

The value of admissions must depend upon the circumstances in which they were made and possible motives for incorrect statements by interested parties should not

be ignored. The nature of the facts admitted is also a material point to be considered. If the fact admitted, is one within the personal knowledge of the party admitting and there is no evidence of convincing explanation forthcoming, its value is considerable. If, on the other hand, the fact admitted is an inference from evidence and circumstances, the weight of admission may be very little: 1939 All.L.J. 708: A.I.R. 1939 All. 626.

Once a party accepts his earlier statement, made in an earlier proceedings, it becomes a substantive piece of evidence of the facts admitted therein in view of S. 17 and S. 21; what weightage is to be attached to such a statement is a different matter. Before using such a statement, it is not required to be put to its maker to provide him an opportunity to explain it when he appears as a witness or by calling him as a witness: 1993 Cr.L.J. 1008 (Him. Pra.).

An admission of a person is binding if the facts alleged to have been admitted on his personal knowledge and not otherwise: A.I.R. 1994 All. 174.

There is a marked difference between an admission and estoppel. Admissions being declarations against an interest are good evidence but they are not conclusive and a party is always at liberty to withdraw admissions by proving that they are mistaken or untrue. But estoppel creates an absolute bar: A.I.R. 1982 S.C. 121: (1982) 1 S.C.C. 223.

Distinction between admission by a party and admission by a witness. *See* 1977 W.L.N.(U.C.) 42 (Raj.).

Witnesses produced to prove admission, unable to give what actually were the words used by party where he was alleged to have admitted the title of opposite party—Statements cannot be taken to prove the admission: Madh.B.L.J. (1954) H.C.R. 232: A.I.R. 1954 Madh. Bh. 58.

Admissions made by infants before the proceedings are commenced are accepted by Courts in the normal course of events and they are given whatever weight the Court may consider proper to attribute to them: (1958) 1 W.L.R. 177 (2).

That the party making the statement, that the consideration under the document in question was paid by a certain person, was a child at the date of the document is not a ground referred to in S. 17, Evidence Act, which will hinder the statement from being regarded as an 'admission' under law, by supposing that because of his childhood at that time he could not be expected to speak out of personal knowledge: 1957 Ker.L.J. 558: A.I.R. 1957 Ker. 178.

A plea of a particular status taken on the basis of a document is a matter which relates to the interpretation of that particular document and cannot operate as an admission under S. 17. The nature of the document and the status of the parties concerned have to be determined according to the terms of the document itself and by a competent Court. No amount of interpretation of the document by a party can, therefore, operate as an admission: 1940 O.W.N. 1233.

The admission of a party cannot make a document a registered one unless there has been due compliance with the Registration Act. Thus, if the defendant had in a previous suit between the parties admitted that the document in suit had been duly registered, it would not be sufficient to hold that the document is duly registered in the absence of any circumstances showing that the admission amounts to estoppel: A.I.R. 1963 Mys. 335.

A draft deed of partition prepared according to the instructions of the defendant but not signed by both the parties might not amount to a contract, nevertheless, if it is approved and signed only by the defendant, *held*, it would amount to an admission: A.I.R. 1987 Cal. 69 (D.B.).

Where a brother suing his other brother and purchasers, for partition of joint family property was confronted with his deed of relinquishment admittedly written and signed by him prior to the suit undoubtedly indicating that the plaintiff had received his share from the joint family property and had let off his right, title and interest in the other joint family properties, *held*, the deed is an unequivocal admission sufficient to defeat the plaintiff's claim: (1991-1) 11 Guj.L.H. 566.

Where the husband in an earlier deed had described the property as owned by his wife but, subsequently, without any explanation therefor claimed it as held *benami* by the wife, *held*, he was bound by the earlier admission; his claim is liable to be dismissed: A.I.R. 1978 N.O.C. 228 (Pat.) (D.B.).

Where a woman had admitted in her certificate for obtaining family pension that she was a widow of a specific person and had not married after his death, *held*, this is a binding admission and she was precluded from asserting that she was wife of another person, having contracted marriage under *gharbasa* marriage by performance of village custom or rites: (1992) 3 W.L.C. 524 (Raj.).

As to admissibility of statement of accused to police as to admission, *see* 44 Cal.L.J. 253: A.I.R. 1927 Cal. 17. As to effect of erroneous admission, *see* 77 I.C. 875: A.I.R. 1928 All. 575.

An admission can be shown to be erroneous and can be withdrawn: (1988) 2 Hindu L.R. 359 (P.&H.) (D.B.); A.I.R. 1931 Lah. 6; A.I.R. 1967 Ori. 110: 1967 Cr.L.J. 1036; A.I.R. 1972 P.&H. 333; 1983 M.P.W.N. 245.

An admission by a witness put forward by one side as a witness of truth is not to be entirely disregarded as evidence against that side merely because, the matter in question being outside his personal knowledge, his statement (if to the opposite effect) would not be evidence in his favour: 80 Cal.L.J. 297.

It is more satisfactory if a body entrusted with functions such as the customs authorities are entrusted with, takes the precaution of getting the admission of the accused in writing when its decision is mainly to depend upon such admission: (1961) 1 S.C.R. 933: A.I.R. 1961 S.C. 264.

On a question as to who under the law or custom is entitled to succeed, the statement of a witness as to his notion of the law or custom is not binding on the party: A.I.R. 1963 Punj. 66.

Admissions are relevant against the maker thereof and as laid down in S. 31, they are not conclusive proof of the matters admitted, but they may operate as estoppel: (1988) 2 Hindu L.R. 359 (P.&H.) (D.B.). However, when the other party had not altered his position to his prejudice, the person making the admission may show that it is not true and cannot be acted upon: (1971) 2 Mys.L.J. 619.

An admission is not conclusive unless it amounts to estoppel. It may be proved to be wrong; but unless so proved, it is a very strong piece of evidence against the maker thereof and is decisive of the matter, though not conclusive: (1968) 34 Cut.L.T. 328: I.L.R. (1968) Cut. 87: A.I.R. 1968 Ori. 99.

An admission is not conclusive even of a matter admitted under S. 31; the maker is at liberty to prove that the admission was made under a mistake; where, however, no attempt is made to prove it so, it is a strong evidence against the maker and his successor-in-interest whom it binds. Where a fresh suit was filed after permission to withdraw the previous one, not on the ground that the admission in the previous suit of certain facts was mistaken, but on the ground that some necessary parties had been left out and no attempt is made to rebut the admission made in the previous plaint, the admission remains binding on the plaintiff. Suits may come and go, withdrawn with or without liberty to sue afresh, dismissed or decreed—no matter which—but statements made therein—no matter where, in pleadings, petitions, affidavits or evidence—remain for ever and for all purposes allowed by law; such as to be proceeded with as admissions when they are found to be such so long as they are not rebutted, or to be confronted with under S. 145 of the Evidence Act. Otherwise the Court no less the party interested will be deprived of very valuable evidence, nothing to say of premium being put on reckless allegations with no apprehension of the makers thereof coming to grief in future for such glibness: (1967-68) 72 Cal.W.N. 867: A.I.R. 1968 Cal. 550.

Statement explaining a discrepancy in accounts maintained by Secretary of a Co-operative Society in reply to a Memo from the Co-operative Registrar—Registrar entitled to call for information under Ss. 54 and 60 (*b*) of the Bombay Co-operative Societies Act—Statement in reply is an admission under

S. 17 and not hit by S. 24: 1969 Cr. L.J. 791: A.I.R. 1969 Tripura 31.

Where a person, who is alleged to have made an admission regarding his status in an agreement with the Government, files a suit for a declaration as to his status as against others, the Government is neither a necessary nor a proper party to this question which is independent of the validity or invalidity of the agreement. As between the parties to the suit, it will be necessary to consider whether the statement in the agreement amounts to the admission claimed, and, if so, to consider its evidential value alongwith the other evidence, as S. 31 expressly provides that admissions are not conclusive proof of the matters admitted. Even if it amounts to a clear admission it will not act as a bar to the suit: 63 I.A. 248: I.L.R. 60 Bom. 634: A.I.R. 1935 P.C. 150: 71 M.L.J. 691 (P.C.). Two different statements in prior and subsequent documents—Value of. *See* 1957 Raj.L.W. 254: A.I.R. 1957 Raj. 261.

Admission in application for visa—Effect of. *See* (1957-58) 62 Cal.W.N. 589.

Where in an election petition, the issue involved was regarding the age of the elected candidate on the date of the scrutiny of his nomination and there were a number of clear admissions in prior declarations precisely and deliberately made in solemn documents by him which admissions were made *ante litem motam* during the decade preceding the election in question, *held*, these admissions were entitled to great weight and had shifted the burden on to the candidate to show that they were incorrect: A.I.R. 1977 S.C. 1724: (1977) 3 S.C.C. 540: (1977) 3 S.C.R. 538.

Where the main relief sought for was declaration of title and the consequential relief was injunction and partition was set up by way of evidence to the main relief, *held*, as in such a case question of possession became a collateral fact, admissions contained in an unregistered partition deed could be received in evidence to prove possession. [1969 S.C.D. 1158, Rel. on]: 1983 Hindu L.R. 11 (Karn.); (1981) 94 Mad.L.W. 764.

Where natural succession is sought to be displaced by alleging an adoption, the burden of proving the factum and validity of the adoption lies on the party who alleges it, though on proof of certain admissions, in the process of evaluation of the evidence, the onus of proof may shift. On this principle, when an admission is proved, it may reasonably be presumed to be true until the presumption is rebutted: (1968) 34 Cut. L.T. 890.

Merely because a person performed funeral rites of his paternal issueless uncle or used to live with him during vacations raises no presumption of adoption; the adoption and performance of the rights therefor have to be independently established. That is all the more true when one of the two wives of the deceased had denied the adoption and the other had admitted: (1994) 2 An.L.T. 445.

Where the fact in issue was whether or not the plaintiff was the adopted son of *G* and statements made in sale deeds by some defendants were sought to be used as admissions, *held*, those defendants not being jointly interested in the suit property would not be affected either way by the decision; their statements were of no assistance as admissions to the plaintiff: A.I.R. 1974 Ori. 120: (1973) 1 Cut.W.R. 809 (D.B.). *See* also (1988) 1 Raj.L.R. 506.

A cheque drawn by a person in settlement of a debt and encashed undoubtedly amounts to an admission by its writer of the debt owed by him to the drawee; it is an admission of the liability to pay the debt even if the cheque is dishonoured subsequently. Whether or not it amounts to an admission of the debt is to be determined with reference to the point of time when the cheque was issued; an admission does not cease to be an admission merely because it is subsequently retracted. The factum of an admission is to be determined from the statement and not from the mental process underlying or accompanying the statement: A.I.R. 1981 Pat. 187: 1981 B.L.J. 422: 1981 B.L.J.R. 537: 1981 Pat.L.J.R. 327.

2. Admission to be clear and unambiguous.—Admission must be unambiguous and clear: A.I.R. 1960 Pat. 407.

In order to make the admissions binding on the party making them they should have been clearly and unequivocally made: (1989) 1 Hindu L.R. 125: (1989) 1 Rev.L.R. 145 (P.&H.).

An admission must be clear, precise, not vague or ambiguous—If an admission is capable of two interpretations, an interpretation unfavourable to the person making it should not be put on his admission: (1960) 62 Bom. L.R. 322: A.I.R. 1961 Bom. 169.

In order to bind a party by his admission, the admission must be clear, precise and unambiguous. An admission is only a piece of evidence and the weight to be attached to it depends upon the circumstances under which it has been made. Thus, before the right of a party can be considered to have been defeated on the basis of an alleged admission made by him in a prior litigation, the implication of the statement must be clear and conclusive. There should be no doubt or ambiguity about the alleged admission: A.I.R. 1973 Raj. 208; A.I.R. 1971 S.C. 1542; 1977 R.D. 419 (All.).

A party's admission, as defined in Ss. 17 to 20, fulfilling the requirements of S. 21, is substantive evidence *proprio vigore*. An admission, if clearly and unequivocally made, is the best evidence against the party making it and though not conclusive, shifts the onus on to the maker on the principle that "What a party himself admits to be true may reasonably be presumed to be so and until the presumption was rebutted, the fact admitted must be taken to be established": A.I.R. 1977 S.C. 1724: (1977) 3 S.C.C. 540: (1977) 3 S.C.R. 538.

An admission in order to be competent and to have the value and effect should be clear, certain and definite, and not ambiguous, vague and confused. Every admission should be given plain, literal and fair meaning and its scope should neither be enlarged nor restricted on the basis of suspicion or surmises: (1990) 3 Karn.L.J. 473.

The admission to be binding on a person must be very specific and should not be vague; and an admission on a question of fact is binding on a party unless it is proved to be contrary or has been successfully withdrawn: A.I.R. 1994 All. 174.

Unless an express reference has been made to a witness on a certain question, his statement will not be constitute an admission as regards that question: L.R. 2 A. 204.

Vague admission is no admission.—*See* 21 All.L.J. 869: A.I.R. 1924 All. 193.

Stray sentences elicited in the cross-examination could hardly be construed as admission. Before the right of a party can be considered to have been defeated on the basis of an alleged admission by him, the implication of the statement made by him must be clear and conclusive. There should not be any doubt or ambiguity about the alleged admission and to examine whether there is ambiguity in the admission, it would be necessary for the Court to read the other parts of the evidence and the stand taken by him in the pleadings: A.I.R. 1981 Karn. 40: I.L.R. (1981) Karn. 78.

3. 'Statement'—Meaning of.—*See* (1959) 1 M.L.J. (S.C.) 101: 1959 Cr.L.J. 389: A.I.R. 1959 S.C. 356. The word 'statement' has been used in its primary meaning, namely, something that is stated. Under Ss. 17 and 21 statements made by persons may be used as admissions against them even though they may not have been communicated to any other person: A.I.R. 1973 Mys. 280.

4. Admission by conduct.—Admission by conduct—Defendant remaining *ex parte*—He cannot be deemed to have admitted the claim: A.I.R. 1958 Ker. 203.

The explanation of any admission or conduct must come from the party itself, if alive and able to depose; the Court is not to form an explanation of its own if it is not offered by the party: A.I.R. 1971 All. 29 (D.B.).

Mere conduct is not admission for making it eligible to be used as admission under S. 21. Thus, where the trustees, not being fully conscious of their rights or not being aware of the true state of law or facts, yielded to the dictates of the Board of Religious Trusts and submitted returns, *held*, the statements contained in such returns could not amount to an admission of the fact that the trust in question was a public one. [1968 Pat.L.J.R. 507: I.L.R. 46 Pat. 23, Rel. on]: A.I.R. 1974 Pat. 95: 1973 Pat.L.J.R. 509 (D.B.).

5. Admission regarding landlord-tenant relationship.—Though the statement made by the landlord in the petition for fixing of fair rent would amount to an admission, yet such an admission can be explained as it is open to the Court to fix the rent at a value higher than that stated by the landlord: (1993) 1 M.L.J. 232.

Deposit of rent under S. 17(1) of W.B. Premises Tenancy Act, 1956 cannot operate as an admission of the relationship of landlord and tenant within the meaning of S. 17 of the Evidence Act: A.I.R. 1972 Cal. 446: (1971-72) 76 Cal.W.N. 397.

Mere acceptance of rent does not constitute settlement of land, nor would the filing of an arrears of rent suit constitute such a settlement. But the latter would operate as an admission under S. 17 against the zamindar: 1941 All.W.R. (Rev.) 454: 1941 R.D. 414. *See* also 1944 R.D. 346.

Admissibility of entries in counterfoils of rent receipt. *See* (1982) 2 Guj.L.H. 89.

Where in a suit for eviction the defendant admitted to be a tenant in disputed property but stated that he has never paid rent to plaintiff, *held*, relationship not established; such admission is of no consequence and does not operate as estoppel: 1982 M.P.W.N. 472.

Where in her earlier statement made in a revenue Court, the landlady had admitted that a person was her tenant and in the subsequent proceedings in civil Court under the Tenancy Act the said statement was put to her in the cross-examination and she admitted that it was correctly recorded, *held*, the admission of the landlady was substantive evidence and could be relied upon: A.I.R. 1976 Bom. 219.

A declaration made to the Municipal Corporation by a person to the effect that he was a tenant in the suit premises, *held*, in a subsequent suit for possession and *mesne profits*, such a declaration can be treated as an admission that he was in the permissive possession of the suit premises, when such admission had been duly proved: A.I.R. 1974 Bom. 12: 1973 Mah.L.J. 771: I.L.R. (1974) Bom. 816.

Where a suit was instituted by a partner of a registered firm claiming to be a tenant as proprietor of the firm but later on he sought an amendment in the plaint so as to substitute the firm as the plaintiff-tenant, which application was dismissed, the admission fell under S. 11(2) and was relevant for making probable or improbable the existence or non-existence of the fact in issue, that is, the plaintiff's tenancy; whether the admission amounts to an estoppel or not, but it certainly is evidence but not 'conclusive proof'. [A.I.R. 1956 S.C. 593, Rel. on]: A.I.R. 1972 Del. 221.

Evidence by the real owner and the tenant that the house belonged to the *benamidar*, *held*, is no admission; it is like any other evidence to be considered by the Court: 1979 B.L.J.R. 296.

Admission—Value of—Village forming part of Tanjore Palace Estate—Lands, treated by Raja as separate property — Effect of seizure by Government and subsequent regrant—Eviction of tenants in long possession by alienee from purchase and in execution—Burden of proof—Admission by tenants—Binding nature of: (1957) 1 M.L.J. 72.

6. Income-tax proceedings/records.—An admission is no doubt a relevant piece of evidence, but it is never conclusive. It is all the more so in the matter of an assessment to tax which has to conform to Art. 265 of the Constitution of India. So far as an assessment to tax is concerned, it is open to the assessee who made an admission to show that it is incorrect. If he puts forward such a plea, he should be given a proper opportunity to show that it is so. When the assessee contends that he has committed a mistake in making the admission, it cannot be relied on without first considering the said contention. Thus, while an admission made by an assessee is relevant, it is not conclusive. It is open to the assessee to explain or clarify under what circumstances it was made, or to prove that what was stated did not reflect the true state of affairs. But in the absence of any demur or explanation therefor, an admission is almost conclusive regarding the facts contained therein: A.I.R. 1995 Ker. 62.

Where in a suit for partition between a father and his two sons their respective shares in the property were ascertained, in the absence of any contract or other material on record, on the basis of their wealth and income-tax assessment orders containing their respective admissions, *held*, though the orders were not admissible under Ss. 40 to 42 but they were certainly admissible under S. 43: A.I.R. 1991 Del. 325.

Admission made by *karta* before Income-tax Authorities would be binding on the coparcenary, where the *karta* has not acted against the interest of the family: (1973) 2 Mys.L.J. 337.

Waiver of notice under S. 34, Income-tax Act by Counsel—Not binding on client: A.I.R. 1966 Cal. 438.

Use of statement recorded under S.131 of the Income-tax Act, 1961 as an admission. *See* (1986) 99 Mad.L.W. (S.N.) 61.

Where in a statement made by a firm in support of income returns, the suit item is shown as a debt owing by the firm to the

plaintiff, that surely constitutes an admission of liability of the firm to the plaintiff in respect of the amount mentioned therein: (1957) 2 An.W.R. 499.

Where in an eviction case on the ground of sub-letting, the affidavit filed by the alleged sub-tenant before the Income-tax Authorities claiming to be in exclusive possession as a tenant, was relied upon for proving sub-letting and that such admission was binding on the tenant, *held*, tenant being not a party to the said affidavit signed by the alleged sub-tenant, admission made by the latter in said affidavit was inadmissible and did not bind the tenant: (1992) 1 S.C.C. 143: A.I.R. 1992 S.C. 123: (1992) 19 All.L.R. 242: (1992) 46 Del.L.T. 6.

7. Entries in account books.—(*See* also S. 34, *infra*).While entries made by one partner without the knowledge of the other would not prejudice the latter as between himself and his co-owners, as regards partnership books these being accessible to all the partners and being kept under the surveillance of them all, they are *prima facie* evidence against each of them and, therefore, also for any of them against the others: I.L.R. (1969) 1 Mad. 734: A.I.R. 1969 Mad. 257.

As to admissions gathered from entries in account books, *see* 23 Mad.L.W. 272: 96 I.C. 423: A.I.R. 1926 Mad. 955. *See* also A.I.R. 1937 Cal. 433 (S.B.).

8. Admission in First Information Report.—(*See* also S. 21, Note 6; S. 24, Note 3; S. 25, Note 3; S. 27, Note 8, *infra*). It is valuable corroborative evidence. It cannot support a conviction, when the maker of the report himself is an accused person and cannot, therefore, be examined as a witness: 63 I.C. 822: 22 Cr. L.J. 694 (1).

Entire confession made by the accused in the first information report is inadmissible: (1990) 2 Crimes 288 (Madh. Pra.).

But where such a report contains an admission not amounting to a confession, the admission is admissible in evidence against the accused: 63 I.C. 822: 22 Cr.L.J. 694 (1).

Admission—First information report—Use of: 1958 Cr.L.J. 129: A.I.R. 1958 All. 90.

First information report—Admissibility as admission of accused: 1959 All.Cr.R. 267: 1959 All.L.J. 340.

The accused, immediately after he had committed a crime, appeared before an officer in charge of a police thana and made a statement to him which disclosed the facts that led to the actual commission of the crime and his subsequent conduct. It was treated as the first information report by the prosecution. On the question of admissibility of the statement in evidence, *held*, that if the statement be treated as a statement made by an accused to a Police Officer during the course of an investigation it could not be used as evidence in view of the provisions of S. 162, Cr.P.Code, but there was no bar to the use of such a statement made by the accused to a Police Officer before the investigation of the case had commenced as an admission under S. 17 of the Evidence Act unless it was hit by the provisions of Ss. 24 and 25 of the Act. There was no bar to splitting up of the first information report where the confessional part was separable from the rest of the statements which were otherwise admissible and to exclude from it any of the inadmissible parts and admitting the rest of it. The statement read as a whole did not appear to have been made as a result of any inducement, promise or threat by any person in authority or otherwise, as was clear from the fact that the accused appeared at the thana on his own accord and made his statement voluntarily.

The statement of the accused in the instant case examined in the light of the provisions of Ss. 17, 25 and 27 of the Evidence Act divided itself into three parts—First was introductory to the relevant fact referring to the motive, opportunity and description leading to the crime. Second part related to the commission of the actual crime and the third related to the after events as to his conduct and his confessional statement leading to the discovery of certain facts. Thus, it was only the second part dealing with the actual commission of the crime that became inadmissible in evidence under S. 25 and the whole first information report need not be excluded from consideration: (1964) 1 Cr. L.J. 528: A.I.R. 1964 Pat. 210.

9. Admission and confession.—(*See* also S. 21, Note 4, *infra*). All confessions are inculpatory admissions on the part of the maker thereof. To be a confession, admission should contain an acknowledgment of the guilt. Therefore, all confessions are admissions, but every admission may not be a confession: 1979 Bom.C.R. 680 (D.B.).

Confession is admission by accused in a criminal case and if he does not incriminate himself, statement cannot be said to be a confession: A.I.R. 1966 Pat. 448.

It is true that whenever there is a statement amounting to an admission or a confession, then the statement should be read as a whole. But it is open to a Court of law to accept the inculpatory part and reject the exculpatory part provided: (*a*) there is other evidence on the record to show the falsity of the exculpatory part, and (*b*) besides the confession there are other materials on the record establishing or indicating the guilt of the accused. Thus, the inculpatory part by itself cannot form the sole basis for conviction even if there are other materials on the record to show the falsity of the exculpatory part: (1963) 2 Cr.L.J. 611: (1963) 4 Guj.L.R. 1088: I.L.R. (1963) Guj. 1007: A.I.R. 1963 Guj. 312.

Admission and confession—Distinction: 1959 Cr.L.J. 940: A.I.R. 1959 All. 518.

Admission would mean an admission of all the facts constituting the offence; simply saying that I am guilty of the charge does not constitute an admission of guilt. Further, the accused's plea should be recorded as nearly as possible in his words, otherwise the appellate Court is deprived of the previlege to examine as to whether the plea made by the accused amounts to admission of guilt or not. Where accused stated that he was guilty of charge as given in the charge sheet and further there was no plea of guilt recorded by the Magistrate in the words of the accused, *held*, the alleged admission did not constitute an admission in the eyes of law: 1994 Cr.L.J. 375 (Gau.).

The Customs Officers who are empowered under S. 53 of the Narcotic Drugs and Psychotropic Substances Act, 1985 to be Police Station Officers are not Police Officers and any confessions made before them are admissible in evidence under S. 17 and the same is not hit by S. 25 or S. 26: 1993 Cr.L.J. 1310 (Pat.); (1989) 1 Bom.C.R. 503; (1988) 2 Guj.L.H. 531: 1989 Cr.L.J. 860; 1988 All.L.J. 441; A.I.R. 1991 S.C. 45: 1991 Cr.L.J. 97: (1990) 2 S.C.C. 409: (1990) 41 Del.L.T. 49: (1990) 2 Crimes 435 affirming (1989) 37 Del.L.T. 362: 1989 Cr.L.J. (N.O.C.) 199: (1989) 3 Crimes 146. *See* also 1988 Raj.Cr.C. 462. *See* also S. 25, Note 4; S. 26, Note 4, *infra*.

10. Admission on point of law.—Admission on point of law has no force against party making it: A.I.R. 1957 Raj. 267: 1957 Raj.L.W. 290; A.I.R. 1928 Lah. 779; A.I.R. 1929 Lah. 879; A.I.R. 1929 Nag. 343. There cannot be an admission regarding the operation of law. If a person could not succeed to a holding under the law, an admission that such a person succeeded to the holding cannot confer on him any tenancy rights: 1942 O.W.N. (B.R.) 198: 1942 O.A. (Supp.) 165. The question whether or not a person is entitled to succeed as the heir of a deceased person is a question of law and there can be no legal admission about it. Where a landholder acquiesces in a person continuing to remain in possession of a holding under the impression that he was the heir of the deceased tenant, if it is later on found that he was not the heir, the acquiescence in his possession would only operate as a licence which can be revoked at will and the landholder would not be estopped from ejecting him: 1942 All.W.R. (Rev.) 212: 1942 O.A. (Supp.) 238: 1942 O.W.N. (B.R.) 340. *See* also 1944 R.D. 346.

A concession made on a point of law by its Counsel will not bind the party, for no estoppel can be pleaded against a statute: 1981 Hindu L.R. 445 (J.&K.); A.I.R. 1977 N.O.C. 246 (Him. Pra.); 1974 Punj.L.J. 1; A.I.R. 1966 Pat. 235; (1963) 65 Punj.L.R. 792; A.I.R. 1956 Manipur 18.

Though the defence expressly stated that they were not urging that a certain statement was wrongly admitted in evidence, their concession will not justify the Court to depend upon it for any purpose: I.L.R. (1957) Ker. 781: 1957 M.L.J. (Cr.) 662: A.I.R. 1958 Ker. 8.

An admission in so far as facts are concerned would bind the maker of the admission but not in so far as it relates to a question of law: (1964) 1 S.C.R. 316: A.I.R. 1963 S.C. 1165. As to who can make binding admissions, *see* (1921-22) 26 Cal.W.N. 273: A.I.R. 1922 P.C. 102.

An admission made in ignorance of legal rights or under duress cannot bind its maker. Thus, where a candidate, very anxious to appear in Part II of the L.L.B. examination, gave an undertaking to the University to file his employer's permission therefor when in fact no such permission was necessary or to abide by any order the University might pass, *held*, the undertaking was given *in terro rem* and in complete ignorance of his legal rights; as the University was bent on prohibiting him from taking the examination he had no alternative but to write the letter; the letter would not put him out of Court in case he challenged cancellation of his candidature by the University: A.I.R. 1976 S.C. 376: (1976) 1 S.C.C. 311: 1976 U.J. (S.C.) 15: (1976) 2 S.C.R. 722.

11. Admission regarding contents of document.— [*See* also Ss. 61 and 90, *infra*]. While a document is marked on its formal proof being waived, the party relying upon it need not examine any witness to prove it formally, that, however, does not amount to an admission of the document's contents: (1991) 2 Hindu L.R. 428 (Cal.).

Merely because documents more than 30 years old are presumed to be duly executed raises no presumption that their contents are true. But once the execution of such a document is presumed, it would amount to the executant's admission about the truth of the statements in the recitals; the third party, not a signatory to the document, may not be bound by it but the admission can be pressed in service against the executant's successor-in-interest; that is the combined effect of Ss. 17, 18(2) and 21: A.I.R. 1981 Guj. 142: (1981) 22 Guj.L.R. 389.

Admission of mere signatures/thumb impression—Whether admission of contents of document.—Where a party only admits the signature and also explains the circumstances which led to his signing the document without knowing its contents, it cannot be said that the party has admitted its execution. Execution implies conscious execution and knowledge of its contents. Thus, where a party merely admits the thumb impression or his signatures on a document but does not admit that he executed the document in the sense that he subscribed to the contents thereof, it cannot be said that the party has admitted the execution. [A.I.R. 1957 Pat. 64; A.I.R. 1931 Pat. 266 and 1968 All.L.J. 480, Rel. on; A.I.R. 1962 Raj. 231, Dissented from]: A.I.R. 1980 J.&K. 54 (D.B.); A.I.R. 1976 All. 23: 1976 All.L.J. 656; A.I.R. 1975 Mad. 333: (1975) 88 Mad.L.W. 265.

Admission of signature of—On document—If tantamount to admission of execution of document by that person—It is one thing to admit signature of a person on a document and quite another thing which has different legal implications to admit that that person whose signature is identified by the deponent has executed the document: 1969 Mah.L.J. 838: (1970) 72 Bom.L.R. 32: A.I.R. 1970 Bom. 160.

12. Section 17 *vis-a-vis* section 145.—Admissions must be clear if they are to be used against the person making them. They are substantive evidence by themselves in view of Ss. 17 and 21 of the Evidence Act, though they are not conclusive proof of the matters admitted. The admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether such party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions. The purpose of contradicting the witness under S. 145 of the Evidence Act is quite different from the purpose of proving the admission. Admission is substantive evidence of the fact admitted while a previous statement used to contradict a witness does not become substantive evidence and only serves the purpose of throwing doubt on the veracity of the witness. Weight to be attached to an admission made by a party is a matter different from its use as admissible evidence: (1966) 1 S.C.W.R. 222: A.I.R. 1966 S.C. 405; (1972) 38 Cut.L.T. 161; A.I.R. 1971 P.&H. 177 (D.B.); 1984 M.P.L.J. (N.O.C.) 71; 1991 Punj.L.J. 361: (1991-2) 100 Punj.L.R. 529.

The object of S. 145 is to give the witness a chance of explaining the discrepancy or inconsistency and to clear up the broad point of ambiguity or dispute; but this procedure does not apply to admissions in view of Ss. 17 and 21. The purpose of contradicting the witness under S. 145 is quite different from the

18. Admission by party to proceeding or his agent.—Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorised by him to make them, are admissions.

by suitor in representative character.—Statements made by parties to suits, suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character.

---

purpose of proving the admission: A.I.R. 1971 Pat. 215 (D.B.).

Admission in prior proceedings—Mutation petition—Admission by party adverse to the position taken by him in the suit is admissible against him—He need not be confronted with it while in the witness box—Difference between purpose of proof of admission and earlier contradictory statement: I.L.R. (1966) Cut. 483.

13. Miscellaneous.—Industrial Dispute—Charge of illegal gratification—Workman answering that some times he used to feed boys alleged to have given money and some times they gave money of their own accord—*Held*, there was no admission of facts constituting offence under Cl. 10(*a*)(3) of Standing Orders: A.I.R. 1966 Assam 138.

Where in a case of a deported foreigner's surreptitious re-entry, his earlier deportation was proved by documentary evidence and the Counsel for the accused admitted the genuineness of the Police Officer's letters containing details of the earlier deportation, *held*, the contents of the letter stood admitted and proved. [1981 Cr.L.J. 379 (All.), Rel. on]: 1982 All.L.J. 703.

Admission — Construction — *A* stating that *A* and *B* are monthly joint tenants under the landlord of certain premises—This must be regarded as admission on part of *A* that *B* is alive and not that he is dead—S. 108 is ruled out and S. 107 is attracted—*A* must prove that *B* is dead: (1963-64) 68 Cal.W.N. 786: 1963 Cal.L.J. 75.

Section 18—Synopsis.

1. Scope.

2. Recitals in documents—Relevancy as admission.

3. Admissions by parties to suit.

4. Admission to be taken as a whole.

5. Admission by agent.

6. Admissions by guardians, etc.

7. Admissions by persons in joint interest.

8. Admission by co-owner.

9. Admission by partner.

10. Admission by member of community.

11. Admission by predecessor-in-interest.

12. Admission by co-defendant.

13. Admission by landlord.

14. Admissions by counsel, attorneys and pleaders.

15. Admissions by accused.

16. Admission in pleading/written statement.

17. Admission in pleading/written statement to be read as a whole.

18. Admission in previous litigation.

19. Admission regarding relationship of husband and wife.

20. Admission by person from whom interest derived.

21. Miscellaneous.

---

1. Scope.—"Proceedings"—Meaning of: 146 I.C. 653: A.I.R. 1933 Rang. 292. Where a certain fact was sought to be proved by the plaintiff by referring to an admission contained in a document and the defendant remained *ex parte*, *held*, that the admission should be given effect to unless there was anything in the plaintiff's own evidence contradicting it. Such an admission is presumptive evidence: A.I.R. 1926 Lah. 299. For an admission to be relevant it should be shown that the person who made it had an interest at the time of making it within S. 18: 21 I.C. 174: 19 Cal.L.J. 1.

The statement of one person cannot be regarded as admission of another person merely on the allegation that the two are in collusion: 151 I.C. 261: A.I.R. 1934 All. 684.

Statements made by—

(1) by party interested in subject-matter.—persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or

(2) by person from whom interest derived.—persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

are admissions, if they are made during the continuance of the interest of the persons making the statements.

Statements by previous mahants cannot be regarded as admissions binding on the present incumbent of the office: I.L.R. 12 Lah. 497: A.I.R. 1931 Lah. 161.

Admission by husband respecting a property—Not binding on the wife unless it was established that she derived her title through him: I.L.R. (1964) Cut. 274.

There is no requirement of the Evidence Act that the statements or admissions of a person cannot be read against him if they were not adverse to his interest when made. Such an argument unreasonably restricts the opportunity to prove the true state of affairs on the party's own showing and to demolish his subsequent claim as self-contradictory: A.I.R. 1977 S.C. 409: (1977) 1 S.C.C. 60: (1977) 1 S.C.R. 967; 1995 Punj.L.J. 267.

Admissions adversely affecting property by previous owner are not admissible in evidence after he has parted with the property: 1963 M.P.L.J. (Notes) 171.

Admission, to be relied upon, must be unequivocal—Relying upon unclear statements as admissions is hazardous: I.L.R. (1964) Cut. 274.

Non-confessional statements made under S. 164, Cr.P. Code—Statements are evidence if relevant and admissible: A.I.R. 1969 Ori. 245.

Suit for possession of house by mortgagor — Mortgagee admitting mortgage deed in lower Court—Suit contested only on ground that mortgage was of particular type different from usufructuary or possessory mortgage—Plea taken in second appeal that mortgagor failed to prove mortgage deed by not adducing evidence as to attestation as required under S. 59, T.P. Act—*Held*, admission of mortgagee in lower Court was decisive—Mortgagee could not be allowed to wriggle out of his admission on new plea subsequently raised: (1969) 35 Cut.L.T. 821.

Where a document embodying a statement made by a person (a lady in the instant case) to a Judicial Magistrate was headed with particulars such as her name, her father's name, her husband's name, her age, occupation and residence, *held*, the particulars must be presumed to have been furnished by the lady herself to the Magistrate and not to have been taken down by him at the instance of somebody else. In view of such an admission subsequent denial by her about giving out her husband's name cannot be accepted: 1970 Cr.L.J. 93 (Punj.) (S.B.).

Where in a petition before the Mamlatdar under Tenancy Act for declaration that they were tenants, the respondents alleged that they were tenants of some plots of the land in dispute and that a third party was tenant of other plots in that land, but on examination, that third party submitted that neither he nor the respondents were tenants, *held*, the evidence given by the third party was not sufficient to negative the claim of the respondents; the provisions of S. 18(1) were not at all applicable to the present case: A.I.R. 1971 Goa 2.

Where an admission was made in a compromise effected between parties to the suit but not incorporated in any decree as the suit itself was dismissed in default, *held*, being a gratuitous admission, it did not amount to an estoppel; it could be withdrawn or shown to be untrue and erroneous as and when it was sought to be relied upon against its maker; it can, however, be considered as a piece of evidence along with other evidence but not as a binding admission; of course, the position would have been different if an executable decree based on it had been passed: (1985) 11 All.L.R. 172: 1984 All.W.C. 1019: 1985 All.L.J. 154.

2. Recitals in documents—Relevancy as admission.—Recital in a mortgage bond as to receipt of consideration is admissible as against a subsequent purchaser: I.L.R. 8 Pat. 766: A.I.R. 1929 Pat. 254. *See* also A.I.R. 1943 Pesh. 17 (Admission by donor in deed of gift that possession is delivered is binding on him). When the recital of boundaries is in a document *inter partes*, the recital is a joint statement made by the parties to the document and, therefore, relevant against all of them as an admission: (1955) 2 M.L.J. 687: A.I.R. 1956 Mad. 226 [Overruled on another point in A.I.R. 1972 Mad. 154: (1971) 84 Mad.L.W. 691: (1972) 1 M.L.J. 317 (D.B.)].

Recitals as to boundaries in documents not *inter partes* are inadmissible in evidence under Ss. 11, 13(*a*) and 32(3) and (5); they can be admitted in evidence by testimony in Court of the documents' executants. [A.I.R. 1915 Mad. 746, Foll.; A.I.R. 1956 Mad. 226, Overruled]: A.I.R. 1972 Mad. 154: (1971) 84 Mad. L.W. 691: (1972) 1 M.L.J. 317 (D.B.).

A person is bound by his admission in the document he has executed. The normal presumption is that his recitals in the document are true. If he seeks to displace this presumption the onus is heavy on him to show that the document signed by him was tainted with illegality or that an untrue statement was obtained with set purpose: I.L.R. (1962) Andh. Pra. 431: A.I.R. 1964 Andh. Pra. 17.

When in a sale deed there is an admission of a party admitting the receipt of consideration, *held*, it is for him to prove by cogent evidence that the statement contained in the document was false: A.I.R. 1971 All. 151.

Where the defendants admitted receiving of the sums mentioned in a voucher and signature thereon, *held*, when that voucher mentioned that the amount was advanced by way of loan, it was for the defendants to prove that the voucher was signed in blank and/or that amount was towards profits: A.I.R. 1992 Bom. 434.

Land tenures—Grant—Post Settlement Inam granted in lieu of service to ancestors of grantees—Evidence about origin and nature of grant not available—Admissions by ancestors of grantee in documents executed by him in favour of plaintiff is strong evidence of existence of occupancy rights: I.L.R. (1963) Cut. 146.

Record of rights—Presumption of correctness—Rebuttal—Admission of party to the contrary—Effect. *See* A.I.R. 1956 Cal. 669.

Release deed—Admission in—Value of—Mere release is ineffective to pass title—It can, however, be used to rebut presumption of correctness of settlement record. *See* A.I.R. 1956 Cal. 669.

Recital in deed by donor that possession was delivered—Effect: (1958) 1 M.L.J. 14: A.I.R. 1958 Mad. 327.

In a suit for adverse possession, the donor's admission contained in the gift deed that possession of the donated house was handed over to the donee on the very day the gift deed was executed, *held*, is not binding on the coparceners of the donor's family, when they did not claim the suit house through the donor, but were claiming the same as coparceners by virtue of their birth in the H.U.F. to which the suit house belonged: A.I.R. 1982 J.&K. 141.

Admission regarding the execution of document will mean not only the signature on the deed of the testator but also all requirements, namely, attestation of the will by the witnesses as well: 1977 R.D. 419 (All.).

3. Admissions by parties to suit.—Such admissions are generally contained in pleading, written statements or depositions. *See* 7 W.R. 249; 9 W.R. 162; 5 Beng.L.R. 529: 14 W.R. (P.C.) 28: 13 M.I.A. 438; 15 W.R. 437; 17 W.R. 372; 22 W.R. 303; 23 W.R. 27.

Such writings (to become admissible) must conform to legal requirements: 24 W.R. 114: I.L.R. 6 Cal. 762. *See* also 21 W.R. 34; 21 W.R. 414.

Effect of not putting a fact in issue. *See* A.I.R. 1958 Manipur 22.

An admission could only be given in evidence against the party making it and not against any other party. The only exceptions to the rule are laid down by Ss. 18 to 20: (1932) 34 Bom.L.R. 35: A.I.R. 1932 Bom. 117. An admission on a pure question of law is not binding upon a party: A.I.R. 1928 Lah. 779: 113 I.C. 99; A.I.R. 1929 Nag. 343: 119 I.C. 698; A.I.R. 1929 Lah. 879: 120 I.C. 532.

On this point, *see* also Note 10 under S. 17, *supra*. But admission as to existence of custom is binding: A.I.R. 1928 Lah. 779: 113 I.C. 99. An admission made by a party in a proceeding is of no value if a decree opposed to it is passed: (1943-44) 48 Cal.W.N. 15.

Admitted fact—Proof: (1956-57) 61 Cal. W.N. 170.

When an admission of a party is satisfactorily proved, it can reasonably be presumed to be true, unless that presumption is satisfactorily rebutted by other evidence. [I.L.R. 29 All. 184 (P.C.), Foll.]: 1956 Nag.L.J. 427: A.I.R. 1956 Nag. 257; I.L.R. (1957) Andh. Pra. 806: A.I.R. 1958 Andh. Pra. 662.

What is admitted by a party to be true must be presumed to be true unless the contrary is shown: A.I.R. 1954 S.C. 355; 1969 Ker.L.R. 1.

It is well-established that what a party himself admits to be true may reasonably be presumed to be so. The express admissions of a party to the suit or admissions implied from his conduct are evidence—Indeed strong evidence against him unless he can prove that such admissions were mistaken or were untrue, but he is not estopped or concluded by them unless another person has been induced to alter his position or condition: A.I.R. 1951 Ori. 313.

Admission—Binding force—Acknowledgment of mortgage by mortgagee—If binding on assignee: A.I.R. 1958 Ker. 307.

Where in a suit for possession, the plaintiff had admitted in his deposition that under an agreement between him and his father, the land mortgaged by an unregistered deed was in sole cultivating possession of his father, a plea not taken by the defendant in his written statement, *held*, an admission made in Court regarding the true state of affairs does not disentitle the other party from succeeding merely for want of such plea; the admission made in evidence was equally effective to non-suit the plaintiff: A.I.R. 1971 Del. 316.

A Court is not free to ignore or get over definite and clear statements of admission made by parties in the box by ascribing them to inadvertence or mistake especially when there is not even a suggestion made in the re-examination to that effect: A.I.R. 1955 Trav.-Co. 199.

Suit for recovery of rent based on title—Admissions made by defendants for long period of time—Proof of title—Sufficiency. *See* (1954) 2 M.L.J. (Andhra) 208.

It is not a correct proposition of law to state that the only kind of admissions by parties to a litigation which will either be relevant to or conclude the matter in issue are admissions operating as estoppels. There are other admissions which are equally, if not more, effective, namely: (*1*) admissions contained in the pleadings in a case which would circumscribe the issues and avoid the necessity for proof; and (*2*) admissions made by parties to a suit on earlier occasions, either in prior proceedings in a Court of law or in statements made out of Court. But the admissions made by one defendant will not bind his co-defendant, though they would bind the party making them: I.L.R. (1951) Trav.-Co. 209: A.I.R. 1951 Trav.-Co. 109.

Court can base its decision on admission of parties—Trial Courts finding on admission of wife and other evidence that child was conceived by petitioner before marriage. It is not right for High Court to remit issue for recording finding on question whether child was conceived after marriage: A.I.R. 1965 S.C. 364.

Admission—Acknowledgment of paternity: (1958) 1 An.W.R. 1: A.I.R. 1958 Andh. Pra. 195.

Statements of a party in letters written by her can be used against her as her admissions, but cannot be used in her favour: A.I.R. 1965 S.C. 364.

Statements by third parties—Admission is not admissible against a person other than the person making it, unless such person can be said to be bound by the admission: (1966) 1 S.C.W.R. 974: A.I.R. 1966 S.C. 1697.

Proceeding under O. 21, R. 97, C.P.Code —Dispute whether house belonged to mother of obstructor or to firm—Affidavit by auction-purchaser—On facts, affidavit held did not amount to admission: A.I.R. 1964 All. 302.

It is open to a defendant to treat a statement made by the plaintiff in evidence as an admission made by the plaintiff and use it against him: (1957) 59 Bom.L.R. 1112: I.L.R. (1958) Bom. 797: A.I.R. 1959 Bom. 504.

4. Admission to be taken as a whole.—The first important rule of the admission is that the whole statement containing the admission must be taken together; the object is only to ascertain what is conceded and may therefore, be presumed to be true; unless the whole is received, the true meaning of part which is evidence against him cannot be ascertained: 1981 B.L.J.R. 649. An admission of any party has to be read in its entirety and no statement out of context can constitute admission of any fact: A.I.R 1991 Madh. Pra. 18.

Every admission should be given plain, literal and fair meaning and its scope should not be widened or restricted on the basis of suspicions or surmises: A.I.R. 1954 Manipur 11. A statement in the nature of an admission has to be taken as a whole. One cannot truncate the statement and take a part and reject another: (1955-56) 60 Cal.W.N. 633: A.I.R. 1956 Cal. 102; A.I.R. 1954 Trav.-Co. 152: 1953 Ker.L.T. 587; A.I.R. 1953 Cal. 530: (1952-53) 57 Cal.W.N. 778 (S.B.); 1956 B.L.J.R. 197: A.I.R. 1957 Pat. 293; (1956-57) 61 Cal.W.N. 483: A.I.R. 1957 Cal. 372.

The entire statement must be taken together; particular passages cannot be selected to the exclusion of the rest. Admission operates merely to shift the onus and raise only a rebuttable presumption: A.I.R. 1924 Nag. 387: 78 I.C. 981; I.L.R. 10 Lah. 694: A.I.R. 1929 Lah. 318.

Admission must be deemed to be exhaustive. It must be read as it stands and it is not permissible to take one part of an admission and reject another part: I.L.R. 49 All. 704: A.I.R. 1927 All. 385.

Though the entire statement containing the admission must be put in and considered, the Court is not bound to believe or disbelieve the statement as a whole. Where there is other evidence in the case, it may, in the light of that evidence, believe one part of the statement and disbelieve the other: I.L.R. (1964) 14 Raj. 26: A.I.R. 1964 Raj. 126.

Before a statement of a party may be used against him as his admission, the statement must be considered as a whole and the Court should not pick out isolated sentences torn from their context.

Another principle governing admissions is that if the statement is ambiguous it must be put to the party who must be given an opportunity of explaining it before it can be used against him as his admission: (1963) 1 Cr.L.J. 724: A.I.R. 1963 All. 260.

5. Admission by agent.—*See* (1900) 2 Bom.L.R. 651. *See* also 12 Pat.L.T. 582: I.L.R. 11 Pat. 50: A.I.R. 1932 Pat. 105. The fact of agency must be proved: 3 Beng.L.R. 273: 46 I.C. 709: 19 Cr.L.J. 789; A.I.R. 1957 Raj. 189.

Where *A* is sought to be bound by an admission made by *B*, the relation of agency between *A* and *B* should be pleaded and established; for in the absence of a proper case made in the pleading and in the absence of any amendment, the case of agency made at the hearing cannot be taken notice of by the Court: A.I.R. 1955 Cal. 594.

Recitals in a document by person alleged to be agent of accused—Before the recitals can be used against accused, in a criminal case, agency must be satisfactorily proved: 1954 Cr.L.J. 1679: A.I.R. 1954 S.C. 660. Statement of agent before Settlement Officer that his principal was a bastard is admissible as an admission: I.L.R. 3 Luck. 416: A.I.R. 1928 Oudh 233.

A person called by a party as his witness cannot be deemed to be his agent within the meaning of S. 18: (1932) 34 Bom.L.R. 35: A.I.R. 1932 Bom. 117. The Home Minister speaks on behalf of the Government as its spokesman and his answers to questions put to him in the House as Home Minister, in relation to matters dealt by him as Home Minister, are admissible in evidence as admissions made by the Government. When Government is a party to the proceedings, these admissions are relevant and admissible under the Evidence Act against the Government. The Crown may, of course, show that the admissions were really not admissions or that they were made under a mistake or that they were not binding on Government for

any other valid reason, but unless this is shown the admissions must be taken in evidence against Government: A.I.R. 1943 Cal. 377 (S.B.). *See* also 219 I.C. 81: A.I.R. 1944 Pesh. 34.

6. Admissions by guardians, etc.—A lunatic or his guardian or the latter's Advocate cannot admit or deny that he is a lunatic; a lunatic, by the very fact of his deranged mind, is unable to know whether he has a sound or unsound mind: (1956) 1 M.L.J. 459.

Admissions by guardians do not generally bind the wards. *See* 10 C.L.R. 377; 20 W.R. 223 (Signature of guardian when not binding on minor; I.L.R. 13 Cal. 292). So also are admissions by *guardian-ad-litem* or next friend (Tay, Evi, 8th Edn., S. 742; Field, 6th Edn., p. 89). There can be no doubt that the *guardian-ad-litem* has the power to make admissions provided they are made in good-faith and for the benefit of the minor. But where the minor had a good title and therefore, the admissions in question cannot be said to have been made for the benefit of the minor and where further the conduct of the *guardian-ad-litem* was also not free from suspicion it must be held that there was want of good faith on the part of the guardian and hence the admissions are not admissible in evidence against minor in any subsequent suit brought by him. Before such an admission can operate as an estoppel against the minor plantiff, it is necessary that it should have induced the other party to act to his prejudice: A.I.R. 1957 Manipur 32. As to admissions by Court of Wards, *see* 24 I.A. 107: I.L.R. 24 Cal. 853 (P.C.).

Statements made by suitor in representative capacity are binding. *See* 1 W.R. 339 (executor). *See* also 8 W.R. 63; 14 W.R. 162.

7. Admissions by persons in joint interest.—When several persons are jointly interested in the subject-matter of a suit, an admission of any one of these persons is receivable, not only against himself but also against the others whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and be made by the person in his character of one jointly interested with the party against whom the evidence is tendered. The requirement of the identity in legal interest between the joint owners is of fundamental importance: 222 I.C. 604: A.I.R. 1946 Pat. 278; I.L.R. (1977) 22 Raj. 107: 1971 W.L.N. 396; A.I.R. 1973 Pat. 310; it is of no consequence whether or not all of such persons are jointly suing or sued against: A.I.R. 1981 Pat. 111 (D.B.).

As a matter of probative value, the admission of a person (such as one joint owner) having precisely the same interest at stake as another (his co-owner), will, in general, be likely to be equally worthy of consideration; there being an identity of legal liability, the two persons may be deemed one so far as it affect the propriety of discrediting one by the statements of the others. An admission of one co-defendant is not receivable against another merely by virtue of his position as a co-party in the litigation. It is not by virtue of that person's relation to the litigation that his admission can be used against the other. The vital point under consideration, is whether there is such priority of obligation or title between two persons as to justify the use of the admission of one against the other; and that must be determined by reference to the relation between the parties at the time the admission is made. Where the admission was made at a time when the parties had no community of interest, it cannot be used: A.I.R. 1954 Madh. Bh. 58.

As to statements by interested persons when binding, *see* 5 W.R. 268; 10 W.R. 89; 14 W.R. 484; 18 W.R. 105: 22 I.C. 714: 19 C.L.J. 1; A.I.R. 1945 Mad. 361: (1945) 1 M.L.J. 378 [Statement by a person jointly interested in the subject-matter of litigation (*i.e.*,) a brother of the party as to heirship of a deceased person is admissible].

Admission by some of brothers who are living undivided, in respect of disputed house property which is the subject-matter of the suit and in which all are jointly interested and amongst whom there is no friction, that their father and the eldest brother, who was given in adoption, held eight annas shares each in disputed property is binding on other brothers: I.L.R. (1962) Cut. 641.

In the case of joint family, the admissions of the father or the admissions of the managing member would not by their own force

bind the other members of the family and the admissions cannot be used against them on the ground that the managing member or the father, as the case may be, did not satisfactorily account for those admissions. The junior members can always prove that the admissions are either untrue or incorrect. If the managing member or the father had made an admission while acting on behalf of the family or for acquiring properties for the family or for protecting the interests of the family and where, what he does is on behalf of himself and on behalf of the members of the family the admission made in that representative character may be used as against all the members. But, if such an admission was made by the managing member or by the father to advance his own interests and to acquire property for himself, and what he acquires would be his own acquisition which he is not bound to share with the other members or the sons, such an admission cannot bind the sons. The position is *a fortiori* if such an admission advances not only the personal interests of the managing member or the father but also prejudicially affects the interests of the other members: I.L.R. (1969) 1 Mad. 459: (1970) 1 M.L.J. 105: A.I.R. 1969 Mad. 329.

Office note put up for sanction of certain amount containing a statement to the effect that this amount was consideration for relinquishment of coparcenary rights by a person in an impartible estate—Same cannot have any probative value nor can be relevant evidence against person who is not a party or signatory to such note: (1961) 1 An.W.R. 183.

When several persons are jointly interested in the subject-matter of the proceedings relating to the grant of patta, the admissions of any one of those persons are receivable against himself and others; provided the admission related to the subject-matter in dispute and is made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. The admissions are, however, rebuttable: I.L.R. (1960) 10 Raj. 6.

8. Admission by co-owner.—An admission of a relevant fact, it is fairly well settled, by a co-owner would operate against all co-owners, whether sued jointly or not, if it satisfied the triple test: (*i*) the admission is about the suit property (*ii*) by a jointly interested co-owner against his own interest (*iii*) but not collusive or fraudulently designed to wholly or partially deprive the other co-owners of their interest in the property. It would then bind all the co-owners or those claiming under them. [A.I.R. 1954 S.C. 355; A.I.R. 1977 S.C. 1724; I.L.R. 11 Cal. 588; A.I.R. 1946 Pat. 278 and A.I.R. 1976 Raj. 249, Foll.]: 1985 R.D. 135.

9. Admission by partner.—*See* I.L.R. 11 Cal. 588. An admission by one partner made in a representative capacity would be evidence against the firm. If in suit against a partnership for damages for infringement of trade mark, one of the partners admits the infringement but disputes the claim for damages, the admission will bind the other partners: 148 I.C. 763: A.I.R. 1934 Lah. 625.

Admissions by partner—Partners of partnership firm though dissolved, continuing to have identical interest in subject-matter of suit—Admission by partner is binding on other partners: 1965 Raj.L.W. 346: I.L.R. (1965) 15 Raj. 1035: A.I.R. 1966 Raj. 229.

10. Admission by member of community.—Statement made by a member of a community to the prejudice of his own right in a disputed graveyard does not bind the other members of his community in the absence of any proof that when he made the statement he occupied a representative capacity: A.I.R. 1949 All. 493: 1950 All.L.J. 21.

11. Admission by predecessor-in-interest.—Statements made by persons from whom the parties to a suit have derived their interest in the subject-matter of the suit are admissible as admissions only when the admissions are of date prior to the date of transfer. A purchaser is not bound by admission made by his vendor subsequent to the purchase made by him: Madh.B.L.J. (1954) H.C.R. 232: A.I.R. 1954 Madh. Bh. 58.

An admission made by a party's predecessor-in-interest in an earlier litigation, *held*, may be used against that party in another proceeding. [A.I.R. 1967 S.C. 341, Rel. on]: 1983 All.W.C. 296. *See* also 1976 W.L.N. (U.C.) 265 (Raj.).

There is a time lag between the recitals and the execution and it can hardly be said that the recitals and the execution are made exactly at the time of the execution. Under S. 47, Registration Act, the instrument after registration takes effect from the date of execution and not from that of registration. But it cannot be argued from this that the recitals

in the sale deed also being made at the time of execution were made at the time when the vendor divests himself of his title. S. 47 cannot be legally extended by implication in its meaning beyond what it expressly provides for. The recitals in the sale deed were statements at a time when interest of the party in the property still continued and those statements of his were admission as against his successor-in-interest: A.I.R. 1957 Cal. 59.

Lease deed containing option for renewal—Lessee exercising the option by registered letter sent to lessor, before expiry of term of lease and prior to lessor's contract for sale of the property to another—Original letter not filed in suit for specific performance of contract for sale but lessor admitting lessee's exercise of option—*Held*, an assignee from lessee is entitled to take advantage of that admission and claim benefit of the option exercised by his assignor in resisting the attempts of transferee from lessor for ejecting him: A.I.R. 1954 Trav.-Co.10.

Any statement, made by a pre-emptor decree-holder after he had transferred the land with all the rights he possessed under the decree, is not a statement made on behalf of the transferee as at that time the pre-emptor transferor had no title in the property: A.I.R. 1953 Punj. 163: I.L.R. (1954) Punj. 15. Admission by predecessor-in-interest—Copies of original. *See* (1953-54) 58 Cal.W.N. 533.

12. Admission by co-defendant.—The general rule is that an admission can only be given in evidence against the party making it and not against any other party. In general, the statements of defence made by one defendant cannot be read in evidence either for or against his co-defendant, the reason being as there is no issue between the defendants, no opportunity for cross-examination is afforded. But this rule has no application to cases where the co-defendants have joint interest. It is not by virtue of a person's relationship to the litigation that the admission of one can be used against the other. It must be because of some privity of title or of obligation. This principle is deducible from S. 18 (1): I.L.R. (1962) Cut. 422: A.I.R. 1963 Ori. 45.

The admission of one defendant contained in a deposition in an earlier suit is not admissible in a subsequent suit against persons who were his co-defendants in the earlier suit: I.L.R. 20 Pat. 855. Admission not to be used against a co-defendant unless it is made in his character of a person jointly interested with the co-defendant: (1925-26) 30 Cal.W.N. 254: A.I.R. 1926 Cal. 705.

Co-defendants—Admission made by one defendant—Admission not binding on co-defendants unless interest of defendants in the suit be joint: A.I.R. 1965 Him. Pra. 32.

Admission by one of several co-defendants—Such admission can only bind the persons making it: 22 W.R. 519: I.L.R. 6 All. 395; I.L.R. 7 All. 353: 2 I.A. 113 (P.C.); 23 W.R. 214; 9 Cal.L.R. 359: 2 Cal.W.N. 166: I.L.R. 11 Cal. 588; A.I.R. 1971 All. 494.

An admission or even confession by a co-defendant is no evidence: (1927) 29 Punj.L.R. 715: A.I.R. 1928 Lah. 679; A.I.R. 1929 Lah. 721: 11 Lah.L.J. 404.

Admission by one of the defendants that the land in suit is ancestral is not binding on the others when they are not represented by him and have independent rights of their own: 122 I.C. 109: A.I.R. 1930 Lah. 238. *See* also 71 Cal.L.J. 200.

Admissions of liability made by some of several defendants in their written statements in the suit will not be evidence against the other defendants who have no opportunity of testing their veracity by cross-examining them. If the plaintiff wants to rely on such admissions he must examine the admitting defendants at the trial and make the admissions evidence: 44 Mys.H.C.R. 499: 18 Mys.L.J. 186.

When a co-defendant, who never appeared in the witness-box, made a statement in the written statement admitting the plaintiff's claim, *held*, his admission is not binding on the other defendant who had no opportunity to cross-examine him: A.I.R. 1982 Him. Pra. 57.

Where in a suit for ejectment against defendants 1 & 2 who were son and mother respectively, the defendant No. 1 had not contested the suit in the trial Court and the suit was contested by the defendant No. 2 on behalf of both the parties, *held*, even then defendant No. 1 will be entitled to file an appeal against the Judgment of the trial Court, but he will not be allowed to shun his disability of forfeiture of tenancy on account of the written statements filed by defendant No. 2 wherein she denied the title of the landlords: A.I.R. 1976 Raj. 249: 1976 Raj.L.W. 212: 1976 W.L.N. 44.

Where the defendant's brother in a document had admitted the defendant's title to suit properties and their alienation by the defendant to the plaintiffs and in their suit for possession of those properties on their title and the denial of execution of the document by the defendant's brother was disbelieved, *held*, the document, relied upon as admission,

and not estoppel, was sufficient evidence to prove the defendant's title to the suit properties and their alienation by the defendant to the plaintiffs: A.I.R. 1971 S.C. 2548.

Where on scrutiny of the previous evidence of one of the co-defendants, the appellate Court considered it to be of no evidentiary value; the question whether his admission would bind the other defendants is of little importance: A.I.R. 1973 Pat. 310.

Where one of the two wives of the deceased, an issueless paternal uncle of the plaintiff, impleaded as a defendant in a suit for partition on the basis of adoption had common interest with the plaintiff and admitted the plaintiff's claim of adoption, *held*, her admission could not be used against the other wife; in fact, she should have been made a co-plaintiff in the suit: (1994) 2 An.L.T. 445.

13. Admission by landlord.—An admission made by a landlord after the tenancy has been created and after the controversy has arisen about the rights of the tenants cannot be said to be an admission by a person from whom the tenants have derived their interest in the subject-matter of the suit within the meaning of S. 18 of the Evidence Act: 1952 Raj.L.W. 133.

14. Admissions by counsel, attorneys and pleaders.—As to circumstances when they are binding on the client and when not, *see* I.L.R. 18 Mad. 73; (1945) 47 Bom.L.R. 114: I.L.R. (1945) Bom. 390: A.I.R. 1945 Bom. 351. Admission by pleader in lower Court cannot be set aside by engaging another pleader in appeal. *See* 102 I.C. 283: A.I.R. 1927 Lah. 248, following 9 W.R. 465; 2 M.I.A. 253; 6 Cal.W.N. 52; I.L.R. 21 Mad. 274; I.L.R. 22 Mad. 538 (adverse opinion expressed by vakil in argument not binding on client); 9 W.R. 375; 6 Cal.W.N. 62; I.L.R. 21 Mad. 724; I.L.R. 22 Mad. 538 (admission of fact by a vakil is binding on client); A.I.R. 1956 Him. Pra. 68 (Do.). But *see* also 17 W.R. (Cr.) 49, where the Court held that such admissions are not binding in criminal cases. *See* also I.L.R. 27 Cal. 421; nor when they relate to matters of law. *See* 18 W.R. 359 at 367; 16 W.R. 246; A.I.R. 1934 All. 531.

Suit for declaring land acquisition proceedings null and void — *Locus standi* of plaintiff questioned — Plaintiff relying on statement of Government Counsel admitting his title to land on date of notification under S. 4 (1), Land Acquisition Act—But statement also asserting valid termination of plaintiff's interest by acquisition and that the acquisition has to be taken as a whole and if full effect is given to it, it will prove fatal to plaintiff's case even if it was sufficient to prove his title on date of notification under S. 4 of Land Acquisition Act: I.L.R. (1969) 1 Cal. 529.

An admission made by a counsel in the course of a proceeding can be withdrawn unless circumstances are such as to give rise to an estoppel. If the other party has acted to his prejudice on the faith of that admission, it may not be allowed to be withdrawn. [(1825) 8 Bing. 119; (1835) 3 Knapp 375, Rel. on]: (1967) 1 An.L.T. 182: A.I.R. 1967 Andh. Pra. 211.

Admission by plaintiff's counsel — On point of law—Not binding on plaintiff: (1963) 65 Punj.L.R. 792. *See* also S. 17, Note 10, *supra*.

The concession on a point of law made by an Advocate will not bind a party. The plea of *res judicata* being a pure question of law can be raised at any stage provided that the necessary evidence is on record: 1966 B.L.J.R. 237: A.I.R. 1966 Pat. 235.

An erroneous concession of law made by an advocate of a party cannot be relied upon for saving the adversary: A.I.R. 1956 Manipur 18.

When it was the clear case of the plaintiffs that they were the owners of the suit land, it cannot be accepted that the plaintiffs' counsel would admit the ownership of the Gram Panchayat treating the plaintiffs as tenants. Thus, where writing to that effect had been made by the trial Judge who had signed it and the signature of the plaintiffs' counsel was on the left side of the Judge's signature, *held*, such a writing could not be said to be an admission of the plaintiffs' counsel: 1995 Punj.L.J. 156.

Where in a suit by a contractor for damages for breach of contract, the contractor (plaintiff) contended that the counsel of the defendant conceded at the time of argument before the Special Referee that on termination of contract, the plaintiff would have been paid certain amount as one months remuneration in lieu of one month's notice, *held*, the lawyer's concession could not be treated as an admission of fact binding on the defendant as there was no occasion for adducing any secondary evidence as the original contract was before the Special Referee: (1988) 2 Cal.L.T. (H.C.) 136 (D.B.).

Where in a prosecution under S. 109

forging a sale deed, the complainant's specimen thumb impressions were taken for comparison with the thumb impressions on the forged document, though not in the presence of the Court but the accused's counsel admitted that they were so taken, *held*, the trial Court could not decline to rely upon the accused's counsel's sworn testimony about something which happened during the trial; the rule that the accused are not bound by their counsel's admission is not attracted in such a case: A.I.R. 1973 S.C. 1100: (1973) 1 S.C.C. 564: 1973 Cr.L.J. 858.

Suggestions put in cross-examination are no evidence at all against the accused and on the basis of such suggestions no inference can be drawn against the accused that he admitted the facts referred to in the suggestions. It is possible that in putting suggestions the lawyer of the accused, if he thinks fit and proper, may not put the entire case of the accused in the cross-examination of a prosecution witness.

Therefore, the accused is entitled to the benefit of the plea set up by the lawyer but it cannot be said that the plea or defence which his lawyer puts forward must bind the accused. The reason is that in a criminal case a lawyer appears to defend the accused and has no implied authority to make admissions against his client during the progress of the litigation either for the purpose of dispensing with proof at the trial or incidentally as to any facts of the case. It is, therefore, evident that role that a defence lawyer plays in a criminal trial is that of assisting the accused in defending his case. The lawyer has no implied authority to admit the guilt or facts incriminating the accused. [A.I.R. 1936 Rang. 1, Rel. on].

There is another principle which is equally to be borne in mind that suggestions made in the cross-examination of prosecution witnesses cannot be used to fill in the gaps in the evidence of prosecution. Burden lies on the prosecution to prove the guilt of the accused. Such suggestions in any case cannot stand higher than the statement of the accused under S. 342 of the Criminal Procedure Code: 1969 Cr.L.J. 409: (1969) 10 Guj. L.R. 245: I.L.R. (1968) Guj. 173: A.I.R. 1969 Guj. 69.

Suggestions put are no evidence at all against the accused. Thus, suggestion by the defence counsel to the prosecutrix, in a prosecution for rape under S. 376, I.P.Code, about consent on her part would not amount to admission of guilt on behalf of the accused: 1991 Cr.L.J. 1925 (Madh. Pra.).

15. Admissions by accused.—It cannot be said that Ss. 18 to 21 do not apply to admissions in criminal cases. The illustrations given apply to criminal cases, and there is nothing in the sections to suggest that they apply to civil cases only. Incriminating statements by an accused under S. 164, Cr.P.Code, though not admissible as confessions in evidence may be admitted as admissions against interest under Ss. 18 to 21. The fact, that the statement is not a full confession but is only a partial confession or something less than a confession or is of a self-exculpatory nature cannot be made a ground for excluding it either from evidence or from consideration. It is true that extra-judicial confessions are to be regarded with caution, but it does not follow that they are always to be rejected. They may be made in such circumstances as to have no reasonable doubt as to their truth: I.L.R. (1941) Kar. 257: A.I.R. 1941 Sind 129.

Extra-judicial confession being only an admission—*Held*, that admission could be considered alongwith other evidence: A.I.R. 1955 Kutch 1: 1955 Cr.L.J. 177. Letters written by accused held were evidence only against themselves: A.I.R. 1957 S.C. 747.

A statement by the accused which amounts to an admission that he was present at the scene of the crime and that he was accompanying the persons who had committed the crime and which is otherwise exculpatory, fixing the sole guilt on the other man, although entirely inadmissible as against the other accused, is admissible for what it is worth, against the person making it under S. 18, *vide* Illus. (*c*) and (*d*) to S. 21: 162 I.C. 6: A.I.R. 1936 Rang. 131. An admission of incriminating facts made by an accused person to a Magistrate under S. 164, Cr.P. Code or a statement made to the Court during the course of the trial, admitting that he was at the scene of the crime when the murder took place, cannot be ruled out as inadmissible in evidence. It is admissible, in evidence for what it is worth against the accused making it under Ss. 18 to 21. Such a statement is not a confession. A confession must either admit

in terms the offences or at any rate substantially all the facts which constitute the offence: I.L.R. (1939) Kar. 800: A.I.R. 1940 Sind 53.

Where the accused merely made a general statement that he used to keep the bags of foodgrains left with him by the businessmen and nowhere he had stated that those particular bags were kept for sale and the Court had rejected the prosecution case that the accused was a grain dealer, *held*, that the statement itself did not make out all the necessary ingredients of the offence to prove that the bags were stored 'for sale' under S. 3(1) of U.P. Foodgrains Control Order (1949) and the conviction could not stand: 1952 All.L.J. 571: A.I.R. 1953 All. 101.

Where during the trial of the accused under S. 326, Penal Code, the accused filed applications to the effect that they never intended to cause injury to the complainant, that the injury was caused accidentally and they felt extremely sorry that the complainant was injured and that they should, therefore, be pardoned.

Held, that the statements did not amount to an unequivocal admission of guilt on the part of the accused and their conviction based on the alleged admissions in the petitions would be illegal: (1964) 1 Cr.L.J. 460 (Mys.).

Scope—Charge under Ss. 302, 149 and S. 120-B, I.P. Code—Statement by accused under S. 164, Cr. P. Code—Accused exculpating himself but only admitting his presence at the place of occurrence—Weight of statement—It can only be treated as admission of the fact of his presence—Statement does not amount to confession and what is stated by accused against co-accused cannot be used as evidence against other co-accused: A.I.R. 1970 Ori. 100.

Admission by co-accused—Admission can be considered against other accused if there is other evidence to prove his guilt: 1969 Mad.L.W. (Cr.) 68.

Confession of co-accused—Can only be used to lend assurance to other evidence against the accused—When other substantive evidence is absent, confession cannot be basis of conviction of other accused persons: A.I.R. 1966 Pat. 448.

Where an accused obtained acquittal in a criminal revision in the High Court by admitting that he would not interfere with the defendant's rights, *held*, it did not amount to an unqualified admission; it only amounted to an undertaking not to take law into his own hands; besides, it was an admission made in *terrorem*; he was, therefore, not precluded from suing the defendants under S. 92 of the Code of Civil Procedure for framing of a Scheme: A.I.R. 1976 S.C. 1569: (1976) 4 S.C.C. 780: (1976) 3 S.C.R. 721.

Third proviso to S. 33 and *Explanation* thereto—Suit for declaration of title and recovery of possession—Evidence of deceased witness from whom plaintiff purchased suit land given in a criminal case launched against defendant by plaintiff—Admissibility—Issue in criminal cases was as to who had grown the crops said to have been cut away by defendant and as to who was in possession—Every fact stated in evidence that deceased sold land to plaintiff for consideration and of the possession of witness before he parted with land and that the *Hukumnama* in favour of descendant was not executed by him taken as true—To the extent issues were not substantially the same in criminal trial and suit, evidence of deceased person was, *held*, inadmissible: 1969 Pat.L.J.R. 219.

16. Admission in pleading/written statement.—[*See* also S. 58]. Admission in pleadings or judicial admissions by themselves can be made the foundation of the rights of the parties. [A.I.R. 1974 S.C. 471, Foll.]: A.I.R. 1986 All. 126; (1987) 1 Cal.L.J. 188: (1987) 1 Cal.H.N. 220: (1986-87) 91 Cal.W.N. 971.

True, an admission contained in a pleading is binding on the party in the sense that the party cannot thereafter be permitted to take up a different stand; this does not mean that such an admission cannot be relied upon as a piece of admissible evidence in subsequent proceedings; however, its maker can show that the admission was made under some mis-apprehension or that it did not really mean what it purports to convey: 1971 All.L.J. 1027 (D.B.).

Though statements and pleadings are not automatically accepted as evidence, yet statements made by a person against his own interest and at times when he could have

explained the correct facts would be admissible; the effect of such candid admissions cannot be lightly got over by their maker. [A.I.R. 1967 S.C. 341, Rel. on]: (1978) 1 M.L.J. 56: 1978 Hindu L.R. 525.

When a fact pleaded in plaint is not specifically denied, but mere ignorance about its existence is pleaded, in such cases unless by necessary implication it amounts to denial of the fact pleaded, mere plea of ignorance amounts to admission of fact: A.I.R. 1994 Raj. 133.

A person making any admission in his pleading cannot take advantage of the same; the party in whose favour the admission is made may get benefit of the same: A.I.R. 1975 Cal. 203 (D.B.).

Where the plaintiff's admission in his plaint in an earlier suit is not properly verified, *held*, it cannot be used against him in another case wherein that plaintiff is a defendant: (1976) 2 Cal.L.J. 113 (D.B.).

Though parties' averments in pleadings may become admissions and may be used against their maker but their value and the rule of admissions are controlled by Ss. 18 to 23 and S. 31; that is why S. 31 cautions that admissions are not conclusive proof but may operate as estoppel. The law is settled that admissions of a party bind the other if they have a common interest but not their status as parties arrayed in the proceedings. Case law discussed: (1994) 2 An.L.T. 445.

S. 17 makes no difference between the admission made by a party in a pleading and other admissions. Under the Indian Law, an admission made by a party in a plaint signed and verified by him may be used as evidence against him in other suits. If the parties have taken up a particular position before the Court at one stage of a litigation, it is not open to them to approbate and reprobate and resile from that position. This wholesome doctrine applied not only to the successive stages of the same but also to another suit than the one in which the position was taken up: (1994-2) 104 Punj.L.R. 745. *See* also (1989-1) 9 Guj.L.H. 539: (1989-1) 30 Guj.L.R. 183 (D.B.).

The admission made by a party to the suit is admissible against him *proprie vigore* and in order to make such admission admissible in evidence, it is not even necessary to bring the said fact to the notice of the person making such an admission. [A.I.R. 1974 S.C. 117, Rel. on]: A.I.R. 1991 Pat. 203.

Admission made in pleadings are conclusive and no further evidence is required. However, evidentiary admissions are not conclusive proof of a fact admitted; they may be explained or shown to be wrong. The evidentiary admissions shift the burden of proof on the persons making them or the representatives claiming through them to show that they are wrong or are not binding; in the absence of such a proof they are the best evidence: (1989) 1 Hindu L.R. 125: (1989) 1 Rev.L.R. 145 (P.&H.).

Where the plaintiff filed suit on title and there were admissions of parties contradicting each other, *held*, admissions did not cancel each other; the Court has to assess evidentiary value of the admissions and accept one in preference to other: 1980 Mah.L.J. 205.

Admission in pleading—Exclusion from joint family property—Onus of proof—Nature of evidence—Averment in plaint that plaintiff left joint family with his mother—Plaintiff minor at the time—Suit for partition on plaintiff attaining majority—Admission not binding on plaintiff as it was not clear and specific—Limitation starts from the date party attains majority or from date of exclusion from joint family property—Onus of proof of expulsion is on opposite party: I.L.R. (1965) 1 Mad. 711: (1964) 77 Mad.L.W. 697: A.I.R. 1965 Mad. 200.

Plea of defendant in written statement not denied by plaintiff in his replication—No change made in such plea by amendment—Admission in replication to the original written statement will operate as an admission: A.I.R. 1967 Del. 22.

A person may acquire title by inheritance and the like. Ownership is a mixed question of law and fact and until and unless the plaintiff-landlord in an eviction case has alleged his mode of acquisition of property in dispute specifically as to how he acquired the property in the plaint, vague allegations about ownership in the written statement of the defendant cannot be deemed to have been admitted by the other side: A.I.R. 1994 All. 174.

17. Admission in pleading/written statement to be read as a whole.—Admissions in pleadings to be binding must be taken as a

whole—Admissions in witness box: A.I.R. 1965 S.C. 364; A.I.R. 1965 Pat. 262.

When an admission in a pleading is supplemented by a further statement depending and conditional upon the admission, all of them should be taken and considered together; but if the admission is unconditional and the further admission is not conditional or based on the earlier admission this principle will not apply. Where in an eviction case the landlord's assertion of the tenancy being created on 25th of the English calendar was admitted but the tenant further stated that by mutual agreement, the rent was paid according to English calendar month, *held* , such admission being unconditional, did not depend on the tenant's other admission about the commencement of the tenancy; it was not necessary to treat the defence of subsequent conversion of the tenancy 'according to English calendar month' as a part of the first admission: A.I.R. 1978 Cal. 123: (1976-77) 81 Cal.W.N.629: 1978 Cal.H.N. 356.

Admission in written statement must be taken as a whole or not at all: A.I.R. 1970 Madh. Pra. 40.

Dissection of an admission in parts arising out of the pleadings is not permissible. [A.I.R. 1970 Madh. Pra. 40, Foll.]: A.I.R. 1975 Pat. 168; 1980 Hindu L.R. 654 (P.&H.).

Admissions in written statement—Acceptability in part or whole: A.I.R. 1967 Cal. 294. *See* also 1980 Mah.L.J. 477.

A plaintiff cannot be allowed to dissect a written statement; if the plaintiff wants to avail of those parts of the written statement or the additional written statement which are favourable to him and to discard the other parts not favourable to him, such dissection of written statement being not permissible, the plaintiff's suit cannot be allowed to succeed in view of the variance between the written statement and the evidence of the defendant : A.I.R. 1985 Cal. 233.

Where the defendant in his written statement had admitted the execution of a sale-deed in favour of the plaintiff in respect of half-share in the suit property, *held*, non-production by the plaintiff of the said sale-deed in the Court was of no effect: A.I.R. 1980 Ori. 54: 49 Cut.L.T. 215: I.L.R. (1979) 2 Cut. 542.

Withdrawal of admission by amendment—An admission of a fact in written statement which had been drafted at the defendant's instance, *held*, cannot be withdrawn by him by filing an application for amendment of the written statement: A.I.R. 1988 P.&H. 53: 1987 Punj.L.J. 184.

Where the plaintiff had filed a suit for possession for 1/9th share pleading that defendants were collaterals owning the remaining share but subsequently, sought amendment of the plaint to plead that he was the sole collateral and the defendants were merely mortgagees, *held*, it is always open to a party to show that the admission was wrong; if the defendants were the collaterals of an equal degree to the plaintiff, it will be open to them to show the same and if they so establish then the plaintiff will fail inspite of amendment. But in case the plaintiff was not given opportunity to back out of the wrong admission, he would not be able to show that the admission was wrong. On the peculiar facts of this case it was justified in the interest of justice to allow amendment in this behalf: 1991 Punj.L.J. 154: (1991-2) 100 Punj.L.R. 617.

18. Admission in previous litigation.—The admission contained in a pleading of a former litigation, is indeed an admission in the true sense and is certainly available to be used for all purposes. It cannot be kept out by saying that it was an admission in a former litigation and was meant for that proceeding alone and thus cannot be taken to be an admission binding in any other suit or for all times to come. Such a distinction is not open in law to be made. If it is an admission, it is so and is certainly an admission for all times to come. Unless explained away properly, an admission is the best available support for the adversary: A.I.R. 1971 Ori. 267: (1971) 1 Cut.W.R. 269; 1981 B.B.C.J. 74; (1990) 1 Ker.L.J. 354: (1990) 1 Ker.L.T. 559.

The Court is entitled to consider the admission solemnly made by a party in the course of a proceeding, in the other suit if it concerns the subject-matter in dispute. However, such an admission cannot be regarded as conclusive and the party can show that it was not true: A.I.R. 1984 Pat. 191: 1984 Pat.L.J.R. 407; (1985-2) 26 Guj.L.R. 644.

Evidence of admissions made in the prior litigation but not produced in the subsequent litigation, *held*, cannot be deemed to be evidence in the subsequent case: A.I.R. 1983 Andh Pra. 219: (1983) 1 A.P.L.J. 29: (1983) 1 An.L.T. 47: (1983) 2 An.W.R. 1.

Previous admissions of a party can be taken into account against him even if he was not confronted with the same when he appeared in the witness box in the subsequent proceedings. [A.I.R. 1946 Lah. 65 (F.B.) held to have been disapproved in A.I.R. 1966 S.C. 405]: A.I.R. 1971 P.&H. 177 (D.B.).

A duly proved admission, even if its maker appears as a witness or not or has been confronted with it or not, is admissible in evidence. The purpose of contradicting the witness under S. 145 is quite different from the purpose of proving the admission; an admission is substantive evidence of the fact admitted while a previous statement used to contradict the witness is not; the latter only throws doubt on the veracity of the witness; but the weight to be attached to an admission as evidence is an altogether a different thing : (1972) 38 Cut.L.T. 161; A.I.R. 1977 N.O.C. 358 (All.).

When admission in previous litigation is not clear, *held*, it cannot be availed of: 1983 M.P.W.N. 261.

There is a distinction between admission contained in the pleading of a party and an admission contained in some earlier proceedings or extra-judicial admission. The former stands on a higher footing: 1977 R.D. 419 (All.).

A statement in a pleading cannot be evidence in subsequent proceedings before a Court of law unless it amounts to an admission. Where in a previous suit for recovery of rent, the predecessors of defendant-tenant had, in their written statement, stated that while they were ready and willing to pay the rent up to certain date, they were not responsible to pay any rent after that date as the rented premises had fallen down due to lack of repair, *held*, in a subsequent suit for declaration of title by the landlord, the said statement in the written statement by the predecessors of tenant, could not be said to be any admission on their part that they surrendered the tenancy; had the earlier suit been one for declaration of title and there, in the written statement, something as to their own status and capacity had been pleaded by the defendants, certainly then it would have been an admission: A.I.R. 1971 All. 273: 1971 All.W.R. (H.C.) 26.

It is well known that an admission by the adverse party is decisive, though not conclusive, proof of the facts admitted; an admission in the written statement in another litigation will be a substantive evidence in a subsequent litigation even if its maker is not confronted with it; but the maker of the admission may explain it away by showing that it was not true and was made to serve an ulterior purpose. [A.I.R. 1967 S.C. 341 and A.I.R. 1966 S.C. 405, Foll.]: (1972) 38 Cut.L.T. 110. *See* also (1992) 3 Karn.L.J. 685: I.L.R. (1992) 1 Karn. 2905.

Defendants in previous suit pleading plaintiffs were tenants and, hence, there is no question of title by adverse possession—Previous suit dismissed without issue on the point—Subsequently defendants filing suit for possession on ground that plaintiffs were trespassers—Admission by defendants in earlier suit that plaintiffs were tenants held to be erroneous—Before doctrine of approbate and reprobate will apply, there has to be estoppel in one form or the other—As there was nothing that made plaintiffs alter their position in any manner and in both suits plaintiffs claimed ownership of land, doctrine did not apply: A.I.R. 1967 Punj. 328.

Where a plaint containing an admission is subsequently amended, the admission contained in the original plaint cannot be considered to be of any value. Admissions contained in a plaint cannot be utilised in part and rejected in part: 1942 O.W.N. (B.R.) 209: 1942 I.A. (Supp.) 150.

Mere withdrawal of a suit does not destroy the effect of an admission made by a party therein. [Correctness of 9 Cal.W.N. 147 (Notes), doubted]: (1955-56) 60 Cal.W.N. 1006: A.I.R. 1956 Cal. 577.

The absence of denial in written statement of an allegation in the plaint may amount to an admission only for the purpose of that suit, and cannot have the effect of an admission capable of being proved under S. 17 in another litigation: (1946) 48 Punj.L.R. 21: A.I.R. 1946 Lah. 256.

Adverse admissions made in a prior suit are not conclusive—Such admissions are, however, strong pieces of evidence against the maker—It can be proved wrong or untrue and the burden of proof is on the party making it—Such admissions, made in a prior suit, though not binding on the party making it, have great evidentiary value: 1967

Raj.L.W. 63: I.L.R. (1966) 16 Raj. 1047: A.I.R. 1968 Raj. 51.

Admission by party—Statement by party made in one litigation can be used against person claiming under that party in another litigation: (1962) 64 Bom.L.R. 322: I.L.R. (1962) Bom. 417: A.I.R. 1963 Bom. 100.

Admission in the pleading of a previous suit—Admission binds the party making it in a subsequent suit—Admission can be used against him in the subsequent suit—Admission by agent without instigation of or without benefit to principal is not binding on principal: A.I.R. 1969 Pat. 385. Admission by party in earlier suit between same parties. *See* (1981-82) 86 Cal.W.N. 516.

It is not correct to say that an admission of a question of fact made by a party in the course of a proceeding has in another proceeding no value whatever and cannot be regulated as a good piece of evidence relying on which the opposing party may contend that the claim made in the subsequent proceedings is unjustifiable. The Court is certainly entitled to consider admissions solemnly made by a party in the course of proceedings in other suits relating to the same subject-matter: (1959) 61 Bom.L.R. 792: I.L.R. (1959) Bom. 1144: A.I.R. 1960 Bom. 153. *See* also (1989-1) 30 Guj.L.R. 183.

An alleged admission contained in a deposition made in previous probate case by the defendant cannot be used against the defendant when it is not put to her and no opportunity is afforded to her to explain it. It is no answer to say, that the plaintiff had no opportunity to confront defendant with the statement as her deposition on the point in the probate case was given after her deposition in the suit. If her deposition in the probate case be allowed to be put in evidence against her in the subsequent suit in order to contradict her without giving her an opportunity to tender her explanation or to clear up the particular point of ambiguity or dispute, it will be acting contrary to general principles of law: A.I.R. 1955 Cal. 206: (1953-54) 58 Cal.W.N. 980. On this point *see* also Notes under S. 21, *infra*.

S. 18 permits a previous statement made by the accused being tendered in evidence against him in the course of a criminal trial. It depends upon the Court trying the accused as to what value should be attached to that statement when proved: 1958 Raj.L.W. 417: 1958 Cr.L.J. 1241: A.I.R. 1958 Raj. 240: I.L.R. (1957) 7 Raj. 756.

A previous admission cannot be taken into consideration in a later case unless it is legally proved on record. Recitals in a judgment are no evidence to prove the exact admission made unless the whole of the statement is recited therein. A previous admission, however, cannot be excluded from consideration in a later case simply because it was not put to the maker thereof: 1966 Cur. L.J. 537.

Admission cannot be proved by recital in judgment: 1953 B.L.J.R. 234: A.I.R. 1953 Pat. 346.

It is true that the judgment of the criminal Court cannot be used for the purposes to prove that whatever has been written in this is correct as S. 43 clearly lays down that they are irrelevant unless comes under exceptions covered by Ss. 40, 41 and 42 and, thus, it is not necessary to consider, whether any of the exceptions can be invoked or not, when the admission in the criminal proceedings was not on the question of law but on question of fact: 1986 Raj.L.W. 217.

If in a particular case an admission or consent is in relation to possession at the time of the compromise, that admission or consent is admissible even in the title proceeding. When a regular Court is called upon to decide or adjudicate the title of the parties, it can take into consideration the fact that in mutation proceedings one party had admitted or consented in respect of their possession: 1979 All.L.J. 640: 1979 All.W.C. 302; 1979 All.W.C. 299.

Admission in land acquisition cases that the properties were endowed properties is relevant to support endowment: I.L.R. (1975) Karn. 1708.

In a suit before revenue authorities for declaration of title and possession in respect of a plot, *held*, though an order passed in correction of paper case is not binding, any admission made therein is admissible on the question of possession: A.I.R. 1980 All. 408.

An admission made by the owner of the truck involved in the accident before the police during investigation of the criminal case

against the driver would be relevant and admissible in the proceedings before the Claims Tribunal: (1981) 1 Karn.L.J. 178 (D.B.). Admission by the accused in a criminal case that he was driving the truck, *held*, can be pressed into service in compensation case to corroborate the testimony of the witnesses that he was the driver of the truck involved in the accident: A.I.R. 1976 Raj. 71: 1975 Raj.L.W. 399.

19. Admission regarding relationship of husband and wife.—An admission of a husband in his counter-affidavit in a former similar litigation between the parties recognising the other party as his wife, *held*, is an admission against his own interest; it is relevant, needs no proof and cannot be ignored because the husband has retracted from it: 1973 Mad.L.W. (Cr.) 8: 1975 Cr.L.J. 28.

The admission made by a party to a marriage might be actuated by an ulterior motive; it cannot by itself be used as evidence; it has to be considered on facts of each case whether the admission is so actuated or not; in the absence of any occasion for any such ulterior motive, the admission would bind its maker unless it is explained away by the maker himself. Thus, where in a suit for declaration of title the plaintiffs produced a 33 years' old sale deed wherein their father had admitted their mother to be his wife and there could then be no motive for him to make a false statement in the deed, the admission conclusively proved that the plaintiffs' mother was indeed the legally wedded wife of their father: A.I.R. 1989 Mad. 252: (1988-2) 102 Mad.L.W. 348: (1989) 1 Hindu L.R. 29: (1989) 1 Hindu L.R. 656: (1989) 1 D.M.C. 420.

Where a husband, despite his first wife, had been cohabiting for three decades with another woman and had begotten 6 children from the union and he had issued invitation cards for marriages of his daughters long before his death holding himself out as their father and both the women as his wives, and the cards showed his brothers as extending compliments to the invitees, *held*, the evidence of his first wife, his daughter from the first wife and his brothers in a suit between the first wife and her daughter and his second wife and her children after his death in 1978, about the husband's property to the effect that the second wife was not the deceased's legally wedded wife but only a concubine is negatived by the deceased's statement supported by the witnesses in the invitation card; it amounted to the deceased's admission which bound the parties as well as the witnesses: A.I.R. 1994 Karn. 247 (D.B.).

Where in a title suit the defendant, in his written statement, admitted that his father was married to plaintiff's mother in accordance with '*Henga*' form of marriage, *held*, even though he did not come to the witness Box in support of his said averment, he could not be allowed to say that there was no marriage between the above mentioned parties according to '*Henga*' custom of marriage: A.I.R. 1981 Gau. 42.

Where a husband in defence to a claim for maintenance under S. 125 of the Code of Criminal Procedure denied marriage, admitting only cohabitation, contended that he was married to another woman begetting a son and a daughter from the wedlock and the trial Magistrate concluded on the basis of earlier proceedings for maintenance by the first wife that the earlier marriage had been dissolved by customary divorce but the Sessions Judge in revision reversed that finding on the ground that the first wife was absent at the 'Nati Panch' meeting where divorce was talked about and no custom was pleaded or proved that such divorce is effective even in the absence of the first wife, *held*, the Sessions Judge having acted within his jurisdiction, the High Court could not interfere in revision: (1991-2) 11 Guj.L.H. 127.

Where in a proceeding for restitution of conjugal rights, the respondent categorically stated that no marriage had taken place between her and the petitioner, *held*, in absence of evidence that essential ceremonies of valid marriage had been performed, a vague admission in the statement of the respondent, in a proceeding under S. 97 of the Code of Criminal Procedure regarding factum of marriage between the parties, cannot be allowed to fill up the *lacuna* in the petitioner's evidence: 1980 Hindu L.R. 157 (P.&H.).

Where in a proceeding for maintenance, the husband filed an application that a compromise was entered into between the parties whereunder the wife was to remain at her parents' place and the husband was to send a monthly sum as stipulated in the compromise, *held*, there could not be a greater

abuse of the process of law then, in spite of detailed admission concerning entering into compromise and acting upon it, to come forward and urge that decree awarding maintenance was *ex parte*, that the husband had no knowledge of the proceeding, that the compromise was signed by an imposter: 1984 Hindu L.R. 322 (All.).

A conviction under S. 494, I.P.Code, cannot be sustained on the presumption that all the rites and ceremonies for a valid marriage must have been performed unless the observance of the requisite form and performance of the necessary ceremonies are affirmatively proved. A mere letter written by the co-accused woman, the wife to the second marriage, wherein she had stated that she had already disclosed to others that she and the accused-husband were already married and that she had to suffer very much from that marriage, *held*, cannot be relied upon for convicting accused for the offence of Bigamy: 1992 Cr.L.J. 1502 (Cal.) (D.B.).

20. Admission by person from whom interest derived.—Though under S. 18, statements made by persons from whom the parties to the suit have derived their interest in the subject-matter of the suit, are binding on such parties as their admissions; nevertheless, before the same may bind them, it has further to be shown that the statements were made by those persons during the continuance of their interest in the subject-matter, and obviously so, because it would be highly unjust and improper to divest a person of his right in the property, lawfully acquired by him from another, on the basis of the latter's admission, after his own interest in the property has ceased to exist: A.I.R. 1983 J.&K. 29.

Merely because documents more than 30 years old are presumed to be duly executed raises no presumption that their contents are true. But once the execution of such a document is presumed, it would amount to the executant's admission about the truth of the statements in the recitals; the third party, not a signatory to the document, may not be bound by it but the admission can be pressed in service against the executant's successor-in-interest; that is the combined effect of Ss. 17, 18(2) and 21: A.I.R. 1981 Guj. 142: (1981) 22 Guj.L.R. 389.

An admission, in respect of property sold, made by vendor in favour of third party after sale, *held*, is not binding on the vendee: 1982 Raj.L.W. 345: 1982 W.L.N. 81. This rule can be strictly applied in all cases: (1989) 1 Raj. L.R. 922. *See* also 1981 All.W.C. (Rev.) 65.

21. Miscellaneous.—Admission of liability by the principal debtor, *held*, is no proof against the surety: A.I.R. 1978 N.O.C. 207 (Cal.).

Where a dealer appointed by the Indian Oil Corporation for operating a petrol pump under contract was given lease of the site for 99 years without any right to assign or transfer the premises or any part thereof or his interest in the dealership; on framing of a town planning scheme by the Municipal Corporation under S. 203(1) (*c*) of the Haryana Municipal Act, 1973, the dealer surrendered to the Municipal Corporation one fourth of his unbuilt area against compensation therefor as its owner, *held*, the transfer of land was for the limited purpose of development; in law, the possession and ownership still remained with the owner; the dealer's statement admitting the Municipal Corporation to be the owner, being in ignorance of the legal position, had no legal consequence; it did not divest the dealer of his rights in the site nor did it vest the transferred land's ownership in the Municipal Corporation: 1989 Punj.L.J. 424.

In a trial for dacoity, '*A*' claiming to be '*B*', who had attested the Panchnama, was examined as such—Subsequently, he was found to be imposter—Prosecution of that person alongwith the appellant, a Sub-Inspector of Police, who produced him and had deposed that he was '*B*'—*Held*, in view of admissions of the appellant in the trial Court that he knew '*B*' very well and in reply to show-cause notice and in his deposition before the Court he had asserted that the person examined was '*B*' and was the person who had attested the Panchnama, the plea that the appellant gave evidence under an erroneous impression could not be entertained: A.I.R. 1971 S.C. 1789: 1973 Mah.L.J. 883.

Evidence as to admissions and promises made by alleged thieves before a panchayat is admissible without proof of the actual words used: 13 P.R. 1914 (Cr.): 26 I.C. 625. Bhatwara Kesra is admissible in evidence: A.I.R. 1929 Pat. 32: I.L.R. 7 Pat. 85.

19. Admissions by persons whose position must be proved as against party to suit.—Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

Illustration

A undertakes to collect rents for *B*.

B sues *A* for not collecting rent due from *C* to *B*.

A denies that rent was due from *C* to *B*.

A statement by *C* that he owed *B* rent is an admission, and is a relevant fact as against *A*, if *A* denies that *C* did owe rent to *B*.

20. Admissions by persons expressly referred to by party to suit.—Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Illustration

The question is, whether a horse sold by *A* to *B* is sound.

A says to *B*—"Go and ask *C*, *C* knows all about it". *C*'s statement is an admission.

Section 19—Notes.

On the section, *see* I.L.R. 5 Mad. 239; 25 M.L.J. 51; 25 M.L.J. 329: 20 I.C. 792; 602 I.C. 417. Ss. 19 and 20 are exceptions to the general rule in S. 18. Admission by immediate reversioner that alienation was proper is not binding on actual reversioners even though they be his sons—Nobody has a vested right so long as the widow is alive and the eventual reversioner does not claim through anyone who went before him. The actual reversioners do not claim as heirs of their father but as heirs of the last holder. *See* A.I.R. 1954 S.C. 505.

Where in a suit for eviction for *bona fide* requirement, the tenant pleaded that one *G* had negotiated and executed an agreement for sale of the demised property on behalf of the landlord with the tenant in his own handwriting, which *G* denied when confronted in cross-examination whereupon the tenant's request to send the agreement to a handwriting expert was declined by the trial Court for the reason that the agreement was used by the tenant only for the limited purpose of discrediting the credibility of the witness by confronting with his previous inconsistent statement, *held*, the agreement was not limited to such purpose alone; the agreement could be substantive evidence against the landlord to prove not only that it was in *G*'s writing but also that *G* was acting as an authorised agent of the landlord; case remanded: A.I.R. 1977 Karn. 113.

Where plaintiff, who approached the Court for letters of administration after a lapse of 20 years, satisfactorily explained the delay, *held*, delay was not fatal to the plaintiff's case. Further, preferential heirs to the estate of deceased had also admitted execution of will. Therefore, suspicious circumstances pleaded by the defendants, namely, delay in approaching the Court for letters of administration, was of no consequence: A.I.R. 1995 Ori. 131 (D.B.).

Section 20—Notes.

See also notes under S. 18, *supra*. S. 20 contemplates the existence of three parties: first, the party who refers; secondly, the party who is referred; and thirdly, the party to whom the reference is made. The principle is that when one party refers another second party to a third party for information, the first party is presumed to undertake to adopt as his own the information furnished by the third party. These conditions cannot be said to be fulfilled where a master calls for a report from a servant, regarding the conduct of another servant who is dismissed for misconduct, where there is nothing to indiciate that in doing so the master intends to regard the servant's report as conclusive on the matter. S. 20 cannot apply to such a case and the report of the servant cannot become admissible as against the master in a suit for damages for wrongful dismissal even if such report corroborates the version of the

dismissed servant (plaintiff): (1935-36) 40 Cal.W.N. 865.

If the Court with the consent of the parties or with their acquiescence departs from the usual course of procedure (governing the case) and decides a question of fact, *held*, the parties are bound by the order: A.I.R. 1987 Ker. 42. A litigant cannot be permitted to challenge to his own advantage the validity of procedure suggested or consented to by him on the result thereof going against him: A.I.R. 1993 Madh. Pra. 147: 1993 M.P.L.J. 273.

The information referred to in S. 20 need not be information specially within the knowledge of the person referred to. The information may be gathered by inspection of the lands or by reference to accounts or by other means: (1958) 1 An.W.R. 446: A.I.R. 1958 Andh. Pra. 304.

The word 'information' occurring in S. 20 is not to be understood in the sense that the parties desired to know something which none of them had any knowledge of. Where there is a dispute as regards a certain question and the Court is in need of information regarding the truth on that point, any statement which the referee may make is, nevertheless, information within the purview of S. 20: A.I.R. 1985 S.C. 998: 1985 (Supp.) S.C.C. 17.

A dispute as to the validity or genuineness of a will cannot be referred either to an arbitrator or a referee under S. 20; it can be decided only in accordance with the law of probate under the Succession Act. The word 'information' in S. 20 means a statement of facts, not a decision; if the parties agree to abide by what the referee says, and the referee makes the statement of facts as per his knowledge or belief, *held*, that would be deemed to be the referring party's admission on which the Court would pronounce the judgment; a referee, thus, cannot make enquiries or collect evidence: (1976) 78 Punj.L.R. 46. *See* however I.L.R. (1977) 1 Del. 247.

A reference to an outside party to decide matters in dispute in a suit and question of costs is not a reference to that party for information in reference to a matter in dispute and is not justified by S. 20: 73 I.A. 52: I.L.R. (1946) All. 193: A.I.R. 1946 P.C. 72: (1946) 1 M.L.J. 339 (P.C.).

S. 20, which is second exception to the general rule laid down in S. 18 deals with one class of vicarious admissions of persons other than the parties. Where a party refers to a third person for some information or an opinion on a matter in dispute, the statements made by the third person are receivable as admissions against the person referring. The reason is that when a party refers to another person for a statement of his views, the party approves of his utterance in anticipation and adopts that as his own. The principle is the same as that of reference to arbitration. The reference may be by express words or by conduct, but in any case there must be a clear admission to refer and such admissions are generally conclusive: A.I.R. 1985 S.C. 998: 1985 (Supp.) S.C.C. 17.

Where the parties appointed a referee and *inter alia* agreed that the referee's statement either in person or in writing submitted by him to the Court should be treated as binding evidence for both the parties, *held*, if the referee's decision did not suit one party, he could not be allowed to wriggle out of the same by alleging that the sole referee was appointed not as a referee, but as an arbitrator and his decision was an award; at the most, if at all, the party could resile from the agreement before the referee's decision but not afterwards by filing objections: A.I.R. 1983 P.&H. 445: (1983) 85 Punj.L.R. 300. Merely naming a person to be a referee is not decisive of his status as a referee; what is to be seen is the parties' real intention. Where in a money suit, the parties jointly applied for appointment of *'A'* as a referee and agreed to be bound by his decision and making it a decree, *held*, the parties' intention was to get the dispute settled through the intervention of *'A'* who could decide it by hearing the parties and perusing the relevant record; the parties had clearly intended to refer to their dispute to arbitration of *'A'*; calling him a referee was, in fact, a misnomer; his decision does not amount to an admission under S. 20: (1993-1) 103 Punj.L.R. 188; A.I.R. 1978 All. 351: 1977 All.W.C. 44.

Where in a suit for a declaration that the plaintiff's resignation was involuntary and procured by fraud, coercion, threat and inducement, the plaintiff offered in writing that if the employer's two named officers took a special oath in a religious place that his resignation was not so procured, that part of his claim might be dismissed as withdrawn and the two officers did take such an oath, *held*, the two officers had undoubtedly taken oath as the plaintiff's nominees; it amounted to an admission of the defendant's claim envisaged in S. 20; the trial Court rightly acted on the oath despite repeal of the Oaths Act, 1873 by the Oaths Act, 1969. [I.L.R. (1979) 2 Karn. 2018

21. Proof of admissions against persons making them, and by or on their behalf.—Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:—

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.

---

and A.I.R. 1983 Ori. 250 held *per incuriam*; A.I.R. 1977 Mad. 273: (1977) 90 Mad.L.W. 279(D.B.), Approved; 1985 (Supp.) S.C.C. 17: A.I.R. 1985 S.C. 998, Foll.]: A.I.R. 1992 S.C. 1356: (1992) 3 S.C.C. 129; A.I.R. 1980 P.&H. 284 (F.B.) overruling A.I.R. 1976 P.&H. 287: 1976 Rev.L.R. 567: (1976) 78 Punj.L.R. 601 (D.B.); (1955) 57 Punj.L.R. 327; A.I.R. 1961 Punj. 31 and (1978) 2 Ren.L.R. 708.

Where in an eviction petition on the ground of continuous non-residence without sufficient cause for 4 months, the parties agreed to the appointment of a referee and upon his reporting non-residence, to the passing of the eviction order, *held*, upon the referee's report that none resided in the premises for a long time, the Rent Controller is bound to forthwith order eviction; objections against the referee's report were not admissible: (1986-1) 89 Punj.L.R. 31: I.L.R. (1986) 1 Punj. 345.

Where one of the tenants was conducting proceedings acting for himself and also for other tenants of the premises, and he agreed before the trial Court that the dispute regarding arrears of rent be resolved by the Court, *held*, the statement by Court in its order as to liability of tenants in the matter of arrears of rent would be a statement, made by one to whom the tenants had expressly referred for information in reference to a matter in dispute and, hence, would bind the tenants as admissions within the meaning of S. 20: A.I.R. 1993 Madh. Pra. 147: 1993 M.P.L.J. 273.

Where a person was appointed to ascertain value of disputed land by mutual consent of the parties, *held*, his report cannot be treated as admission under S. 20: (1985) 2 W.L.N. 135 (Raj.).

A fire insurance company informed the plaintiff that they had appointed Sinclair Murray & Co., as the Surveyors to assess the loss on their behalf and requested the plaintiff to assist the Surveyors from the plaintiff's side. The Surveyors did not supply any information to the plaintiff. They submitted their report to their employers and the company. *Held*, that as the plaintiff did not receive directly any information from Sinclair Murray & Co., Ltd., the case did not fall within the scope of S. 20: A.I.R. 1955 Cal. 594. Admission by person nominated by the parties: 80 I.C. 16: I.L.R. 46 All. 710. *See* also I.L.R. 42 Mad. 625; 21 All.L.J. 209: A.I.R. 1923 All. 443. Agreement to be bound by the statement of a referee is an admission: 103 I.C. 34: A.I.R. 1927 All. 659. *See* also 1939 All.W.R. (H.C.) 7: A.I.R. 1939 All. 176. Effects of admission, *see* 37 I.C. 983. *See* also A.I.R. 1935 Oudh 118: 1935 O.W.N. 15. Effect of entry by creditor in debtor's book, *see* (1912) 14 Bom.L.R. 1020.

Suit for partition of joint family properties and rendition of accounts including partnership business created for evasion of income-tax—Arbitrator appointed by Court as per the recitals of the partnership deed—Subsequent reference to a 'referee' by consent of parties to hear the dispute and give a decision—Referee should be deemed to be an arbitrator and his decision is an award and not a reference under S. 20 of the Evidence Act: A.I.R. 1967 Punj. 179.

Section 21—Synopsis.

1. Scope.

2. Admission to be proved against party making it.

3. Admission to be taken as a whole.

4. Admission and confession.

5. Confession to Magistrate.

6. Admissibility of statement in First Information Report/Criminal case.

7. Admissions by representative-in-interest are binding.

8. Admission by witness.

9. Miscellaneous.

10. Denials of party.

11. Clause (3).

12. Previous admission by party—Use of—Procedure.

---

(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

Illustrations

(*a*) The question between *A* and *B* is, whether a certain deed is or is not forged, *A* affirms that it is genuine, *B* that it is forged.

A may prove a statement by *B* that the deed is genuine, and *B* may prove a statement by *A* that the deed is forged; but *A* cannot prove a statement by himself that the deed is genuine, nor can *B* prove a statement by himself that the deed is forged.

(*b*) *A*, the Captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. *A* may prove these statements, because they would be admissible between third parties, if he were dead, under section 32, clause (2).

(*c*) *A* is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post mark of that day.

The statement in the date of the letter is admissible, because if *A* were dead, it would be admissible under section 32, clause (2).

(*d*) *A* is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(*e*) *A* is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin, as he doubted whether it was counterfeit or not, and that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding *illustration*.

---

1. Scope.—An admission or a concession by a party should be strictly construed: 1976 All.W.C. 720.

The provision that 'admission is not conclusive proof' is to be considered in regard to two features of evidence; (*i*) the weight to be attached to an admission, would depend upon whether the admission is clear, unambiguous and relevant evidence; and (*ii*) even a proved admission sought to be used against its maker who as a witness is under cross-examination, he should be given an opportunity, if the admission is to be used against him to offer his explanation and to clear up the point of ambiguity or dispute which is a general salutary and intelligible rule. A mere proof of admission, if its maker had concluded his evidence, will be of no avail; it cannot be utilised against him: A.I.R. 1977 S.C. 1712: (1977) 2 S.C.C. 49: (1977) 2 S.C.R. 671.

Admissions though not conclusive proof of matters admitted, are relevant under S. 21: I.L.R. (1964) 1 Mad. 1012: A.I.R. 1965 Mad. 266.

Previous statements containing the admissions even if not confronted to the party are admissible against him in the suit: (1972) 2 Cut.W.R. 1842: (1972) 38 Cut.L.T. 1323.

Admission is substantive evidence even though party is not confronted with the statement—Weight to be attached to it is

different matter: A.I.R. 1966 S.C. 405; A.I.R. 1994 Bom. 358.

The admissions are substantive evidence by themselves in view of Ss. 17 and 21, though they are not conclusive proof of the matters admitted. The admissions duly proved are admissible in evidence irrespective of whether the party making them appeared in the witness box or not and whether such party when appearing as a witness was confronted with those statements in case it made a statement contrary to those admissions: 1991 Punj.L.J. 361: (1991-2) 100 Punj.L.R. 529.

It is well established that admissions made in pleadings by a party against his own interest are conclusive; there can be no better evidence; no further evidence is required. But evidentiary admissions are not conclusive; they may be explained or shown to be wrong; they also shift the burden of proof. Admissions, if not shown to be wrong or not binding, they are best and substantive evidence of the facts admitted. But they must be clear and unequivocal: (1989) 1 Rev.L.R. 145: (1989) 1 Hindu L.R. 125 (P.&H.).

Law is well settled that an admission is not conclusive unless it amounts to an estoppel; however, the party making the admission may explain it away and show that the admission was erroneous: (1973) 2 Cut.W.R. 1204; 1979 All.W.C. 162: 1979 All.L.J. 231: 1979 All.L.R. 245.

It is well known that an admission by the adverse party is decisive, though not conclusive proof of the facts admitted; an admission in the written statement in another litigation is a substantive evidence in a subsequent litigation even if its maker is not confronted with it; but the maker of the admission may explain it away by showing that it was not true and was made to serve an ulterior purpose. [A.I.R. 1967 S.C. 341 and A.I.R. 1966 S.C. 405, Foll.]: (1972) 38 Cut.L.T. 110.

In order to bind a party by his admission the admission must be clear, precise and unambiguous. An admission is only a piece of evidence and the weight to be attached to it depends upon the circumstances under which it has been made. Thus, before the right of a party can be considered to have been defeated on the basis of an alleged admission made by him in a prior litigation, the implication of the statement must be clear and conclusive. There should be no doubt or ambiguity about the alleged admission: A.I.R. 1973 Raj. 208: 1972 Raj.L.W. 522: 1972 W.L.N. 784.

Once a party accepts his earlier statement, made in an earlier proceeding, it becomes a substantive piece of evidence of the facts admitted therein in view of S. 17 and S. 21; what weightage is to be attached to such a statement is a different matter. Before using such a statement, it is not required to be put to its maker to provide him an opportunity to explain it when he appears as a witness or by calling him as a witness: 1993 Cr.L.J. 1008 (Him. Pra.). But *see* (1992) 1 Cal.L.T. (H.C.) 418 [An admission by a person, who subsequently appears as a witness, can be taken advantage of only if that person is afforded an opportunity to explain the same].

Though the admission is a very material piece of evidence against a party making the same, yet the maker of it can always prove it to be wrong and even withdraw the same: (1984) 86 Punj.L.R. 96; (1972) 2 Cut.W.R. 1842: (1972) 38 Cut.L.T. 1323; (1975) 1 Cut.W.R. 3; (1994-2) 107 Punj.L.R. 277.

Where no opportunity has been afforded to the plaintiff to explain or, if so advised, to withdraw the admission and it is apparent that the admission was made in an application in a police case in which the plaintiff company was in danger of being prosecuted, the admission cannot be used against the plaintiff: I.L.R. (1952) Nag. 700: A.I.R. 1952 Nag. 154.

As an abstract proposition of law, the prosecution may be allowed in a given case not to be bound by stray admissions of its witnesses if it is shown that those admissions have been made either on account of mistake of fact or law, or on account of the witnesses being interested in the accused or if it is proved that he had any motive to give a false statement and the statement given, was not correct: 1979 Raj.L.W. 37.

Admissions doubtless raise only a presumption which is rebuttable but unless the peculiar circumstances under which the admissions were made are satisfactorily explained, they would have to be considered just as any other piece of evidence: 1958 M.P.C. 351: 1958 Jab.L.J. 512: 1958 M.P.L.J. 513: A.I.R. 1958 Madh. Pra. 261.

An admission is not conclusive proof of the matter admitted, though it may in certain circumstances operate as an estoppel: 1958 S.C.A. 544: A.I.R. 1958 S.C. 419: 1958 S.C.R. 1295.

The effect of an alleged admission depends upon the circumstances in which it was made: A.I.R. 1974 S.C. 1121: (1974) 2 S.C.C. 319.

Evidentiary nature of admissions vary very much in value according to circumstances and the Court is quite at liberty to reject them, if it is satisfied from other circumstances that they are untrue: I.L.R. 10 Luck. 423: A.I.R. 1935 Oudh 41.

The word 'statement' has been used in its primary meaning, namely, something that is stated. Under S. 17 read with S. 21 statements made by persons may be used as admissions against them even though they may not have been communicated to any other person: A.I.R. 1973 Mys. 280.

Admission regarding motive in committing murder of deceased is admissible under S. 21: 1963 M.L.J. (Cr.) 343: (1963) 2 S.C.R. 433: I.L.R. 42 Pat. 166.

Statements of a party in letters written by her can be used against her as her admissions but cannot be used in her favour accepting them to be correct statements: (1964) 7 S.C.R. 267: A.I.R. 1965 S.C. 364.

Admission by agent without instigation of or without benefit to principal is not binding on principal: A.I.R. 1969 Pat. 385.

Statement made in police enquiry with respect to theft case—Use of that statement in proceedings for maintenance not forbidden—That statement could be used under S. 21, Evidence Act also: 1966 Cr.L.J. 1275: A.I.R. 1966 Mad. 392.

Admission in a document—Document secured at late stage—Admission can still be employed against its maker: (1965) 1 Mys.L.J. 42: A.I.R. 1966 Mys. 154.

A document containing the admission of third person cannot be used as evidence against the parties but the document can be admitted in evidence as proof of the fact mentioned therein as evidence of the transaction if it could be shown that it was executed in due course of business to settle disputes between the parties: 146 I.C. 937: A.I.R. 1934 at. 48.

Admission in a document by pardanashin lady: 59 Cal.L.J. 532: A.I.R. 1934 Cal. 851. *See* also (1935-36) 40 Cal.W.N. 75: 164 I.C. 530.

Documents clearly asserting right of plaintiff regarding cultivation and enjoyment of disputed lands—Effect and weight: 34 Cut.L.T. 1131: I.L.R. (1968) Cut. 673.

Admission of guilt by Government servant—Admission used only to corroborate independent evidence led to prove charges against him—Enquiry proceedings not vitiated: A.I.R. 1967 Cal. 381.

Statements recorded by officers of Customs Department in enquiry under S. 107 or S. 108, Customs Act (1962)—Admissions made therein can be proved against person making them or his representative in interest: 1967 Cr.L.J. 1007: A.I.R. 1967 Mad. 263 (F.B.); 1988 Raj.Cr.C. 462.

Proof of statements made by accused persons before the Custom authorities—Statement signed by accused as well as their lawyer—Statements properly proved by admission of their signatures by accused—Examination of lawyer not necessary: (1965) 1 Cr.L.J. 490: 1965 M.L.J. (Cr.) 98: A.I.R. 1965 S.C. 481.

Admission in income-tax proceedings—Binding character in subsequent suit—In income-tax assessment proceedings against predecessor of defendant in present suit, the predecessor and the defendant alleging that properties belonged to society registered under Societies Registration Act—This admission is binding on defendant in present suit against him and can be taken as evidence of fact that the society was duly registered, under Societies Registration Act, which fact is denied by defendant in the present suit: A.I.R. 1969 All. 248. *See* also S. 17, Note 6, *supra*.

Books regularly kept in the course of business—Entries alone do not fix liability: I.L.R. (1967) 1 Punj. 435.

Entries in solicitor's books of account regarding object of purchase for client are neither inadmissible nor irrelevant, nor hearsay: (1928-29) 33 Cal.W.N. 439: A.I.R. 1929 P.C. 77: 57 M.L.J. 581 (P.C.).

It is well established that although admissions constitute good evidence against the

party making them and his representatives-in-interest, he is not concluded by them unless they operate as estoppels and he is at liberty to show that they were mistaken or untrue. Admissions are valuable evidence because, what a party himself admits to be true may reasonably be presumed to be so and until the presumption is rebutted the fact admitted must be taken to be established. The effect of admissions is merely to shift the onus of disproving them on the party making them unless a plea of estoppel can be successfully invoked. The evidentiary value of admissions depends upon the circumstances in which they are made and the possibility of incorrect statements being misguidedly made by ignorant persons should not be overlooked. If it is proved by other evidence that the facts admitted cannot be true, no Court of justice will hesitate to give effect to that conclusion: A.I.R. 1958 Andh. Pra. 19.

A statement made by a party to the suit to a third party or stranger of which the other party had no knowledge, and the truth of which he never directly or indirectly admitted is altogether inadmissible in evidence: 1940 A.M.L.J. 115.

Admission is pleadings/written statement.—Admission in pleading—Use of, for other purposes—Written statement following compromise arrived at earlier—Admission in written statement held could not be looked into for other purposes: I.L.R. (1962) 12 Raj. 406: 1962 Raj.L.W. 327: A.I.R. 1962 Raj. 196.

Admission by party in plaint signed and verified by him—Admission may be used as evidence against him in other suits—Such admission cannot, however, be regarded as conclusive and party can show it as not true: I.L.R. 46 Pat. 175: (1967) 1 S.C.R. 1: A.I.R. 1967 S.C. 341.

See also S. 18, Note 16, *supra.*

Admission in previous litigation.—Statement made by a plaintiff in a former suit in his written statement is admissible against him as an admission in a subsequent proceeding. There is a difference between the relevancy of an admission and its binding character.

An admission is the best evidence that an opposite party can rely upon, and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous: 27 Cut.L.T. 81: I.L.R. (1961) Cut. 183.

Admission by plaintiff in previous suit—Binding on him in fresh suit, unless rebutted: A.I.R. 1968 Cal. 550.

Under the provisions of the Evidence Act, an admission contained in a plaint or written statement or an affidavit or any sworn deposition given by a party in a prior litigation will be regarded as an admission in a subsequent action though it is capable of rebuttal: *Held*, in the instant case that *J* the owner of house at *B* asserted his right in his written statement in previous suit and that was relevant under S. 13(*a*) of Evidence Act and *J*, being dead it was relevant under S. 32(7) of the Evidence Act. The written statement in the previous suit was, therefore, admissible in evidence: 1965 B.L.J.R. 800: A.I.R. 1966 Pat. 110.

Admission in plaint in previous suit—Party appearing as defendant in subsequent suit but not examined as witness—S. 145 cannot be invoked but previous statement can be proved as admission against such party under S. 21: I.L.R. (1962) Cut. 422: A.I.R. 1963 Ori. 45.

Contradiction by reference to previous admission—Statement in previous suit—Witness failing to avail of opportunity to explain it—Statement is admissible to prove admission by witness in previous suit: 1962 Jab.L.J. 796: A.I.R. 1963 Madh. Pra. 155.

Admission in prior proceedings—Mutation petition—Admission by party adverse to the position taken by him in the suit is admissible against him—He need not be confronted with it while in the witness box—Difference between purpose of proof of admission and earlier contradictory statement: I.L.R. (1966) Cut. 483.

Admission made by defendant in his deposition in prior proceedings under S. 145, Cr.P.Code about continuance of plaintiff's right of shebaitship—Admission can be used as such in subsequent civil suit when in said deposition, he had admitted that there were litigations going on between his father and grandfather of plaintiff: 1960 B.L.J.R. 717: A.I.R. 1961 Pat. 293.

See also S. 18, Note 18, *supra.*

2. Admission to be proved against party making it.—An admission may be proved as against the person who makes it or his representative-in-interest but it cannot be proved by or on behalf of the person who makes it or by his representative-in-interest. The section is the affirmance of the well-known rule that a man shall not be allowed to make evidence for himself: 1939 Mar.L.R. 244 (Civ.).

An admission against the interest of the party making it must be regarded as true until it is clearly proved to be untrue: (1932) 34 Punj.L.R. 788 (2): A.I.R. 1933 Lah. 885; (1946) 48 Punj.L.R. 187: A.I.R. 1946 Lah. 450.

What a party himself admits to be true must necessarily be presumed to be so, and it is for him to establish by evidence that the admission was made under a circumstance which do not make it binding on him: 1947 Mar.L.R. 280 (Civ.): A.I.R. 1934 Lah. 662: (1933) 35 Punj.L.R. 578; and until the presumption is rebutted the fact admitted must be taken to be established: A.I.R. 1958 Andh. Pra. 19; A.I.R. 1960 Mys. 97. *See* also 1939 Mar.L.R. 253 (Civ.): I.L.R. 15 Luck. 191: A.I.R. 1940 Oudh 35 (admission shifts the burden of proof on the party making it).

Admission—Evidentiary value—Onus, shifting of: A.I.R. 1968 Mys. 309.

An admission made by a party is not absolutely binding on him and its only effect is to shift the burden as against him. He is at liberty to prove that his admission was mistaken or untrue and is not estopped or concluded by it unless another person has been included by it to alter his condition: 67 Cal.L.J. 495.

It is no doubt true that what a party himself admits to be true may reasonably be presumed to be so. But before this rule can be invoked, it must be shown that there is a clear and unambiguous statement by the opponent, such as will be conclusive unless explained. A statement by a party that certain proceedings were fraudulent and not collusive in character would not be sufficient, without more, to sustain a finding that the proceedings were collusive: A.I.R. 1956 S.C. 593: 1956 S.C.R. 451.

Per *Kartar Singh Campbellpuri, J.*—There can be no doubt that under the provisions of the Evidence Act an admission in a signed pleading or affidavit made by a party in a prior litigation would be regarded as an admission in a subsequent action though it is capable of rebuttal. It is for the maker of the admission to come into the witness box where the objection is taken at the very early stages and explain as to what led him to make the admission. In the absence of any such explanation the value of the admission is rather enhanced. Per *Teja Singh, C.J.*—The effect of Ss. 21 and 31 of the Evidence Act is that when an admission is proved against a party a presumption arises that the matters to which the admission relates are true and the burden of proving that they are not true lies upon the person who made the admissions. The fact that the admission was gratuitous does not affect this rule and all that can be said is that if proved to be erroneous it can be withdrawn by the person who makes it and will not operate as estoppel: A.I.R. 1951 Pepsu 101. An admission is not conclusive as to the truth of the matters stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel: A.I.R. 1956 S.C. 593: I.L.R. (1956) Mys. 152. *See* also A.I.R. 1958 S.C. 419.

A person making any admission in his pleading cannot take advantage of the same; the party in whose favour the admission is made may get benefit of the same: A.I.R. 1975 Cal. 203 (D.B.).

Some self serving statements made in other proceedings by a party cannot be used as substantive evidence in subsequent proceeding: A.I.R. 1974 S.C. 280: (1974) 1 S.C.C. 289.

Admission can be used against the party making it. The party making the admission has a right to rebut the same and can plead and prove that admission so made is not true. Burden shall be on the party who wants to show that the admission so made is untrue: A.I.R. 1988 Raj. 188: 1987 Raj.L.W. 210: (1987) 1 Raj.L.R. 548.

A self-serving admission is not admissible in evidence, unless it comes within any of the exceptions under S. 21. Where after adoption of the plaintiff, the adoptive father had two sons born to him and, thus, by the time the

plaintiff was about 21 years' old the adoptive father started devising ways and means to disown the plaintiff as his adopted son and in the process executed a sale-deed in favour of the plaintiff describing him as the son of his natural father, *held*, this deed being a self-serving document, admission made therein did not come within the ambit of S. 21 and was, therefore, inadmissible in evidence: A.I.R. 1974 Ori. 120: (1973) 1 Cut.W.R. 809 (D.B.).

Applicability—Statement against interest—Weight of—Admission against his own interest made by plaintiff's ancestor at a time when he was the Karta of the joint family consisting of himself and his son would be clearly binding against the plaintiff: I.L.R. (1959) Cut. 602.

Conduct of a party evidenced by statements in his or her own favour cannot be proved to support his or her case: (1958) 2 W.L.R. 110.

Mere conduct is not admission for making it eligible to be used as admission under S. 21. Thus, where the trustees, not being fully conscious of their rights or not being aware of the true state of law or facts, yielded to the dictates of the Board of Religious Trusts and submitted returns, *held*, the statements contained in such returns could not amount to an admission of the fact that the trust in question was a public one. [1968 Pat.L.J.R. 507: I.L.R. 46 Pat. 23, Rel. on]: A.I.R. 1974 Pat. 95: 1973 Pat.L.J.R. 509 (D.B.).

A party cannot use in his favour an admission by his predecessor made in his own interest: I.L.R. 41 Cal. 57: (1912-13) 17 Cal.W.N. 1013. *See* also 93 I.C. 996: A.I.R. 1926 Lah. 381.

Hindu family—Conduct of one member of the family, who is not the karta, amounting to an admission on his part about severance of joint status or partition by metes and bounds—Admission is not binding on other members of the family who are not jointly interested with the person admitting: 33 Cut.L.T. 1163: A.I.R. 1967 Ori. 139.

Admission by father or manager of joint family—How far binding on others: A.I.R. 1969 Mad. 329.

Admission by one party, which is favourable to the other party, *held*, cannot be overlooked: (1991) 1 Karn.L.J. 201.

Merely because documents more than 30 years old are presumed to be duly executed raises no presumption that their contents are true. But once the execution of such a document is presumed, it would amount to the executant's admission about the truth of the statements in the recitals; the third party, not a signatory to the document, may not be bound by it but the admission can be pressed in service against the executant's successor-in-interest; that is the combined effect of Ss. 17, 18(2) and 21: A.I.R. 1981 Guj. 142: (1981) 22 Guj.L.R. 389.

Where in an election petition, the issue involved was regarding the age of the elected candidate on the date of the scrutiny of his nomination and there were a number of clear admissions in prior declarations precisely and deliberately made in solemn documents by him which admissions were made *ante litem motam* during the decade preceding the election in question, *held*, these admissions were entitled to great weight and had shifted the burden on to the candidate to show that they were incorrect: A.I.R. 1977 S.C. 1724: (1977) 3 S.C.C. 540: (1977) 3 S.C.R. 538.

When the defendants, who had made an admission, did not show that it was wrong, *held*, the plaintiff could certainly rely on it and the Court could not on some presumption think that the admission might not be true: (1993) 1 M.L.J. 15.

Where in a subsequent mortgage deed, the mortgagor stated the necessity for creation of subsequent mortgage and that she had received certain amount from the previous mortgagee on the basis of a mortgage deed executed by her, *held*, the admission was a very strong piece of evidence against her with regard to the receipt of the consideration as also about the execution of the previous mortgage deed without any undue influence and misrepresentation and that she fully understood what she was about to do and what she had done: A.I.R. 1976 Him. Pra. 41.

Where in a suit for recovery of a sum due on the promissory note, the party admits the execution, *held*, when once the execution of the instrument is admitted, the burden of proof of passing the consideration lies entirely on the shoulders of the promisors: A.I.R. 1987 Mad. 156: (1986) 2 M.L.J. 329.

Where a contractor in his bill for Government works contract expressly described it to

be in final settlement of his dues under the contract, *held*, the bill amounted to a binding admission by the contractor unless he can satisfactorily explain it away: (1982) 1 S.C.C. 415.

3. Admission to be taken as a whole.—If the statements of a party are to be taken as an admission they must be taken as a whole: 1956 B.L.J.R. 745: A.I.R. 1957 Pat. 174.

An admission can be used as against the party making it only when the admission is taken as a whole. Hence, mere recital in the judgment that the tenant admitted surrender cannot be admissible as an admission to be used against him unless the entire deposition is placed on record: A.I.R. 1959 Ori. 38.

Admissions are not conclusive unless they amount to estoppel: I.L.R. 53 Bom. 321: A.I.R. 1929 Bom. 147; 164 I.C. 530; (1935-36) 40 Cal.W.N. 75.

Admission to be used either as a whole or not at all: (1961-62) 66 Cal.W.N. 872.

An admission unless it is separable has to be taken as a whole or not at all. Thus, admission of a returned candidate, in an election petition that the speech appearing in newspaper was correct version of his speech, *held*, has to be taken as a whole or not at all: A.I.R. 1979 S.C. 154.

If the Court wishes to proceed upon the admission of a party, it should consider the admission as a whole or reject it altogether: A.I.R. 1935 Pat. 24; I.L.R. 14 Lah. 218: A.I.R. 1933 Lah. 179; 39 Mad.L.W. 34: A.I.R. 1934 Mad. 100; 151 I.C. 297: 11 O.W.N. 579 and 1367: A.I.R. 1934 Oudh 370; A.I.R. 1933 Rang. 326.

Entire statement made by accused before committal Court is admissible but if Court wants to rely on an admission it must be used as a whole—It is not permissible to take into consideration only those portions of admission which are inculpatory and reject other portions which are beneficial to the accused: 1968 Cr.L.J. 1345 (Andh. Pra.). *See* also S. 18, Note 4, *supra*.

4. Admission and confession.—Admission is usually applied to a civil transaction, and to those matters, in criminal cases which do not involve a criminal intent, while the term confessions is usually used in Criminal Courts as denoting an acknowledgment of guilt. Admission in a civil suit that a document is genuine cannot in the forgery case be regarded as confession at all: I.L.R. 37 Cal. 467: A.I.R. 1929 Cal. 539.

A statement to be called a 'confession' must either admit in terms the offence or at any rate substantially all the facts which constitute the offence; a mere admission of an incriminating fact, however grave, or a statement containing an exculpatory assertion of some fact, which if true, would negative the offence do not amount to a confession. Thus, where the accused in his statement under S. 108 of the Customs Act, 1962 stated that he was not aware that the packages loaded in the truck contained contraband goods nor were they loaded under his instructions, he merely being an innocent traveller in the truck, *held*, it did not amount to a confession within the meaning of S. 24 and the said statement was clearly admissible under S. 21 as an admission of incriminating facts: A.I.R. 1976 S.C. 1167: (1976) 2 S.C.C. 302: (1976) 3 S.C.R. 672.

Admission by the accused made before the beginning of the proceedings alone can be proved under S. 21, as in a civil suit: I.L.R. 36 Mad. 457: 22 M.L.J. 73.

If accusations do not legally constitute an offence, an admission of an accused person of such accusations cannot be the basis of conviction. In the absence of legal proof of a crime, there can be no legal criminality: (1982) 54 Cut.L.T. 241.

What is prohibited under S. 26 is only a confession and not a statement which does not amount to a confession. Admissions can be proved as against the person who makes it, and S. 21 permits such admissions being proved. The contours of S. 21 are not bounded by limitations of the person being in the custody of a Police Officer. There is no doubt that if the admission amounts to 'confession' it transgresses into the forbidden field designed in S. 26. Thus, statements made by the accused to a Government Hospital's doctor, when they were produced before him after their arrest for examining their injuries, *held*, though incriminating, did not amount to confession and, hence, not hit by S. 26: A.I.R. 1988 Ker. 1: 1988 Cr.L.J. 107 (F.B.); 1984 M.L.J. (Cr.) 202: 1984 Mad.L.W. (Cr.) 23: 1984 Cr.L.J. (N.O.C.) 193; 1986 Cr.L.J. 1865: (1987) 1 Ker.L.T. 391 (D.B.); (1993) 2 Ker.L.J. 11: 1994 Cr.L.J. 322

(D.B.); 1985 Cr.L.R. 657 (Raj.); A.I.R. 1972 S.C. 66: 1972 Cr.L.J. 11: (1972) 1 S.C.R. 450 affirming (1970) 2 M.L.J. 371. *See* also 1983 Cr.L.J. 1578 (Gau.); 1982 Cr.L.J. 2102 (Ker.).

Ss. 21 to 27 do not suggest that statements which would be admissible in civil cases as admissions are not admissible in criminal cases. A person who subsequently becomes an accused person might make any admissions which do not by itself implicate him in any criminal charge; and these would be admissible under S. 21 in a trial on a criminal charge against him. Where in the course of an inquiry into the conduct of certain Police Officers, held by a Magistrate who is deputed for the purpose, the Officers who are not even under arrest make certain statements to the Magistrate, such statements are admissible in evidence against them, in a trial on a charge, against them, under Ss. 348 and 330, I.P.Code, of wrongful confinement and hurt for the purpose of extorting a confession. Such statements are not statements recorded under S. 164, Cr.P.Code: 1941 Mad.W.N. 505: 54 Mad.L.W. 81: A.I.R. 1941 Mad. 720.

Under S. 21 admissions made by the accused are admissible in evidence: I.L.R. (1949) Nag. 355: A.I.R. 1949 Nag. 303: 1949 Nag.L.J. 90. Under S. 21 a confession being a species of admission would be relevant and can be proved against the accused unless it can be shown that there is some provision of law which excludes the proof of such confession: A.I.R. 1934 All. 351: I.L.R. 56 All. 720; 1939 Mar.L.R. 244 (Civ.); 170 I.C. 201: A.I.R. 1937 Cal. 433.

Where a person, not yet accused of the offence, wrote in Assamese on a paper in answer to another person's query that his wife and 3 daughters were not in this world, *held*, the writing did not amount to a confession either under S. 24 or S. 162 of the Code of Criminal Procedure; at best it was an admission of a fact; it was not hit by Art. 20(3) of the Constitution either; the writing as well as his oral statements made in response to the query are admissible: 1975 Cr.L.J. 354 (Gau.).

Unless it is so specifically stated in the Cr.P. Code, no rule about the relevancy of evidence in the evidence Act is affected by any provision of the said Code. The admission of guilt in an application presented to a Magistrate is admissible under S. 21 of the Act. It does not become irrelevant under S. 24 or S. 25 of the Act: I.L.R. (1939) All. 367: 1939 All.L.J. 107: A.I.R. 1939 All. 242. *See* also 17 Pat.L.T. 472: A.I.R. 1936 Pat. 358; 167 I.C. 30: A.I.R. 1937 Mad. 19.

A statement made by the accused before the police giving his version of the occurrence and saying he had acted in the right of private defence is an exculpatory statement and is not a confession in any sense of the term. But it is admissible under S. 21 as a piece of admission and can be used against the maker: 1959 Ker.L.R. 1297. A statement made by an accused and recorded under S. 164, Cr.P.Code by a magistrate authorised to record the same, though it does not amount to a confession may be admitted in evidence under S. 21, Evidence Act as an admission: 53 Mys.H.C.R. 17.

See also S. 17, Note 9, *supra*.

5. Confession to Magistrate.—An oral confession by an accused to a Magistrate, is, as an admission by him, a relevant fact and may be proved at his trial under this section by the evidence of the Magistrate: A.I.R. 1929 Lah. 794. Magistrate not empowered under S. 164 holding inquest under S. 176, Cr.P. Code recording confession—Confession is admissible against accused: (1952) 2 M.L.J. 814: A.I.R. 1953 Mad. 138: I.L.R. (1953) Mad. 924.

The Executive Magistrate is competent to record the statement of an accused person during an inquest under S. 174, Cr.P.Code and if proved to be voluntary it could be used as a confession or admission under S. 21: 1993 Cr.L.J. 388: (1993) 1 An.L.T. (Cr.) 174: (1992) 3 Karn.L.J. 763 (D.B.).

Where a person after killing the deceased went to a Magistrate of his own accord and made a statement saying that he killed the deceased, and the statement is taken down by the Magistrate and read over to the person who signs the same, the statement is admissible against him when he is made accused and charged with the murder. Where his statement is exculpatory but contains various features which are in the nature of admissions, the statement can be relied upon against the accused: (1965) 2 An.W.R. 344: 1965 M.L.J. (Cr.) 800: 1966 Cr.L.J. 509: A.I.R. 1966 Andh. Pra. 131.

6. Admissibility of statement in First Information Report/Criminal case.—Where the first information report is given by an accused himself to a Police Officer and amounts to a confessional statement, proof of the confession is prohibited by S. 25. No part of the confessional statement can be proved or received in evidence, except to the extent it is permitted by S. 27 of the Evidence Act. The first information report recorded under S. 154, Cr.P.Code is not a substantive piece of evidence. It may be used to corroborate the informant under S. 157 of the Evidence Act or to contradict him under S. 145 of the Evidence Act in case the informant appears as a witness at the trial. Where the accused himself lodges the first information report, the fact of his giving the information to the police is admissible against him as evidence of his conduct under S. 8 of the Evidence Act and to the extent it is non-confessional in nature, it would also be relevant under S. 21 of the Evidence Act but the confessional part of the first information report by the accused to the Police Officer cannot be used at all against him in view of the ban of S. 25: (1994) 1 An.L.T. (Cr.) 695 (S.C.).

A non-confessional first information report lodged by the accused himself is admissible under S. 21: 1971 Mys.L.J. (S.N.) 292. A non-confessional report lodged by an accused may in the case in which he figures as a complainant attract only the provisions of the law of evidence as to corroboration or contradiction and may be no more admissible than former statement of a witness, yet in the case in which he figures as an accused, it is admissible against him as his admission under S. 21. The bar under S. 162, Cr.P.Code or S. 25 of the Evidence Act would not apply to it: 1994 M.P.L.J. 306 (D.B.); (1990) 2 Karn.L.J. 242.

First information report—What is—Use of, at the trial—First information by accused—Admissibility in evidence: I.L.R. (1961) 11 Raj. 299: (1962) 1 Cr.L.J. 82: A.I.R. 1962 Raj. 3.

Where the person who lodged the first information report regarding the occurrence of a murder is himself subsequently accused of the offence and tried and the report lodged by him is not a confessional first information report but is an admission by him of certain facts which have a bearing on the question to be determined by the Court, *viz.*, how and by whom the murder was committed or whether the statement of the accused in the Court denying the correctness of certain statements of the prosecution witnesses is correct or not, the first information report is admissible to prove against him, his admissions which are relevant under S. 21. The first information report being neither a confession nor a statement made to a Police Officer during the course of investigation, its admissibility is not barred either by S. 25 of the Evidence Act or by S. 162, Cr.P.Code: 1965 M.L.J. (Cr.) 93: (1964) 6 S.C.R. 312: A.I.R. 1964 S.C. 1850.

Statement by accused to Police before F.I.R. not relating to occurrence under investigation but to incidents of previous day—Statement not made during investigation—Statement is admissible under S. 21 and is not barred either under S. 25, Evidence Act or S. 162, Cr.P.Code: (1965) 2 Cr.L.J. 647: I.L.R. (1965) 2 Ker. 33: A.I.R. 1965 Ker. 248.

If the first information given to a Poilce Officer amounts to a confession, any incriminating fact mentioned therein, if it has got a bearing either directly or indirectly with the confession, such fact, even though it may be an admission, will be inadmissible. If, on the other hand, the first information does not amount to a confession, any admission made therein can be proved against the maker thereof under S. 21 of the Evidence Act. In the instant case, the first information by the driver of the lorry, later charged with rash and negligent driving under S. 304-A of the Penal Code, does not amount to a confession. He has only given an explanation as to how the accident occurred. Therefore, the admission therein that he was driving the vehicle at the time of the accident is admissible against him: 1968 M.L.J. (Cr.) 122: 1968 Mad.L.W. (Cr.) 9: (1968) 1 M.L.J. 304: 1969 Cr.L.J. 83.

A report of an accident, which drivers of motor vehicles are required to make to the Police under S. 89 of the Motor Vehicles Act and which contains a statement that the accused was driving the motor vehicle at the time of the accident, contains an admission and as such, the statement would be admissible under S. 21 of the Evidence Act as admission. The question who was driving the vehicle at the time of the accident is a relevant fact. It is not an F.I.R. within S. 154,

Cr.P.Code and, therefore, no objection to its admissibility in evidence on that ground would be countenanced: (1963) 1 Cr.L.J. 596: A.I.R. 1963 Guj. 111.

An admission by the accused in a criminal case that he was driving the truck at the time of accident, *held*, is not in itself a substantive piece of evidence in compensation case but can be pressed into service against him to lend support to the testimony of witnesses that he was the driver of the truck involved in the accident: A.I.R. 1976 Raj. 71: 1975 Raj.L.W. 399.

An admission made by the owner of the truck involved in the accident before the Police during investigation of the criminal case against the driver would be relevant and admissible in the proceedings before the Claims Tribunal: (1981) 1 Kam.L.J. 178 (D.B.).

See also S. 17, Note 8, *supra* and S. 24, Note 3; S. 25, Note 3; S. 27, Note 8, *infra*.

7. Admissions by representative-in-interest are binding.—*See* I.L.R. 22 Cal. 909: 22 I.A. 129; A.I.R. 1926 Oudh 41; I.L.R. 24 Cal. 62 (Purchaser at execution sale is representative of judgment-debtor and is bound by the latter's admissions). *See* also A.I.R. 1924 Nag. 208; 8 I.A. 65: 10 C.L.R. 281: 7 I.C. 107 (P.C.); I.L.R. 17 Mad. 228; I.L.R. 31 Cal. 380; 100 I.C. 835: (1921-22) 26 Cal.W.N. 273 (P.C.).

A statement by way of an admission made by a person cannot be used by him as evidence in his favour nor by his successors-in-interest or legal representatives. For the purposes of this rule, an auction-purchaser at a Court sale cannot be considered to be a successor-in-interest or a legal representative of the judgment-debtor, whatever may be the natural relationship between them: A.I.R. 1948 Pat. 426. Where the son and *mukhtar-e-am* of a party makes an admission before the partition officer, it is admissible under S. 21 in proceedings for the division of joint Sir, it would constitute a strong piece of evidence, but is not conclusive: 1940 A.W.R. (B.R.) 138: 1940 R.D. 364.

Where in a suit for a declaration that, a partition having already taken place, the defendant was not entitled to have it repartitioned, the plaintiff files a certified copy of a previous statement made by the defendant's 'mukhtar-e-am' admitting partition and an ample opportunity is given to the defendant to explain the admission but it is not availed of by him, the admission can be used in evidence: A.I.R. 1953 Him. Pra. 52.

A partnership form and declaration signed by the plaintiff firm and one *M* which were filed in the Stock Exchange had been sought to be tendered. *Held*, that they were admissible as admissions against the plaintiff under S. 21: A.I.R. 1954 Cal. 179.

Where the admissions are wrong in point of fact and are made in ignorance of legal rights they have no binding effect: 1941 O.W.N. 648: A.I.R. 1941 Oudh 429. *See* also S. 17, Note 10, *supra*.

A peson who was no party to a suit cannot be bound by any admissions arising out of the institution of the suit in which he acted merely as the general agent of one of the parties and in that capacity verified the plaint: 1942 O.W.N. (B.R.) 145: 1942 All.L.J. (Supp.) 23.

An admission by a Hindu father that a house built by him was constructed out of the self-acquisiton of one of his sons only has the effect of relieving that son from proving that the house was built out of his self-acquisition; but it does not relieve him from proving what the actual cost of construction was when he claims that amount out of his father's estate: 62 Cal.L.J. 430: (1935-36) 40 Cal.W.N. 75.

8. Admission by witness.—It is well established that the admission has to be taken as a whole. What a party says on the day of his re-examination can be tacked on to his previous day's admission contained in the answers given in cross-examination. There is no warrant for making an artificial division of a party's deposition according to the days on which the deposition is recorded: I.L.R. (1959) Mad. 669: (1959) 2 M.L.J. 395: A.I.R. 1959 Mad. 514.

There is a cardinal distinction between a party whose prior admission is to be proved as a substantive evidence and a witness who is sought to be discredited by confronting him with his prior statement which is not a substantive evidence. In the former case, the admission being evidence *proprio vigore* need not be put to the party; in the latter case, the witness cannot be disbelieved unless he has been confronted with his prior statement. [(1966) 1 S.C.R. 606: A.I.R. 1966 S.C. 405, Foll.]: A.I.R. 1974 S.C. 117: (1973) 2 S.C.W.R. 637: (1974) 1 S.C.C. 78.

Where in cross-examination a witness admits that a statement previously made by him is false he ought to be asked in re-examination why he made a statement which was false. The mere fact that the witness acknowledges the previous statement to be false is no justification for rejecting such previous statement, if on other grounds the Court is able to reach the conclusion that the statement is in substance true: 51 I.C. 449: 20 Cr.L.J. 465. *See* also (1908-09) 13 Cal.W.N. 409: 1 I.C. 320; 7 I.C. 505; 20 W.R. 112; I.L.R. (1945) 1 Cal. 565.

The deposition of an insolvent reduced to writing is admissible as evidence against him in a criminal charge: 54 I.C. 478: I.L.R. 48 Cal. 996. Oral and documentary evidence as to the statement of a postman in a departmental enquiry are inadmissible in evidence in his absence: 26 I.C. 307 (1): 16 Cr.L.J. 3. Statement on oath at coroner's inquest is admissible at the trial: I.L.R. 50 Bom. 111: A.I.R. 1926 Bom. 151.

9. Miscellaneous.—The usual rule of law is that the admissions of ryots that they have no occupancy rights in ryoti lands will have little value, in the face of statute, if they are proved as a matter of fact to be ryoti lands. The policy of the law has been to protect the weak man against himself: (1959) 1 M.L.J. 22.

Will is admissible to prove religion of deceased: I.L.R. 7 Rang. 702: A.I.R. 1930 Rang. 42.

Illegitimate children—Proof of their paternity—Extract from birth register—Probative value of—Information for record in birth register supplied by mother—Not binding on presumed father—Presumption of law as to paternity—Burden of proof as to paternity in such case: (1962) 2 M.L.J. 107: 1962 M.L.J. (Cr.) 427: (1962) 1 Cr.L.J. 437 (2): A.I.R. 1962 Mad. 141.

A husband's signed statement given to the Police is admissible in the wife's suit for maintenance; Policemen like others are competent to prove admissions made before them unless there is a statutory taboo: 1971 Ker.L.T. 182.

Where in the wife's case for divorce on her repudiating their marriage solemnised when she was less than 15 years of age, the husband in his deposition stated that she had then admitted to him that her age was 17 years which he neither pleaded in his written statement nor put to her in cross-examination, *held*, the admission not having been pleaded could not be proved; the principle of pleading and proof did apply to matrimonial causes: (1986) 2 Hindu L.R. 213 (Madh. Pra.).

Where a woman has described herself as the wife of a person in a contemporaneous transaction, it would be admissible in evidence when there is a dispute as to the fact of marriage, because she had the special knowledge in respect of the marriage and it would be proved by her: I.L.R. 16 Luck. 615: 1941 O.W.N. 249: A.I.R. 1941 Oudh 284.

Value of admission in application for *visa*: (1957-58) 62 Cal.W.N. 589.

The statement that a document is a copy of the original is admissible when made by a deceased person in a document relating to a relevant fact and also as an admission under S. 21: 56 I.A. 146: I.L.R. 52 Mad. 453: A.I.R. 1929 P.C. 115: 56 M.L.J. 730 (P.C.).

Mere admission of signature on blank paper, effect of. *See* 17 Pat.L.T. 621: A.I.R. 1936 Pat. 588.

See also S. 17, Note 11, *supra*.

Cross-complaint by accused to police—Uncertified copy produced through defence witness—Accused not himself giving evidence in Court—Admissibility—Duty of Court: (1963) 1 Cr.L.J. 355 (Guj.).

Contradiction by reference to previous admission—Document containing admission admitted by witness in examination-in-chief—No explanation offered—Document can be used to contradict him without drawing his attention to admission: 1962 Jab.L.J. 796: A.I.R. 1963 Madh. Pra. 155.

Delivery of possession—Recitals as to; in deed—Onus to prove non-delivery is on party who challenges validity of gift: A.I.R. 1962 J.&K. 4.

Statement of deceased's father as to the exclusion of daughters from inheritance by custom is admissible: I.L.R. 8 Luck. 445: A.I.R. 1933 Oudh 246. *See* also A.I.R. 1937 Cal. 515: (1936-37) 41 Cal.W.N. 1089.

Statement of a person before Nyaya Panchayat admitting a fact is relevant as admission and can be proved under S. 21 of the Evidence Act: 1959 M.P.L.J. (Notes) 194.

As to admission in butwara proceedings, *see* A.I.R. 1926 Cal. 290. A confession is evidence for the prisoner as well as against him and must be taken altogether: 53 I.C. 145: 20 Cr.L.J. 737 (N.).

But it is only where no other evidence is forthcoming that this can be pressed to the extent of requiring that no part be accepted as true without accepting the whole. (*Ibid*) If other evidence incompatible with a part of the confession is on record, it may be relied on in preference to that part: 53 I.C. 145: 20 Cr.L.J. 737 (N.).

Danger of resting judgment upon verbal admissions of the sum due. *See* 10 I.A. 74 (79): 13 C.L.R. 266 (271) (P.C.).

Where the execution of a mortgage deed is admitted but the receipt of consideration is denied, the onus lies heavily on the defendant (executant) because it was inconsistent with his own admissions in writing: A.I.R. 1928 P.C. 39: 54 M.L.J. 208 (P.C.).

In a title suit, the proceedings in the previous title suit between the present defendant and a third person are relevant under S. 19 and the pleading of the defendant is admissible as admission of the defendants under S. 21: A.I.R. 1930 Pat. 405. *See* also (1933) 35 Punj.L.R. 463: A.I.R. 1934 Lah. 527;(1936-37) 41 Cal.W.N. 1089: A.I.R. 1937 Cal. 515.

Proof of admission—Concession of facts recorded in judgment—No challenge in grounds of appeal—Statement in judgment to be accepted as correct unless properly challenged—Mere incorporation as a ground in memo of appeal not sufficient challenge: A.I.R. 1970 Ori. 218.

A declaration made to the Municipal Corporation by a person to the effect that he was a tenant in the suit premises, *held*, in a subsequent suit for possession and *mesne profits*, such a declaration can be treated as an admission that he was in the permissive possession of the suit premises, when such admission had been duly proved: A.I.R. 1974 Bom. 12: 1973 Mah.L.J. 771: I.L.R. (1974) Bom. 752.

Admission—Value of—Village forming part of Tanjore Palace Estate—Lands in, treated by Raja as separate property—Effect of seizure by Government and subsequent re-grant—Eviction of tenants in long possession by alienee from purchase and in execution—Burden of proof—Admission by tenants—Binding nature of: (1957) 1 M.L.J. 72.

Even the statements made several years after the date of transaction are admissible under Ss. 21 and 32(3) for deciding whether the transaction was or not a *benami* transaction when such statements were against the proprietary interest of their maker: A.I.R. 1980 S.C. 727: (1980) 93 Mad.L.W. (S.N.) 42. Where in some documents the husband had described his wife as real owner, his claim that she held such property as *benami* for him, is not tenable in absence of any explanation for such admission: A.I.R. 1978 N.O.C. 228 (Pat.) (D.B.).

The English doctrine of advancement which requires the Court to presume that a purchase of property in the name of another by the father or the husband or the grand father when the father is dead, unless rebutted by evidence to the contrary, was in fact for the benefit of the ostensible purchaser, is not in vogue in India. In India two kinds of *benami* transactions are generally recognised: (*i*) where the money is advanced by the other person with no intention to benefit the ostensible purchaser; and (*ii*) where the owner conveys the property to another person with no intent to transfer its title; in the former case there is an operative transfer but the transferee holds it for the benefit of the person paying the money; in the second case there is no operative transfer at all notwithstanding the deed of conveyance though in both cases real title is divorced from the ostensible owner: A.I.R. 1980 S.C. 727: (1980) 93 Mad.L.W. (S.N.) 42.

10. Denials of party.—Though 'Court' is bound to receive admissions in evidence, no such rule applies to denials: I.L.R. 49 All. 482: A.I.R. 1927 All. 383.

11. Clause (3).—Cl. (3) of S. 21 is intended to apply to cases in which the statement is sought to be used in evidence otherwise than as an admission, for instance, as part of the *res gestae* or as a statement accompanying or explaining a particular conduct. Where a purchase is made by a parent in the name of his child, the contemporaneous acts of the parent may be admissible but not the subsequent acts and declarations: I.L.R. 6 Luck. 44: A.I.R. 1930 Oudh 441.

Under S. 21, an admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission. Statements in zamindari papers which are entries in books of account regularly kept in the course of business are relevant under S. 34. Such statements can, therefore, be taken into account though they may be admissions on behalf of the zamindar: I.L.R. 19 Pat. 398: A.I.R. 1940 Pat. 622.

12. Previous admission by party—Use of—Procedure.—Under S. 21 of the Evidence Act, a party's previous admision is relevant and can be used as evidence against him if that party has not appeared in the witness-box at all. The value of that admission as a piece of evidence depends on the circumstances of each case but ordinarily an admission is a valuable piece of evidence. An admission is a relevant piece of evidence and can be used as legal evidence against a party even in cases where the party appears in the witness-box but makes no statement inconsistent or contradictory to that admission and a denial of that admission is not involved in the statement made by the party in the witness-box by considering the statement as a whole. A previous admission of a party who has gone into the witness-box on the point in issue and in the witness-box has made a statement inconsistent with the admission or the statement made in the witness-box is such which involves a denial of the previous admission or runs counter to that admission, then the previous admission cannot be used as legal evidence in the case against that party unless the attention of the witness during cross-examination was drawn to that statement and he was confronted with specific portions of that statement which were sought to be used as admission. Without complying with the procedure laid down in S. 145 of the Evidence Act, the admission contained in the previous statement cannot be used as legal evidence against that party: (1945) 47 Punj.L.R. 391: A.I.R. 1946 Lah. 65 (F.B.), followed in A.I.R. 1956 Vindh. Pra. 26.

The object of S. 145 is to give the witness a chance of explaining the discrepancy or inconsistency and to clear up the broad point of ambiguity or dispute; but this procedure does not apply to admissions in view of Ss. 17 and 21. The purpose of contradicting the witness under S. 145 is quite different from the purpose of proving the admission: A.I.R. 1971 Pat. 215 (D.B.).

Previous admissions of a party can be taken into account against him even if he was not confronted with the same when he appeared in the witness box in the subsequent proceedings. [A.I.R. 1946 Lah. 65 (F.B.) held to have been disapproved in A.I.R. 1966 S.C. 405]: A.I.R. 1971 P.&H. 177 (D.B.); A.I.R. 1974 Ori. 120: (1973) 1 Cut.W.R. 809 (D.B.).

An admission is a substantive piece of evidence. Thus, when there is an admission, it is not necessary to confront the person concerned with his previous statement. [A.I.R. 1966 S.C. 405; A.I.R. 1974 S.C. 117 and A.I.R. 1977 S.C. 409, Rel. on]: A.I.R. 1982 Cal. 353 (D.B.).

Admission made in a suit as compared to admissions made in connection with other enquiries have a greater validity; under certain circumstances, they may even serve as a foundation for passing the decree: (1978) 91 Mad.L.W. 156 (D.B.).

In a suit for declaration that certain deity was a family deity, a previous statement of the plaintiffs 1 and 2 before the Inspector of Endowments that the public had installed the deity was put in evidence. The statement was signed by both the plaintiffs. One of them was not examined but the other was examined as a witness of the case and was in fact confronted with the statement and he admitted that he had signed. *Held*, that the statement was admissible in evidence as admission of the parties themselves: I.L.R. (1956) Cut. 689: A.I.R. 1957 Ori. 104.

Where a letter written by the defendant to the plaintiff contains passages some of which amount to pure admission, and others amount to contradiction of the evidence given by him in Court, the plaintiff is not entitled to use passages in the letter as admissions against the defendant under S. 21 of the Evidence Act without complying with the provisions of S. 145 of that Act: A.I.R. 1949 Ori. 27. *See* also A.I.R. 1955 Cal. 206, cited under S. 18, Note 18, *supra*; (Per *Haider, J.M.*) in 1949 R.D. 223. But *see contra* (Per *Lal, J.M.*) in 1949 R.D. 223.

An admission by a party in a previous suit is admissible in evidence in a subsequent suit

and the burden is upon the party making it to show that it was wrong on the principle that what a party himself admits to be true may reasonably be presumed to be so though the party making the admission may give evidence to rebut this presumption. But unless and until that is satisfactorily done, the fact admitted must be taken to be established. This is true notwithstanding the fact that statement was not put to the party making it when he came into the witness box: A.I.R. 1955 All. 361, approved in I.L.R. (1956) 2 All. 399: 1957 All.L.J. 350: A.I.R. 1957 All. 1 (F.B.).

Per *Agarwala* and *Beg, JJ.*—(*Bhargava, J.* Dissenting). (*1*) In a civil suit it is not obligatory on the party who produces documents admitted by the opponents' Counsel and containing admissions by the opponents to draw in cross-examination his attention to the said admissions before he can be permitted to use them for the purpose of contradicting him provided that the admissions are clear and unambiguous but where the statements relied on as admissions are ambiguous or vague, it is obligatory on the party relying to do so. (*2*) The party producing these documents can be permitted under S. 21, Evidence Act to use them as substantive evidence in the case without drawing in cross-examination the attention of the opponent to those admissions: 1957 All.L.J. 350: A.I.R. 1957 All. 1 (F.B.). *See* also 1956 B.L.J.R. 197: A.I.R. 1957 Pat. 293.

The party producing documents can be permitted under S. 21 of the Evidence Act to use them as substantive evidence in the case without drawing in cross-examination the attention of the opponent to those admissions. Though the admission should ordinarily be put to the party in the witness box on principles of fairness, the admission of the parties, which is otherwise relevant under S. 21 of the Evidence Act, does not become irrelevant by reason of his attention not being drawn in the course of cross-examination: (1959) 2 An.W.R. 7.

Where a party makes an oral admission to a witness who deposes to the fact of making such admission, the admission can be used as legal evidence against the party making the admission even though it was not put to him. S. 145, Evidence Act will not apply to such a case because it only applies when it is intended to contradict the witness by a previous inconsistent statement of his in writing or reduced into writing. The admission having been established, it lies on the party to explain it and if he does not say anything about it in his examination-in-chief, then there is no obligation on the opposite party to confront him with the admission: A.I.R. 1957 Madh. Bh. 118.

A previous statement is certainly admissible for the purpose of contradiction and can also be used for corroboration, it being a question of fact as to what probative value should be attached to it, to be decided on the circumstances present in each case: A.I.R. 1958 Manipur 29.

In a prior sale-deed executed in favour of the plaintiff and *M*,the widow of *G*, the plaintiff was described as the adopted son of *G*. In a subsequent will executed by *M* it was stated by *M* that she had no son. Thus, there were two different statements in two documents to which *M* was a party.

Held, that mention of the plaintiff as the adopted son in the earlier document is of little value unless the change in the second document can be explained. In the present case, an explanation has been put forward by the defendant that the plaintiff was intended to be adopted by *M*, and therefore, his name was mentioned as one of the vendees with parentage of *G* in the sale-deed. The explanation by itself may not be wholly explainable, but when the evidence in respect of the adoption is thoroughly unreliable, the explanation becomes plausible: 1957 Raj.L.W. 254: A.I.R. 1957 Raj. 261.

Where a brother suing his other brother and purchasers for partition of joint family property was confronted with his deed of relinquishment admittedly written and signed by him prior to the suit undoubtedly indicating that the plaintiff had received his share from the joint family property and had let off his right, title and interest in the other joint family properties, *held*, the deed is an unequivocal admission sufficient to defeat the plaintiff's claim: (1991-1) 11 Guj.L.H. 566.

Admission of contents of contract—Its validity can still be challenged: (1968) 9 Guj.L.R. 1082.

22. When oral admissions as to contents of documents are relevant.—Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

23. Admission in civil cases when relevant.— In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Explanation.—Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.

Section 22—Note.

Where in a suit by a contractor for damages for breach of contract, the contractor (plaintiff) contended that the counsel of the defendant conceded at the time of argument before the Special Referee that on termination of contract, the plaintiff would have been paid certain amount as one months remuneration in lieu of one month's notice, *held*, the lawyer's concession could not be treated as an admission of fact binding on the defendant as there was no occasion for adducing any secondary evidence as the original contract was before the Special Referee: A.I.R. 1989 N.O.C. 119: (1988) 2 Cal.L.T. (H.C.) 136 (D.B.).

Section 23—Notes.

The rule enunciated in S. 23 does not apply to admissions before an arbitrator. In the absence of an express or implied understanding between the parties that the evidence of the conversation during the period when negotiations for settlement of the claim are being carried on before the arbitrator is not to be tendered, such conversation cannot be held to be privileged and must be held to be admissible in evidence: Madh.B.L.J. (1954) H.C.R. 232: A.I.R. 1954 Madh. Bh. 58.

Founded on the principle that desire for peace is always to be preferred to spoiling for a fight, S. 23 lays down two conditions when in civil cases an admission, (otherwise so prized), ceases to be relevant even. One if an admission is made upon an express condition that evidence of it is not to be given: a condition which is well met by 'without prejudice', meaning, 'the use of what I commit myself to, if not accepted by you, is impermissible'. Two, the existence of circumstances from which the Court can infer that the agreement of the parties was just so: evidence of the admission should not be given. Since an amicable settlement of a dispute merits encouragement always, all that is said and written in the course of negotiations for such settlement appears to be nothing but proof of so many circumstances from which there should be no difficulty in spelling out the agreement of the negotiating parties of not using such statements or writings in evidence. In sum, all that is said and written during such negotiations is generally without prejudice by the very mandate of S. 23, no matter whether those two words, 'without prejudice', are made use of or not: (1967-68) 72 Cal.W.N. 852: A.I.R. 1968 Cal. 388.

Admissions before a person to whom the parties went for a compromise are admissible. *See* 95 I.C. 363: A.I.R. 1926 Lah. 548. But an offer of a certain compensation without prejudice in land acquisition proceedings is not admissible: 92 I.C. 319: A.I.R. 1926 Lah. 509.

An admission contained in a draft of a compromise deed filed in Court has to be excluded under S. 23 where the document provides that the parties to it would be free to repudiate any condition of the proposed compromise by which in their opinion, their rights were prejudicially affected: (1943-44) 48 Cal.W.N. 15.

In civil cases no admission is relevant if it is made in the circumstances from which the Court can infer that the parties agreed that its evidence should not be given: 1984 All.W.C. (Supp.) 243.

Anything stated in the course of an attempted settlement by any of the parties or by witnesses who took part in the settlement

24. Confession caused by inducement, threat or promise when irrelevant in criminal proceeding.—A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise[1], having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

---

1. For prohibition of such inducement, etc., *see* the Code of Criminal Procedure, 1898 (5 of 1898), S. 343.

---

would be hit by the second alternative to S. 23, Evidence Act and, therefore, inadmissible in evidence: (1980) 2 Karn.L.J. 347.

Where compromise entered into between the parties was not acted upon and was not binding on them, *held*, application for recalling witnesses for the purpose of getting the compromise exhibited and for getting the admissions contained therein on the record, was rightly rejected, it being contrary to S. 23: A.I.R. 1992 Ori. 136.

Pardanashin lady—Proof of—Use of statement made by husband in another case—Permissibility: A.I.R. 1958 Madh. Pra. 25.

Admission by counsel of party made without prejudice to his contention does not bind the party—An incorrect admission on a question of law also does not bind the party: A.I.R. 1969 Manipur 23.

Where certain letters were in the ordinary course tendered by the plaintiffs in evidence and they were marked 'without prejudice' and the defendant's counsel admitted them, *held* that the privilege was withdrawn and that the letters were free to be used as evidence in the judicial proceedings. *Held* also, that under S. 23 in order to sustain a plea of privilege as regards the letters it must be shown that both the addressor and the addressee intended to claim the same: 6 O.W.N. 1088: A.I.R. 1930 Oudh 105.

A letter by the husband confessing that he was guilty of cruelty and seeking apology from his wife's father, written at a time when the parties were trying to effect a compromise, *held*, fell within the second condition laid down in S. 23 and as such the husband could claim privilege regarding the same when in a proceeding for restitution of conjugal rights, the wife sought to place that letter on record: A.I.R. 1973 P.&H. 18: 1972 Cr.L.J. 577. Letter written by wife to husband making admission of adultery and also stating that it was condoned by him. *See* 1979 Hindu L.R. 99 (Punj.).

The words 'without prejudice' occurring in a certificate of damage issued by the Railways do not render it inadmissible under S. 23 of the Evidence Act but merely reserves the right of both the Railway and the customer to challenge its accuracy by lending evidence to prove that the actual damage was lower or higher (as the case may be) than stated in it. The certificate is, therefore, admissible as *prima facie* evidence of the quantum of damage: 1966 All.L.J. 495.

Section 24—Synopsis.

1. Confession—What is.
2. Admissibility of confessions—Extent of.
3. Scope and applicability.
4. "Accused person" [*See* also S. 25, Note 6; S. 27, Note 8, *infra*].
5. Confession—Mode of use.
6. Acceptance or rejection of confession.
7. Conflict between Medical evidence and confession.
8. Confession—Evidentiary value.
9. Confession in Police custody—Inadmissibility of.
10. Confession under inducement, threat, etc.
11. Confession of co-accused.
12. "Person in authority".
13. Duty of Court.
14. Confession recorded by Magistrate.
15. Time for reflection.
16. Retracted confession—Evidentiary value of.
17. Retracted confession—Standard of corroboration required.

18. Retracted confession—Use of against co-accused.

19. Delayed retraction—Effect of.

20. Retracted confession—Proof of.

21. Retracted confession—Illustrative cases.

22. Extra-judicial confession—General.

23. Extra-judicial confession—Corroboration.

24. Extra-judicial confession—Actual words used by the accused.

25. Extra-judicial confession—To whom may be made.

26. Extra-judicial confession—Made by a co-accused/approver.

27. Extra-judicial confession—Illustrative cases.

---

1. Confession—What is.—Confession is not defined in Evidence Act. Confession is a direct admission or acknowledgment of his guilt by a person who has committed a crime: 1994 Cr.L.J. 322 (Ker.) (D.B.).

A confession is not defined in the Evidence Act but it has been judicially interpreted as meaning an admission made at any time by a person charged with a crime stating, or suggesting the inference, that he committed that crime. The statement should, however, be considered as a whole. It would not be right to take isolated portions of it and to consider whether any of them, regarded separately, amounts to an admission of guilt or not: A.I.R. 1933 Rang. 326. It should relate to the particular crime with which accused is charged: I.L.R. (1945) Bom. 278: (1944) 46 Bom.L.R. 811: A.I.R. 1945 Bom. 152.

When confessional statement of the accused was not in respect of the alleged crime which was subject-matter of indictment, *held*, such a statement could not be relied upon: (1983) 56 Cut.L.T. 139: 1983 Cr.L.J. 1715.

A confession to be relied upon must amount to an acknowledgment of its maker's guilt; if it contains some self-exculpatory matter which, if true, would negate the offence, it is no confession. Besides, a confession must either admit the offence as such or substantially all facts that constitute the offence; an admission of a gravely incriminating fact, even if conclusive, is by itself not a confession: 1975 Cr.L.J. 1350 (Sikkim).

A statement to be called a 'confession' must either admit in terms the offence or at any rate substantially all the facts which constitute the offence; a mere admission of an incriminating fact, however grave, or a statement containing an exculpatory assertion of some fact, which if true, would negative the offence do not amount to a confession: A.I.R. 1976 S.C. 1167: (1976) 2 S.C.C. 302: (1976) 3 S.C.R. 672; (1984) 58 Cut.L.T. 127; (1982) 54 Cut.L.T. 250 (D.B.); 1981 M.P.L.J. 594.

A confession must either admit in terms the offence, or at any rate substantiate all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession. A statement that contains self-exculpatory matter cannot amount to a confession if the exculpatory statement is of some fact which, if true, would negative the offence alleged to have been confessed. A statement which when read as a whole is of an exculpatory character and in which the prisoner denies his guilt is not a confession and cannot be used in evidence to prove his guilt: I.L.R. (1962) Cut. 516: (1963) 2 Cr. L.J. 229; 1953 S.C.R. 94: A.I.R. 1952 S.C. 354.

A confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. A statement which purports to convey what appears to be an impression created in the mind of the accused regarding the occurrence is not a confession as it cannot amount to a categorical admission of the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession, (*e.g.*), admission that accused was the owner of the knife which caused the death and was in recent possession of it, would not be enough: 16 Cut.L.T. 141: A.I.R. 1950 Ori. 202; A.I.R. 1952 S.C. 354; A.I.R. 1953 All. 142: 1953 Cr.L.J. 385 (Statement merely suggesting an inference that the accused is guilty is not a confession). But *see* (1920) 22 Bom.L.R. 1247 and 43 I.C. 605 noted below.

A confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession. Hence, an admission by the accused that she put her child into a pond is not a confession of murdering it. It may be an

admission of an incriminating fact and cannot be considered as anything more, especially when the cause of the child's death is not known: 1961 Ker.L.T. 201.

Any statement by a person which would suggest an inference as to his guilt may be a confession: (1920) 22 Bom.L.R. 1247; A.I.R. 1930 All. 29.

Scope—Confession—What is—Law relating to—Confession or admission admissible against maker unless excluded by some provision of law—Confession to Police whether in course of investigation or otherwise and confession made while in Police custody—How far protected: 1966 M.L.J. (Cr.) 134: 1965 B.L.J.R. 865: 1966 Cr. L.J. 100: A.I.R. 1966 S.C. 119.

Where the alleged confession of the accused did not show his complicity in the crime but at best it showed that he was in the company of other accused persons, *held*, it could not be construed as his confession of his involvement in the crime: 1994 Cr.L.J. 555 (Ker.) (D.B.).

A confession is an admission made by a person charged with or accused of a crime suggesting inference that he committed the crime. It is the duty of Court to question the accused clearly and fairly bringing home to his mind the exact case he has to meet. Where the exact accusation as per prosecution report was not explained to the accused, his reply, pleading guilty to such vague question, cannot be said to be admission of guilt: 1994 Cr.L.J. (N.O.C.) 121 (Ori.).

In order to distinguish between a confession and an admission a simple test can be applied. If the statement by itself is sufficient to prove the guilt of the maker, it is a confession. If on the other hand, the statement falls short of it, it amounts to an 'admission'. Where there is a direct admission of guilt, it is not possible to treat the statement as an admission. The acid test which distinguishes a confession from an admission, is that where conviction can be based on the statement alone, it is a confession and where some supplementary evidence is needed to authorize a conviction, then it is an admission. No statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession: 1958 All.L.J. 660: 1959 Cr.L.J. 940: A.I.R. 1959 All. 518; 25 Cut.L.T. 269: A.I.R. 1959 Ori. 159.

Where the effect of the statements might at most be described as suggesting the inference that the accused committed the crime, but could not show that the accused admitted in terms the offence, or substantially all the facts which constituted the offence, the statements individually or taken together did not amount to a confession of the crime: 1960 Cr.L.J. 544: A.I.R. 1960 S.C. 409.

An admission of a fact, however incriminating, but not by itself establishing the guilt of the maker of such admission, would not amount to confession within the meaning of Ss. 24 to 26. Thus, statement made by the accused to the Doctor where he was taken by the Police after arrest that it was the deceased who had caused the injury to him, *held*, it was an admission of a fact, no doubt of an incriminating fact, and which established the accused's presence in the deceased's room but which clearly was not barred under S. 26. [(1970) 2 M.L.J. 371, Affirmed]: A.I.R. 1972 S.C. 66: 1972 Cr.L.J. 11: (1972) 1 S.C.R. 450; 1984 M.L.J. (Cr.) 202: 1984 Mad.L.W. (Cr.) 23: 1984 Cr.L.J. (N.O.C.) 193; 1985 Cr.L.R. 657(Raj.); 1986 Cr.L.J. 1865: (1987) 1 Ker.L.T. 391 (D.B.); A.I.R. 1988 Ker. 1: 1988 Cr.L.J. 107(F.B.); (1993) 2 Ker.L.J. 11: 1994 Cr.L.J. 322 (D.B.). *See* also 1983 Cr.L.J. 1578 (Gau.); 1982 Cr.L.J. 2102 (Ker.).

When once an accused is arrested by a Police Officer and is in his custody and is temporarily left in charge of a private individual, that does not terminate the Police custody and the accused shall still be deemed to be in a Police custody.The accused in the present case was sent in the company of Police Constables for medical examination and the Doctor says that they were actually present outside the room when the accused made the statement. Such a confession is inadmissible in evidence as it is hit by S. 26 of the Evidence Act: 1964 M.L.J. (Cr.) 29: 1962 Ker.L.J. 755: 1962 Ker.L.T. 476: (1962) 2 Ker. L.R. 244.

When the accused makes no statement inculpating himself, such a statement does not

amount to a confession, and is, therefore, not admissible: 1986 Cr.L.R. 567 (Raj.).

A statement of the accused in which he does not implicate himself either directly or indirectly, is not a confession and cannot be used against him: 1960 Cr.L.J. 1577: A.I.R. 1960 Cal. 722.

A statement that contains self-exculpatory matter (case of self-defence) does not amount to a confession, if the exculpatory statement is of some fact, which if true would negative the offence alleged to be confessed: (1970) 36 Cut. L.T. 774.

Where the accused in his statement under S. 164 of the Code of Criminal Procedure *inter alia* stated: 'In fear of my own life, I snatched his knife and assaulted him with it', *held*, it did not amount to a confession of guilt; in fact, he claims the right of private defence: 1976 Cr.L.J. 1921 (D.B.).

Confession—What is—Accused stating that deceased attacked him first threatening to murder him and that, therefore, he gave him some blows in self-defence—Does not amount to confession: (1962) 2 Cr.L.J. 540 (Guj.).

Where a statement made by accused admits in terms the offence of murder and also substantially all the facts which constitute that offence and the only expression suggested to be self-exculpatory is the statement that he acted 'presuming that they would kill me', it would not be a statement of fact which, if true, would negative the offence alleged to be confessed by him. The statement in substance, amounts to a plea of justification but is not a denial of what he did. The confession is not thereby made self-exculpatory and as such inadmissible in law: (1965) 7 Ori.J.D. 198: 31 Cut.L.T. 804: I.L.R. (1965) Cut. 369.

'Confession'—Meaning of: (1960) 62 Punj.L.R. 781.

Applicability—Confessional statement—Acceptance of inculpatory portion alone—Permissibility—Inculpatory portion can be accepted if the exculpatory portion is found to be inherently improbable—Charge for murder—Confessional statement to Mukhiya of village—Exculpatory portion found to be not only inherently improbable but contradicted by the statement of accused under S. 342, Cr.P.Code—Acceptance of inculpatory portion and conviction based thereon, *held*, was valid: A.I.R. 1969 S.C. 422.

To make S. 24 of the Evidence Act fully operative it must be shown that not only there was inducement proceedings from a person in authority, but that the said inducement was sufficient to give the accused person a chance which would appear to the Court reasonable for supposing that by making such confession the accused gained any advantage or did avoid any evil of temporal nature in relation to the criminal proceeding: (1969) 35 Cut.L.T. 513: 1969 Cr.L.J. 995: A.I.R. 1969 Ori. 190.

Statement explaining a discrepancy in account maintained by Secretary of a Co-operative Society in reply to a Memo. from the Co-operative Registrar—Registrar entitled to call for information under Ss. 54 and 60 (*b*) of the Bombay Co-operative Societies Act—Statement in reply is an admission under S. 17 and not hit by S. 24: 1969 Cr.L.J. 791: A.I.R. 1969 Tripura 31.

Judicial confession—Admissible without examining Magistrate before whom it was made: A.I.R. 1969 Ori. 289.

Admissibility of a confession must be based on a reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant.

A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.

The same standard must be applied while determining whether a guilty plea is voluntarily made. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality.

Several constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a criminal trial. First is the privilege against compulsory self-incrimination. Second is the right to trial by jury. Third, is the right to confront one's accusers.

Court cannot presume a waiver of these three important rights from a silent record: (1969) 23 Law Ed. 2nd 274: A.I.R. 1970 U.S.S.C. 10.

Applicability—Arrest and custody—Distinction—Person under surveillance making statement—Statement is not hit by S. 24, Evidence Act: A.I.R. 1970 Bom. 79.

A statement in order to be a confession must be an admission in terms of the offence or at any rate substantially of facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession. If the statement of the accused is suggesting inference that he committed a crime, it cannot by itself become a confession. A statement that contains self-exculpatory matter cannot amount to a confession if the exculpatory statement is of some fact, which if true, would negative the offence alleged to be confessed. A statement which when read as a whole is of an exculpatory character and in which the prisoner denies his guilt is not a confession and cannot be used in evidence to prove his guilt: 1970 Cr.L.J. 541 (Guj.).

In a criminal case if an accused keeps silent and does not speak, it would not amount to confession of the guilt on his part. The confession of the accused should be in an unequivocal terms admitting the commission of the crime: 10 J.&K.L.R. 1: A.I.R. 1954 J.&K. 19.

It is only when an utterance is made with an *animus confidenti* that it would become a confession; if, therefore, the declaration is made neither with an intention to confess, nor does it amount to an admission of facts from which guilt is directly deducible, the declaration would not amount to a confession. When a statement is not a confession, there is no impediment in strict law to use it against the person making it, in the capacity of an accused. But the practice of taking a statement on oath as from a witness and then using it at a later stage against an accused is not a commendable one. Further, part of a statement cannot be used to corroborate evidence which includes that statement itself, and which is obviously in much need of corroboration: A.I.R. 1937 Nag. 254: I.L.R. (1937) Nag. 524; (1938-39) 43 Cal.W.N. 893: A.I.R. 1939 Cal. 610.

A man of sound mind and of full age who makes a statement in ordinary simple language must be bound by the language of the statement made and by its ordinary plain meaning: 159 I.C. 875: A.I.R. 1936 Oudh 156. Where the accused in a conversation with the remanding Magistrate stated to the Magistrate that the Police wanted him to turn approver; that he had given true facts to the Police; that he was in fact guilty and that he had told the Police where he had sold the stolen property, *held*, there was no confession; all that was said to the Magistrate was that the accused had made disclosures to the Police on the promise of pardon: 148 I.C. 400: A.I.R. 1933 Lah. 987. *See* also 1941 Pat.W.N. 653: A.I.R. 1942 Pat. 156 (mere admission of being present in the company of dacoits is no confession of dacoity).

A confession is admission by an accused person in a criminal case. The making of a counterfeit coin is not a statement and hence the evidence of persons who say that the accused made counterfeit coins in their presence is not barred by Ss. 24, 25 or 26: A.I.R. 1931 All. 9.

Oral confession—Accused not shown to understand language in which questions put, but in answer making signs—Conduct held not amount to confession: A.I.R. 1930 Lah. 84: 120 I.C. 539.

To constitute a 'confession' under the Evidence Act, it is not necessary that the person confessing should make a full and explicit admission of his guilt so clean as to leave no other hypothesis tenable. It is enough if they lead to an inference of guilt: 43 I.C. 605: 19 Cr. L.J. 189 (M.).

But the statement of a man who takes particular care at every stage to show that he did not take part in the offence does not amount to confession: 1935 A.W.R. 48: 36 Cr.L.J. 1086.

Where an exculpatory statement of accused is of some facts which, if true, would bring his act within the general exceptions of Ss. 96 to 105 of the Penal Code, it cannot be held to be a confession: A.I.R. 1950 Him. Pra. 18: 51 Cr. L.J. 786. Construction of confession. *See* A.I.R. 1945 Lah. 20.

2. Admissibility of confessions—Extent of.—Under the Evidence Act, confessions are treated as a species of admission, and under the scheme of the Act, confessions are treated *prima facie* as relevant or provable under the category of admissions. Ss. 24, 25 and 26 provide the circumstances under which they are not relevant or provable. Ss. 27, 28

and 29 provide the limitations in the operation of Ss. 24, 25 and 26: I.L.R. (1951) Cut. 65: A.I.R. 1951 Ori. 168: 53 Cr. L.J. 1743 (F.B.).

Confessional statements made by persons not in custody are admissible in evidence against such person in a criminal proceeding unless they are procured in the manner described in S. 24 or made to a Police Officer (S. 25), while confessional statements made by persons in custody, except those in the presence of a Magistrate (S. 26), are not provable except to the limited extent permitted by S. 27 of the Act, *viz.*, so much of the information, whether confessional or otherwise which distinctly relates to a fact thereby discovered and no more: I.L.R. (1964) Guj. 954: (1965) 1 Cr.L.J. 30: (1965) 6 Guj.L.R. 129: A.I.R. 1965 Guj. 5.

S. 27 should be read as a proviso to S. 24, and controls it. If, therefore, a statement by an accused falls under S. 27, it is admissible in spite of the fact that it is hit by S. 24, namely, that the person making the statement may have been threatened or beaten: I.L.R. 25 Pat. 205: A.I.R. 1947 Pat. 152.

The basic theory of relevancy in S. 27 is the discovery of a fact in consequence of information received from the accused while in custody, whether obtained voluntarily or non-voluntarily and this, of course, is quite different from any self-incriminatory information by the accused, whether given voluntarily or under compulsion. A self-incriminatory statement of a confessional nature obtained under compulsion, threat or inducement is also hit by S. 24 of the Evidence Act: (1973) 39 Cut.L.T. 291 (D.B.).

Admissibility of confession: (1964) 1 Cr.L.J. 464 (Ori.).

Where a prosecution witness while referring to the information given by the accused leading to the recovery of a rifle, also stated that the accused had told him in the presence of the Investigating Officer that he (the accused) would point out the rifle, *held*, that the latter part of the information amounted to a confession and was inadmissible in evidence: 1957 M.L.J. (Cr.) 805: I.L.R. (1957) Mys. 81: A.I.R. 1958 Mys. 1.

3. Scope and applicability.—Unless the expectation under which the accused makes a confession is shown to have been the result of any inducement, threat or promise as specified in S. 24, a confession otherwise voluntary does not cease to be so simply because the accused person on his own believes that to confess his guilt would be the only way of saving himself: 1954 Ker. L.T. 344: A.I.R. 1954 Trav.-Co. 456.

Confession—Admissibility—Inducement, threat or promise by person in authority is essential to make it involuntary—Mere fact that accused thought that he would get some benefit out of making confession is not sufficient to strike it down as involuntary: (1965) 1 Cr. L.J. 393 (Punj.).

Merely because a statement had been made to a person in authority, it would not be hit by S. 24 in absence of evidence of threat, coercion or inducement: (1984) 58 Cut.L.T. 127.

When there is nothing in the evidence to show that any of the persons who gave the threat to the accused was a person in authority, the conditions enumerated in S. 24 are not satisfied and, consequently, the confession cannot be held to be irrelevant: (1972) 38 Cut.L.T. 428.

A confession is not hit by S. 24 when none of the persons to whom it was made was a person in authority, though they may have promised not to tell the Police: (1943) 45 Punj.L.R. 391: A.I.R. 1943 Lah. 312.

For assessing acceptability of confession before any person except a Police Officer, the test is whether it is voluntary: 1993 Cr.L.J. 2374 (Ori.) (D.B.).

In deciding whether a particular confession attracts the frown of S. 24, the question has to be considered from the point of view of the confessing accused as to how the inducement, threat or promise proceeding from a person in authority would operate in his mind. [1975 Punj.L.J. (Cr.) 261, Reversed]: A.I.R. 1977 S.C. 1294: (1977) 2 S.C.C. 263: 1977 Cr.L.J. 985.

It is well settled that where the primary basis for convicting an accused is his confession, the Court must satisfy itself whether the confession is (*i*) perfectly voluntary and (*ii*) true and trustworthy. If it is found to have been obtained by inducements, threats or promises, the Court must discard it and need not apply the second test. [1981 Cr.L.J. 424 (Gau.), Foll.]: 1981 Cr.L.J. 430 (Assam) (D.B.).

A confession, if voluntary and truthfully made is an "efficacious proof of guilt". It is an important piece of evidence and, therefore, it would be necessary to examine whether or not the confession made by an accused was voluntary, true and trustworthy. The statutory provisions dealing with the recording of confessions and statements by the Metropolitan Magistrate and Judicial Magistrates are contained in S. 164, Cr.P.Code and the rules framed by the High Court containing guidelines for recording of confessions. Unless the Court is satisfied that the confession is voluntary in nature, it cannot be acted upon and no further enquiry as to whether it is true and trustworthy need be made. Thus, where the only piece of evidence relied upon by the prosecution to connect the accused with the crime was his confessional statement recorded under S. 164, Cr.P.Code and the lower Court without making any serious attempt to ascertain the voluntary character of the confessional statement convicted the accused, *held*, conviction was unsustainable: A.I.R. 1995 S.C. 980.

Before the provisions of S. 24 are applied, the Court has to see firstly, whether the confession has been made by any inducement, threat or promise having reference to the charge against the accused person; secondly, that the said inducement, threat or promise had proceeded from a person in authority, and thirdly, whether in its opinion, it gave the accused person grounds which would appear to him to be reasonable in supposing that he would gain an advantage or avoid any evil of a temporal nature in reference to the proceedings against him. It is always a question of fact depending upon the circumstances of each case whether certain words used have or have not had certain effect on the mind of the accused: I.L.R. (1965) 15 Raj. 143: 1964 Raj.L.W. 596; A.I.R. 1971 S.C. 1087: 1971 Cr.L.J. 933; 1972 Kash.L.J. 65: 1972 Cr.L.J. 961.

Before any reliance can be placed on the confession, it has first to be established that it is voluntary and true. A confession has to be proved like any other fact. The value of the confession as a piece of evidence is just like any other evidence, and depends upon the veracity of the witnesses to whom it is made.

A confession does not become inadmissible merely because it was made before a person in authority. It is inadmissible only when it is brought about under any threat, or inducement, etc., and the Court is of opinion that the accused had reason to believe that he will get some advantage or avoid some evil by making such a confession: 1968 Cr.L.J. 697 (Ori.).

Leaving aside confessions made to a Police Officer and confessions made whilst the maker is in the custody of a Police Officer which are dealt with in Ss. 25 to 27, three conditions circumscribe the use of confessions in criminal proceedings. Firstly, a confession is not admissible in evidence at all unless it is voluntary in the sense that it was not the result of any threat or inducement by a person in authority. Secondly, in order to make it the foundation for a conviction it must be shown to be true. Thirdly, if it is a retracted confession, the reasons for retraction must be shown to be untrue and the confession must be corroborated by other independent evidence. The first is a rule of policy; the second is a rule based on equitable considerations and the third is a rule of prudence. The Courts have to note in this connection that a confession is something more than a mere admission of an incriminating fact, which would be governed by the rules relating to admission. Even if a confession is untrue, if it is proved that it is voluntarily made, it is admissible in evidence. On the other hand if it is shown to be not voluntary, it is inadmissible in evidence even if it is true. The second condition is based on the consideration that though it may be presumed that no person will wilfully make a statement which is against his interest unless it is true, if it is demonstrably untrue it would be unjust to convict him. The rigour of the legal presumption is tempered on equitable considerations. The third condition is two-fold and is a rule of prudence and caution adopted by Courts based on experience. Corroboration merely of collateral facts is not sufficient. In order to perform its function or adding weight to the retracted confession, the independent corroboration must tend to connect the maker of the confession as a participant in the crime, although it need not by itself be conclusive in its tendency.

Held, on facts of the case, that the confessions recorded were voluntary, without any material inconsistency and the test of independent corroboration was satisfied. The convictions based upon them were, therefore, right: I.L.R. (1963) Andh. Pra. 442: (1964) 1 Cr.L.J. 584.

In scrutinising a case from the point of view of S. 24, Evidence Act, the Court will

have to perform a three-fold function: (*1*) it will have as a Court to determine the sufficiency of the inducement, threat or promise as affording certain grounds; (2) it will have to clothe itself with the mentality of the accused to see whether the ground would appear to the accused reasonable for a supposition that he would gain any advantage or avoid any evil; and (*3*) it will have to judge as a Court if the confession appears to have been caused in consequence of the inducement, threat or promise: 1967 M.L.J. (Cr.) 30: (1966) 8 Law Rep. 80 (Mys.).

Where a confession is the result of threat or undue influence by the Police it has to be rejected. It becomes absolutely irrelevant and even though the statement of the accused in Court may bear out major portion of the confession, the Court is not entitled to consider whether it is true: A.I.R. 1951 Kutch 27: 52 Cr.L.J. 257.

A voluntary statement made by an accused person is admissible as a 'confession'. He can confess as to his own acts, knowledge or intention but he cannot 'confess' as to acts of other persons which he had not seen and of which he can only have knowledge by hearsay. A failure of the prosecution to prove an essential element in the offence cannot be cured by an 'admission' of this nature: (1958) 1 W.L.R. 1050.

In order to be acted upon, the confession must be voluntary and true. There should be no doubt from the materials placed before the trial Court that the accused had made a voluntary statement before a Judicial Magistrate: (1985) 59 Cut.L.T. 281.

Where the only evidence against the accused in a prosecution is his own confession admitting his guilt, the Investigating Officer must check the truth or otherwise of the confession in the course of the investigation by independent investigation: (1971) 2 An.L.T. 96: 1971 Cr.L.J. 1594.

'Confession' — Admission — When amounts to: A.I.R. 1957 Cal. 372: 1957 Cr.L.J. 707.

Applicability—Statement of confession—Use of to contradict or corroborate evidence given as approver: A.I.R. 1957 Assam 168: 1957 Cr.L.J. 1231.

Confession induced by promise of being made an approver — Not admissible — (Cr.P.Code, 1898, S. 164).

Held, that the circumstances in which the confession was made left no doubt that the confession of the accused was induced by an indirect promise held out to him that if he made the confession, he would be made an approver and, therefore, it must be ruled out on the ground that it was not a voluntary confession: A.I.R. 1956 Raj. 67: 1955 Cr.L.J. 550: I.L.R. (1956) 6 Raj. 359.

The internal evidence furnished by the statement itself, its wealth of incidental details doubtless designed for that independent corroboration which the law requires, but which a person giving an unprompted account of what took place would hardly think it worthwhile to mention, and its playing down of the part played by the deponent, typical of confessions preceding a pardon, indicates that the statement must have been obtained by some such inducement as a promise to make the accused an approver: 1959 Ker.L.T. 167: 1959 Ker.L.J. 221: I.L.R. (1959) Ker. 319.

The wealth of details contained in the confession is not necessarily an indication of it being a Police-inspired statement: 1960 Ker.L.J. 896: (1960) 2 Ker.L.R. 222: 1960 Ker. L.T. 829.

There is a clear distinction between the admissibility of an evidence and the weight to be attached to it. A confessional soliloquy is a direct piece of evidence. Before accepting such evidence, it must be established by cogent evidence what were the exact words used by the accused. Even if so much was established, prudence and justice require that such evidence cannot be made the sole ground of conviction, but may be used only as a corroborative piece of evidence: 1966 M.L.J. (Cr.) 558: 1966 Cr.L.J. 68: A.I.R. 1966 S.C. 40.

It is not necessary that confession should be made to any particular individual. Soliloquy by the accused confessing therein the act committed by him is good and direct piece of evidence: 1966 M.P.L.J. (Notes) 9.

Statement is a genus, admission is the species and confession is the sub-species. A statement, whether communicated or not, admitting guilt amounts to a confession of guilt. Admissions and confessions are exceptions to the hearsay rule. They are placed in the category of relevant evidence by the Evidence Act (Ss. 17 to 30), presumably on the ground that, being declarations against the interest of the person making them, they are probably true. Their probative value does not depend upon their communication to another, though, just like any other piece of evidence, they can be admitted in evidence only

on proof. This proof in the case of oral admission or confession can be offered only by witnesses who heard the admission or confession, as the case may be: 1966 M.L.J. (Cr.) 558: 1966 Cr.L.J. 68: A.I.R. 1966 S.C. 40.

Even a well grounded conjecture on a strong possibility that the confession was a result of inducement or threat is sufficient to attract the provisions of S. 24. *Held*, on facts, that considering the physical and mental state in which the accused was at the time after delivery, the confession made by her as to her having given birth to a child which she threw away through the ventilator, after repeated questioning by the lady doctor in the hospital was not voluntary and was not, therefore, admissible against her: (1961) 1 Cr.L.J. 258: A.I.R. 1961 J.&K. 11.

There is no legal bar to convict on voluntary confession if believed to be true, but the rule of prudence requires that whenever possible it should be corroborated by independent evidence. Accordingly, both retracted and unretracted confessions are admissible: 1966 Cr.L.J. 323 (2) (Cal.).

In order to sustain a conviction on the basis of a confessional statement, it is sufficient that the general trend of the confession is substantiated by some evidence which would tally with the contents of the confession. Thus, where the statement is corroborated by medical evidence, *held*, it was admissible under S. 24: A.I.R. 1981 S.C. 1165: (1981) 2 S.C.C. 224: 1981 Cr.L.J. 628.

S. 24 refers to a person who is not only an accused at the time when he made a confession but also to one who becomes an accused subsequently. The section refers to the status of the person at the time when the confession is being considered by the Court and when he is undoubtedly an accused person: (1961) 1 Cr.L.J. 258: A.I.R. 1961 J.&K. 11.

Instructions relating to confessions of accused persons—Duty of Magistrate—Confession by child: (1964) 66 Punj. L.R. 1230: (1965) 2 Cr.L.J. 127: A.I.R. 1965 Punj. 291.

Where a Police Officer investigating an offence of murder deposes that the alleged confession was made by the accused after he 'tackled' the accused, it cannot be said that any undue pressure was exerted so as to render the confession involuntary: I.L.R. (1963) Cut. 567: 29 Cut.L.T. 531.

Questions influencing mind of accused—Statements made while in custody of Police Officer but not in presence of Magistrate: I.L.R. (1964) Guj. 954: (1965) 1 Cr.L.J. 38: (1965) 6 Guj. L.R. 129: A.I.R. 1965 Guj. 5.

Where at the time when the petitioners were apprehended from their possession the stolen wires, etc., had been recovered, they admitted having cut the electric line of the transformers of different tube wells at different times and they also had confessed that they had been indulging in the theft of the transformers and their parts including the electric wires, *held*, such confessions though made to the Police authorities, could be considered by the detaining authority as a material in support of ground of detention under the National Security Act, 1980: 1993 Cr.L.J. 3701 (All.) (D.B.).

Confession—Variation—Effect—Slight variation in description as to how accused brought-about death of deceased does not affect the confession: I.L.R. (1961) 1 Andh. Pra. 123: (1963) 1 Cr.L.J. 142: A.I.R. 1963 Andh. Pra. 87.

Murder — Appreciation of evidence — Confession mentioning a person other than deceased is of no relevance: 1966 Cr.L.J. 789: A.I.R. 1966 Ori. 156.

Confession—Reliability—Evidence: 1966 Cr.L.J. 1180: A.I.R. 1966 Ori. 205.

Where the circumstances showed the accused's confession, on the basis of which he was convicted under S. 120-B of the Indian Penal Code read with S. 135 of the Customs Act, 1962, might well have been obtained in a manner bringing it within the mischief of S. 24, *held*, he deserved acquittal: A.I.R. 1979 S.C. 705.

Mere existence of threat, inducement or promise is not enough. It should be sufficient to cause reasonable belief in the mind of the accused that by confessing he would get an advantage or avoid any evil of a temporal nature. The expression 'appears' in S. 24 is equivalent to the word 'seems'. It imports a lesser degree of probability than proof. The word concerned would mean 'interested in', 'involved in', 'and mixed up with'.

The words used in S. 135 of the Customs Act are in *pari materia* with those in S. 167 (81) of Sea Customs Act. It is clear that even though a person is not a direct importer or in any way concerned in such direct import of smuggled goods, any person who knowingly deals with such smuggled goods, would come within the ambit of S. 135 of the Customs Act: 1967 M.L.J. (Cr.) 509: (1968) 1 Mys.L.J. 17: (1967) 10 Law Rep. 46.

Confession must be voluntary—Police being in any way connected with the administration of the jail—Under-trial prisoners must be taken to have been influenced—Confession not treated as voluntary: 32 Cut. L T. 1011: A.I.R. 1967 Ori. 24.

Where, in the course of making a confession, the answer of the accused in reply to a question was: 'Police people have, of course, told me that if I would tell the truth and make a plain statement, perhaps the Magistrate might take pity on me and may give me some advantage. The Judge being pleased with my truthfulness may give me some advantage', *held*, that the Police people referred to in the reply were persons in authority, that what she (the accused) was told by the Police people amounted to inducement sufficient to create a reasonable belief in the mind of the accused, that by confessing she would get an advantage and the Magistrate would take pity on her, and that, looking to all the circumstances of the case, the confession was not voluntary but was brought about by inducement: 1964 Raj. L.W. 596: I.L.R. (1965) 15 Raj. 143: 1966 Cr. L.J. 518: A.I.R. 1967 Raj. 98.

Statement by employer in adulteration offence before Food Inspector recorded and signed, statement was hit by S. 24: 1968 Cr.L.J. 347: A.I.R. 1968 Ker. 66.

Evidentiary value of judicial and extra-judicial confessions—Prosecution should establish the offence by independent evidence—Use of confession should be for limited purpose of finding the offender: 1968 Mad.L.W. (Cr.) 36: (1968) 1 M.L.J. 372: 1968 M.L.J. (Cr.) 291.

Before a confession of an accused can be relied on, the Court has to see whether the same is made voluntarily and whether the facts stated therein can be accepted as true. But the mere fact that the accused was in the custody of the Police for about a period of nine days before he was produced before the Magistrate for recording his confession, by itself is not a sufficient ground for holding that the confession in question cannot be considered as having been made voluntarily. However, the mere fact that the confession in question appears to have been voluntarily made, is not sufficient to rely on the same. The Court must go further and see whether the facts stated therein can be accepted as true: (1967) 69 Punj.L.R. 100: 1967 Cr.L.J. 628: A.I.R 1967 Del. 14.

Prolonged custody immediately preceding the making of confession is sufficient to stamp the confession as involuntary unless it is properly explained: I.L.R. (1962) 2 Ker. 492: (1962) 2 Ker.L.R. 499: 1963 Ker.L.T. 996: 1963 Ker.L.J. 86.

Voluntariness of confession—Mere bald assertion of accused that he was threatened, tortured or that inducement was offered to him, without more cannot be accepted as true: 1967 Cr.L.J. 62: A.I.R. 1967 Him. Pra. 10.

Confession must be voluntary—Accused complaining about Police torture at committal stage and repeating the statement before Sessions Court—Confession retracted—Confession cannot be said to be voluntary in the circumstances: 1967 Cr.L.J. 1023: A.I.R. 1967 Manipur 11.

A confession is relevant and admissible, and may, sometimes, be used to base a conviction on it. That can be done provided the Court is fully satisfied that the confession is voluntary as provided in S. 24 or in S. 28 of the Evidence Act. The question whether a confession is voluntary or not is always a question of fact, and there is no rule of law that if a certain period is not given for reflection that itself would be sufficient to rule out the confession. But at the same time, all the factors and all the circumstances of the case, including the important factor of the time given for reflection, must be considered before deciding whether the Court is satisfied that in its opinion the impression caused by any inducement, threat or promise has been fully removed as provided in S. 28: (1963) 3 Guj. L.R. 1052: (1963) 1 Cr.L.J. 755: A.I.R. 1963 Guj. 135.

Whether confessional statement was voluntarily made or not is essentially a question of fact. In ascertaining the voluntary nature of the statement, different tests will have to be applied to different sets of facts. But in the very nature of things, there can be no rigidity about them. What test is best applicable to given set of facts is for the Judge of facts to decide: (1970) 1 Mys.L.J. 149.

Whether or not confessional statement of an accused is voluntary in nature is a pure question of fact; High Court cannot go into it

in its extraordinary writ jurisdiction: 1983 Cr.L.J. 1899 (J.&K.).

Voluntary confession—Allegation of Police influence—Confession recorded after accused were kept in jail custody for three days and were allowed further time for reflection when produced before Magistrate—Confessions held voluntary: (1963) 2 Cr.L.J. 562 (Manipur).

Confessions whether judicial or extra-judicial, must be voluntary and genuine and besides should have some corroboration to be relied upon and to be the basis of a conviction. Therefore, the circumstances under which the confession is made, the manner in which it is made, the persons to whom it is made, are aspects to be borne in mind before acting on a confession, particularly on a non-judicial confession. Two rules of caution are to be followed, before such action, namely: (*1*) whether the evidence of confession is reliable; and (2) whether it finds corroboration.

Where a Priest against whom proceedings were held for contravention of the provisions of Ss. 4(1), 5(1)(*aa*) and 5(1)(*d*) of the Foreign Exchange Regulation Act stated that "it is written in moral theology that penal laws do not oblige in conscience which means that only after catching me I became a sinner", *held*, the statements could be said to be pointers to their genuineness, voluntariness and reliability when they got ample corroboration not only in the recovery of the foreign currency and documents from his person, but also from the pass books and other documents seized at his residence: 1982 Cr.L.J. 461 (Goa).

Confession—Corroboration—There is no requirement of law that a confessional statement must be corroborated in all respects: 1963 Raj. L.W. 214: I.L.R. (1963) 13 Raj. 199.

Where the confessional statement of the accused, in the absence of direct evidence, that he had throttled and set ablaze an 80 years old lady, living alone and wearing great deal of ornaments and jewels which he had stolen was corroborated by incriminating circumstances like his conduct in absconding, his subsequent arrest and recoveries at his instance, his having been last seen entering the deceased's house and coming out of it 45 minutes thereafter followed by a cloud of smoke therefrom, which the Court found to be true and reliable and sufficient to enter conviction, *held*, merely because the servant-maid of the deceased was not examined as she had subsequently turned mad—as testified to by her mother as well as the Investigating Officer in the Court—it cannot be said that the prosecution evidence was rendered inadequate to sustain the conviction: 1995 Cr.L.J. 2383 (Mad.) (D.B.)

Applicability—S. 176, I.P.Code, applies to public servant—Person appointed as investigator under S. 33 of the Insurance Act is not public servant—Statement made to such person is not barred under S. 24, Evidence Act: (1963) 1 S.C.R. 253: (1962) 2 Cr.L.J. 805: A.I.R. 1962 S.C. 1821.

Conviction of accused on his oral confession—No reliance can be placed on the confession unless Court can be certain of the exact words used by the accused—Material discrepancy found between two statements alleged to have been made by accused—Statements not containing admission of any guilt but on the other hand self-exculpatory—Fact of accused having made the statements to the witnesses deposing to them also found to be improbable—*Held*, that it was unsafe in these circumstances to base the conviction on the confession: (1962) 64 Punj.L.R. 142.

Confessional statement of accused cannot be taken on solemn affirmation: 1983 Cr.L.J. (N.O.C.) 205 (Gau.).

Merely because the signature of the witness, to whom extra-judicial confession was made, were taken on the statement made by him to the Police, *held*, it could not be said that his statement becomes inadmissible; it merely puts the Court on caution and may necessitate indepth scrutiny of the evidence: A.I.R. 1985 S.C. 48.

Effect of signature on the statement: 1968 Cr.L.J. 493: A.I.R. 1968 Mad. 117.

Where a School Principal charged for drawing certain amounts on the contingent bills in order to misappropriate it, was alleged to have signed a written statement before his Superior Officer admitting misappropriation on account of three items which were subject-matter of withdrawal by the same contingent bill but in respect of two items he was acquitted, *held*, no importance could be attached to said document with respect to third item of misappropriation: A.I.R. 1979 S.C. 1080.

A first information report is not admissible in evidence at all, if in substance it is a confession to the Police: 73 I.C. 266: A.I.R. 1923 Nag. 251. *See* also 63 I.C. 822 (L.).

First information report by accused containing confession as to guilt, *held*, is not

admissible in evidence: 1979 W.L.N. (U.C.) 252 (Raj.) (D.B.). However, the fact that the accused himself lodged the F.I.R. is admissible in evidence as his conduct under S. 8: 1986 W.L.N. (U.C.) 10 (Raj.); 1975 Raj.L.W. 542: I.L.R. (1976) 26 Raj. 278: 1975 W.L.N. 623; I.L.R. (1979) 29 Raj. 922; 1992 Cr.L.J. 3027 (Andh. Pra.) (D.B.).

First information report given by accused at Police out-post containing confession of his guilt—Report is to be ignored as inadmissible: (1963) 1 Cr.L.J. 120 (Him.Pra.). *See* also 1981 Cr.L.J. 1734 (Gau.), cited under S. 26, Note 3, *infra*.

First information report—Omission to mention particular matter in first information report—Whether fatal—Depends upon facts of each case: I.L.R. (1961) 11 Raj. 1091. *See* also S. 17, Note 8 and S. 21, Note 6, *supra* and S. 25, Note 3; S. 27, Note 8, *infra*.

The accused, who was charged with murder, made a statement on a morning to the Superintendent of Police which led to the discovery of a bill-hook which the accused said was the weapon used by him to kill the deceased. It was admitted that for four hours on the night before and for two hours on the morning on which he made the statement, the Superintendent of Police was questioning him: *Held*, that this was a flagrant violation of the Madras Police Executive Orders, and that the statement of the accused was not a voluntary statement and could not be admitted as it was ruled out by S. 24, although the evidence regarding the production of the bill-hook alone could be admitted in evidence: 1939 Mad.W.N. 1134: 50 Mad.L.W. 742.

Confession—Admissibility—Accused confessing guilt on being asked twice or doing so on being asked to produce stolen articles—Confession cannot be held to be result of persuasion: 1960 Cr.L.J. 1068: A.I.R. 1960 Cal. 519.

In a fight between the accused, a private soldier and the deceased, another soldier from another regiment, the accused stabbed the deceased. Immediately after the fight the Sergeant-Major of the regiment of the accused put the company on parade and indicated that the men would be kept there until he was told who had been involved in the fight. The accused made a statement to the Sergeant-Major at that parade, confessing the stabbing. At the trial the confession was admitted against the accused. The accused had also made another confession next day to a Sergeant of the special Investigation Branch after a caution had been administered to the accused.

The deceased had received two stab wounds one of which had pierced the lung causing haemorrhage. While he was being taken to the medical reception station for treatment, the man who carried him dropped the deceased twice. The treatment which was given at the station was not only incorrect but might have affected his chances of recovery. In appeal against the conviction, the accused alleged that the confessions were wrongly admitted and that the Court was not properly directed as to causation.

Held, that (*1*) the first confession made to the regimental Sergeant was tainted by threat or inducement and was, therefore, inadmissible; (2) that if the threat or promise under which the first statement was made still persisted when the second statement was made, then it was inadmissible. The time-limit between the two statements, the circumstances existing at the time and the caution were such that it could be said that the original threat or inducement had been dissipated. The effect of the original inducement was spent and the second confession was admissible; (3) that at the time of the death the original wound was still an operating and a substantial cause and that, therefore, death could properly be regarded to be the result of the wound, albeit that some other cause also operated: (1959) 2 W.L.R. 623.

The accused Dalmia confessed to one Annadhanam, a Chartered Accountant, who was appointed by the Central Government in exercise of the powers under S. 33(1) of the Insurance Act to investigate into the affairs of the Bharat Insurance Company, as follows: I have misappropriated securities of the order of Rs. 2,20,00,000 of the Bharat Insurance Company Ltd. 'I have lost this money in speculation'. The High Court did not consider it safe to rely upon it as it considered it was made under circumstances which implied an offer of amnesty being granted to him.

Held, that none of these circumstances would make the confession invalid. Dalmia's knowledge that Annadhanam could record his statement under law and his desire to soften the attitude of the authorities by making the statement did not establish that he was coerced or compelled to make the statement. A person making a confession may be

guided by any consideration which, according to him, would benefit him. Dalmia must have made the statement after weighing the consequences which he thought would be beneficial to him. His making the confession with a view to benefit himself would not make the confession not voluntary. A confession will not be voluntary only when it is made under some threat or inducement or promise, from a person in authority. Nothing of the kind happened in this case and the considerations mentioned in the High Court's judgment did not justify holding the confession to be not voluntary. It must be held that Dalmia made the confession voluntarily: (1962) 32 Comp. Cas. 699: (1962) 2 Cr.L.J. 805: A.I.R. 1962 S.C. 1821: (1963) 1 S.C.R. 253.

Where the prosecution evidence failed to establish that the accused had murdered his wife, *held*, he could not be convicted on his false statement that he had killed his wife with an iron rod: 1982 Cr.L.J. 216 (Gau.).

4. "Accused person".—(*See* also S. 25, Note 6; S. 27, Note 8, *infra*). S. 24 will apply even if the person confessing was not an accused person at the time of confession. A statement falling within S. 339(2) of the Code excludes the operation of S. 24: 59 I.C. 324: (1920) 22 Bom.L.R. 1247.

The words 'accused person' in Ss. 24 to 26 include any person who subsequently becomes accused, provided that at the time of making the statements criminal proceedings were in prospect: 43 I.C. 605. The term 'accused' in S. 24 includes also a person who becomes an accused person subsequent to the making of the confession by him, although at the time of the confession he was not an accused. Hence, a confession by a person who later becomes an accused person cannot be used against him in his trial, if it offends against the provisions of S. 24: 230 I.C. 431: 48 Cr.L.J. 651.

The expression 'accused person' in S. 24 and the expression 'a person accused of any offence' in S. 25 have the same connotation and describe the person against whom evidence is sought to be led in a criminal proceeding. The expression 'accused of any offence' in S. 27, as in S. 25 is also descriptive of the person concerned against whom evidence relating to information alleged to be given by him is made provable by S. 27 of the Evidence Act. It does not predicate a formal accusation against him at the time of making the statement sought to be proved, as a condition of its applicability: A.I.R. 1960 S.C. 1125: (1961) 1 S.C.R. 14: (1961) 2 M.L.J. (S.C.) 90; I.L.R. (1964) Guj. 954: (1965) 1 Cr.L.J. 30: A.I.R. 1965 Guj. 5.

The crucial word in S. 24 of the Evidence Act is the expression 'appears'. The appropriate meaning of the word 'appears' is 'seems'. It imports a lesser degree of probability than proof. The standard of a prudent man is not completely displaced; but the stringent rule of proof is relaxed. A *prima facie* opinion based on evidence and circumstances may be adapted as the standard laid down. In other words, on the evidence and circumstances in a particular case it may appear to the Court that there was a threat, inducement or promise, though the said fact is not strictly proved. This deviation from the strict standards of proof has to exclude forced or induced confessions which sometimes are extorted and put in when there is a lack of direct evidence. The expression 'accused person' in S. 24 and the expression 'a person accused of any offence' have the same connotation and describe the person against whom evidence is sought to be led in a criminal proceeding. The adjectival clause 'accused of any offence' is descriptive of the person against whom a confessional statement made by him is declared not provable, and does not predicate a condition of that person at the time of making the statement for the applicability of the ban: 1964 M.L.J. (Cr.) 708: 1964 Ker. L.T. 569: I.L.R. (1964) 2 Ker. 312: A.I.R. 1965 Ker. 175.

A person who is suspected of complicity in a murder and makes a confession before the coroner under S. 19 of the Coroners Act, is an accused person within the meaning of Ss. 24 and 25, when he is later on charged with the murder or abetment of murder. His confession would be admissible against him and against his co-accused if the requisites of an admissible confession are present, though it may be retracted later on: A.I.R. 1941 Bom. 50: I.L.R. (1941) Bom. 27.

Where a confession is made before a report is made to the Police and before the person confessing is accused by others of any offence, the confession must be regarded as one made by an accused person within the meaning of S. 24: I.L.R. (1951) Mys. 239: A.I.R. 1950 Mys. 82.

The accused who was the agent of a branch of a bank forged certain documents to make out that one of the fixed depositors had applied for and was granted a loan of

Rs. 6,000 on the security of her fixed deposit and appropriated this amount for his use. The bank was then amalgamated with another bank and the accused continued to be the agent under the new set-up. As a result of the action taken by the General Manager of the new bank the accused sent a statement, dated 2nd January, 1960 to the effect that he had taken for his own use the sum of Rs. 40,000 from the bank and that he undertook to return the money in instalments as a security for which he would execute a registered hypothecation bond. On 11th January, 1960 the accused and his father executed the hypothecation bond and also on that date signed a statement giving full account of the money he had misappropriated. A demand loan account was opened in the name of the accused. He paid in a number of instalments and was continued in the service of the bank till April 1960 when his services were terminated and was eventually prosecuted and convicted under Ss. 409, 467, 471 and 471-A, I.P. Code.

Held, (1) that the confession of guilt contained in the two statements, dated 2nd January, 1960 and 11th January, 1960 and the hypothecation bonds were of no use to the prosecution as the making of the confession was caused by the inducement to withhold criminal prosecution and was involuntary in view of S. 24 and was not voluntary as a result of remorse and penitence. The position that S. 24 would not be attracted as the accused was not, at the time he made the confession, an accused person was not tenable, for the expression 'accused person' in S. 24 and the expression 'a person accused of any offence' have the same connotation and describe the person against whom evidence is sought to be led in a criminal proceeding and does not predicate a condition of that person at the time of making the statement: I.L.R. (1964) 2 Ker. 312: 1964 Ker.L.J. 801: 1964 M.L.J. (Cr.) 708: A.I.R. 1965 Ker. 175.

Where persons making statements under S. 40 of the Foreign Exchange Regulation Act sought a writ of *mandamus* directing the authorities to forbear from taking any action against them on the basis of those statements, *held*, they were not standing before the Court as 'accused persons', their statements were not hit by S. 24. The writ petition was not competent: 1989 Cr.L.J. 2138 (Mad.) (D.B.).

Where a person, not yet accused of the offence, wrote in Assamese on a paper in answer to another person's query that his wife and 3 daughters were not in this world, *held*, the writing did not amount to a confession either under S. 24 or S. 162 of the Code of Criminal Procedure; at best it was an admission of a fact; it was not hit by Art. 20(3) of the Constitution either; the writing as well as his oral statements made in response to the query are admissible: 1975 Cr.L.J. 354 (Gau.).

5. Confession—Mode of use.—The Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible: 1930 All.L.J. 1481: I.L.R. 52 All. 1011: A.I.R. 1931 All. 1 (F.B.); (1933) 35 Punj.L.R. 559: A.I.R. 1934 Lah. 673; 143 I.C. 362: A.I.R. 1933 Lah. 665; (1933) 35 Punj.L.R. 659: A.I.R. 1934 Lah. 620; A.I.R. 1933 Mad. 888: 65 M.L.J. 837; (1942) 44 Punj.L.R. 448: A.I.R. 1942 Lah. 271; 44 Cr.L.J. 77; 1933 All.L.J. 581: A.I.R. 1933 All. 401; (1932) 34 Punj.L.R. 349: A.I.R. 1933 Lah. 232; A.I.R. 1933 Rang. 326; A.I.R. 1952 S.C. 545; A.I.R. 1952 S.C. 354; (1957) 2 An.W.R. 63: 1957 M.L.J. (Cr.) 368: A.I.R. 1958 Andh. Pra. 37; 1976 Cr.L.R. 640 (Raj.).

If a confessional statement is accepted it should be accepted *in toto*: 1990 Cr.L.J. 2385 (Gau.).

Confession or admission must be taken as a whole or rejected as a whole—Conviction on incriminatory part alone is not legal: 1966 Cr.L.J. 451: A.I.R. 1966 Raj. 83.

Confession — Admissibility — A confession is to be accepted or rejected as a whole and the Court is not competent to accept the inculpatory and exclude the exculpatory portion: (1962) 4 Ori.J.D. 156: I.L.R. (1962) Cut. 366: (1964) 2 Cr.L.J. 487.

Under the law, where an accused person's confession is the only evidence available, it is obligatory both on the part of the prosecution as well as on the Court to accept it as a whole; there being no other evidence in the light of which any part of the confession could be verified or checked. The confession of the accused person must be taken as a whole, that is, including the exculpatory circumstances indicated in the confession: (1965) 2 Cr.L.J. 614: A.I.R. 1965 Assam 89.

A confession and an admission must either be accepted or rejected as a whole and the Court is not competent to accept only the inculpatory part while rejecting the part which is exculpatory in character: 34 Cut.L.T. 141: 1968 Cr.L.J. 765: A.I.R. 1968 Ori. 97; 1961 All.Cr.R. 320: 1961 All.W.R. (Supp.) 67: (1961) 63 Punj.L.R. 629.

Entire statement made by accused before committal Court is admissible but if Court wants to rely on an admission it must be used as a whole—It is not permissible to take into consideration only those portions of admission which are inculpatory and reject other portions which are beneficial to the accused: 1968 Cr.L.J. 1345 (Andh. Pra.).

Admission — Must be proved as a whole—Cannot be dissected to admit part in favour of one party and to reject part which is in favour of other party: (1968-69) 73 Cal.W.N. 279.

'Confession' has been defined no where. There is no definition of 'confession' either in the Evidence Act or in any other statute. A confession is to be read and considered as a whole. Nothing should be added by the Court in reading a confession. Attempt should not be made to read what is not there in the confession. Artificial inferences to add the missing links should not be raised on the ground that they are the natural inferences: 1986 Cr.L.R. 567 (Raj.); (1978) 2 M.P.W.N. 28.

An admission made by an accused whether amounting to a confession or not cannot be split up and part of it used against him. An admission must be used either as a whole or not at all: 1955 An.W.R. 863 (1). But it is not an infallible rule of practice: 144 I.C. 160: A.I.R. 1933 Pesh. 38; A.I.R. 1933 Rang. 204: 149 I.C. 49; 11 O.W.N. 636: A.I.R. 1934 Oudh 222. *See* also (1938) 40 Punj.L.R. 265: A.I.R. 1938 Lah. 850.

It is true that the statement of the accused has to be accepted and rejected as a whole but if any exculpatory part is alleged by the accused and that is found to be false after close scrutiny of the evidence on record then of course, the inculpatory part of such statement can be accepted. Thus, where the accused stated in their statements under S. 313, Cr.P.Code that they had attacked deceased in order to save the honour of a lady who was injured by the complainant party but on scrutiny of the evidence on record, said version of the accused regarding saving honour of that lady was disbelieved as having no substance, *held*, the other part of their statement that they caused those injuries voluntarily to deceased could be accepted and acted upon for recording a conviction against them: 1995 Cr.L.J. 1333 (Raj.) (D.B.).

Where conviction of an accused is sought to be based on his confession corroborated by other evidence, *held*, the Court must take the confession in its entirety and give full effect to it; if the confession discloses the exercise of the right of private defence or grave and sudden provocation, the Court should as well accept it and give benefit of the same to the accused: 1971 Cr.L.J. 1594: (1971) 2 An.L.T. 96.

Where a confession had both inculpatory and exculpatory parts and the inculpatory part was proved by an independent witness but the exculpatory part raising the plea of self defence was found to be false, *held*, the inculpatory part could be accepted and the exculpatory part could be rejected: 1988 Cr.L.J. 1477 (Cal.) (D.B.).

The principle that the inculpatory facts must be inconsistent with the accused's innocence and incapable of explanation on any hypothesis other than that of his guilt does not mean that any extravagant hypothesis would be sufficient; the hypothesis suggested must necessarily be reasonable. [A.I.R. 1960 S.C. 29, Foll.]: A.I.R. 1979 S.C. 826.

Where a confession or an admission is separable, there can be no objection to taking one part into consideration which appears to be true and reject the other part which is false: 1978 Karn.L.J. (Jr.) 32 (S.N.) 36.

In a case where there is evidence other than the confession of the accused, the Court is not bound to take the confession as a whole. If it is satisfied that a part of the confessional statement is false, it may reject that part and take into consideration that part of the confession which corroborate the evidence of the witnesses: 41 Cr.L.J. 516: A.I.R. 1940 Lah. 157.

Voluntary confession by accused and circumstantial evidence proving guilt of accused—Court can reject that part of confession proved to be false by prosecution evidence and accept rest of confession: 31 Cut.L.T. 401: (1965) 2 Cr.L.J. 385: A.I.R.1965 Ori. 170.

Where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible: A.I.R. 1930 Lah. 534.

It is permissible to believe one part of a confessional statement, and to disbelieve another, and it is enough if the whole of the confession is tendered in evidence so that it may be open to the Court to reject the exculpatory part and to take inculpatory part into consideration if there is other evidence to

prove its correctness: A.I.R. 1976 S.C. 1797: (1976) 3 S.C.C. 101: 1976 Cr.L.J. 1379; 1982 Cr.L.J. 41: (1981) 20 Del.L.T. 354.

Where the accused makes a confessional statement and there is evidence to show that the exculpatory portion is false, the Court can ignore that portion of the confession and use the rest of it against him: (1945) 47 Punj.L.R. 11: A.I.R. 1945 Lah. 91.

A statement or a confession of an accused person need not be considered as true in its entirety if there is other evidence including circumstantial evidence which cast doubt upon some portion thereof and it is open to the Court to accept a part of the admission or confession which appears to the Court to be true and reject the other part which appears to be not true in the light of such other evidence: 1954 Cr.L.J. 1458: 6 Sau.L.R. 421: A.I.R. 1954 Sau. 115.

There is no doubt that in cases where there is no other evidence except the confession, the rule that the confession must be used as a whole or not at all applies with full force, but in cases where there is other evidence also, the entire confession can be examined in order to find out which part of it is correct. Where the entire statement of a prisoner has been given in evidence, any part of it may be contradicted by the prosecution, and if sufficient grounds exist, the Court may accept the incriminatory, and reject the exculpatory portion: A.I.R. 1955 Tripura 19.

Where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible. A Court would be entitled to reject those portions of the confessions or admissions of the accused persons which have been proved to be false by prosecution evidence while accepting the residue: I.L.R. (1956) Cut. 195: A.I.R. 1956 Ori. 177.

Confessional statement—Use of: A.I.R. 1957 Bom. 226: 1957 Cr.L.J. 1107.

Confessional statement—Value of: A.I.R. 1957 Mys. 50: 1957 Cr.L.J. 521.

Confession recorded after a short interval—Weight of—Voluntariness: A.I.R. 1958 Ker. 207: 1958 Cr.L.J. 1021: 1958 M.L.J. (Cr.) 481.

Where the judicial confession appeared to be procured and not voluntary, *held*, no reliance could be placed on it: 1980 Cr.L.R. 135 (Raj.).

Where confessional statement, which was incriminatory in nature, was corroborated by independent and reliable testimony, *held*, it could be relied on: A.I.R. 1971 Tripura 8.

There is nothing in the Evidence Act which precludes an accused from relying upon his confession for his own purpose. Where an accused, charged with offence of murder, made a confession at Police Station to the Police Officer, *held*, the said statement could be relied on by the accused at least to spell out a stand that the offence committed by him was not murder but something less than that: (1991) 3 Karn.L.J. 476: 1992 Cr.L.J. 502: I.L.R. (1991) Karn. 1660 (D.B.).

Where in a murder case, the words *mara hai* were used by the accused in his confession, *held*, it does not mean that he 'gave beating' to the deceased but he had 'killed' him. [A.I.R. 1962 S.C. 554, Foll.]: 1981 M.P.L.J. 594.

Where the accused's conviction by the Court-martial was based on his confession after giving him opportunity to show that it was not voluntary, *held*, the High Court will not interfere under Art. 226: 1982 Cr.L.J. (N.O.C.) 120 (Del.). *See* also (1983) 1 Crimes 1025 (Del.) [Confession found to be not voluntary].

6. Acceptance or rejection of confession.—Where the circumstances of the case compel a Tribunal to act only upon a confession, and to reject all other evidence, the confession must be used *literatimet verbatim* and due effect must be given to every statement in it whether in favour of the accused or against him: 38 I.C. 740: 18 Cr.L.J. 356; 14 Cr.L.J. 252: 19 I.C. 508.

Under S. 24, it is sufficient to exclude a confession if there are circumstances in evidence which afford a well-grounded conjecture that the confession was not voluntary: I.L.R. 25 Pat. 612: A.I.R. 1947 Pat. 305.

The Court is at liberty to disregard any statement in the confession which it disbelieves: 46 I.C. 705: 19 Cr.L.J. 785 (N.).

Where once the existence of threat, assault, beating or improper inducement has been established there is a presumption of its continuance and the prosecution has to prove that the impression caused by the original inducement, beating, assault or threat was fully removed when the prisoner made the confession: 1958 M.P.L.J. 752: A.I.R. 1959 Madh. Pra. 125.

The circumstances under which a confession is made must always be scrutinised with great care and caution, and in all cases the period of the detention of the accused in Police custody before a confession is made is always an important fact to be carefully considered. Illegal detention does not necessarily vitiate a confession. It is a fact to be carefully considered in every case: 31 Sind L.R. 494: A.I.R. 1937 Sind 251.

Where the confession of an accused has been excluded by the trial Magistrate under S. 24, it cannot be taken into consideration in revision even though such confession may be excluded wrongly: 24 Sind L.R. 338: A.I.R. 1939 Sind 168.

7. Conflict between Medical evidence and confession.—Where the accused in his confession stated that he had stabbed the deceased in his belly but the autopsy report showed that the injuries were on the chest, *held*, contradicted by the medical evidence, the confession was not truthful and could not be relied upon: 1977 Cr.L.J. 1831 (Gau.) (D.B.).

Where a wife confessed having murdered her husband by hitting him four times on his head by an axe and buried him in his room; his corpse was recovered ten days after the murder at her instance in a highly decomposed state with no injuries clearly visible on the head; *held*, her confession could not be discarded merely because the doctor conducting the autopsy had testified that there was only one cut injury on the head; the body being highly decomposed, it was not possible for the doctor to see all the injuries: A.I.R. 1989 S.C. 483: 1989 Cr.L.J. 823.

Where the version given in the retracted extra-judicial confession was inconsistent with the medical evidence, *held*, no reliance could be placed on it: A.I.R. 1994 S.C. 214: 1994 Cr.L.J. 245; 1984 Cr.L.R. 193: 1984 W.L.N. (U.C.) 11 (Raj.).

Where a confessional statement had exculpatory parts, which were not only inherently improbable but also contradicted the medical testimony, as well as the eye-witness's evidence which fully supported the inculpatory parts, *held*, the trial Court could not accept the exculpatory parts: (1981) 52 Cut.L.T. 276: 1981 Cr.L.J. 1461.

8. Confession—Evidentiary value.—It is true that ordinarily an offender is reluctant to disclose that he had taken any part in any offence. However, it all depends upon the handling of the situation by the officers responsible for the investigation. It is the experience of the Courts that in some cases offenders do make confessions and furnish information necessary for the detection of the crime. It all depends upon the tact and skill of the Investigating Officers as to how to draw out true facts from the offenders themselves. Therefore, when there appears to be no reason for the officer fabricating when in fact no information leading to the discovery of property had been given, it must be held that the information was obtained by the Investigating Officer by his tact and skill: 1958 Raj.L.W. 527.

All parts of a confession are not entitled to equal weight. Some may be believed while others rejected: I.L.R. 1 Luck. 117: A.I.R. 1926 Oudh 618. *See* also (1940) 42 Punj.L.R. 1: A.I.R. 1940 Lah. 157.

The rule which excludes evidence of statements made by a prisoner, when they are induced by hope held out of fear inspired by a person in authority is a rule of policy: (1913-14) 18 Cal.W.N. 705: 1 Mad.L.W. 989 (P.C.).

A confession to be admissible must be voluntary and made without any pressure: I.L.R. 35 All. 260: 19 I.C. 367; 52 I.C. 881 (1): 20 Cr.L.J. 721. *See* also 47 Mad.L.W. 143.

Confessional statement of exculpatory character—It should not be acted upon: 1959 Ker.L.J. 782: I.L.R. (1959) Ker. 962.

The absence in the confession of the details *in extenso* put forward by the prosecution when the witnesses were examined in Court is not a reason for which the confession can be said to be untrue where there is nothing in the statement in the confession which is contrary to the oral evidence: 1958 Cr.L.J. 238: A.I.R. 1958 S.C. 66.

That before the committing Magistrate no question under S. 342, Cr.P.Code was put to the appellant with regard to the confession and, therefore, he had no opportunity to put forward his complaint about the confession until the case came before the Sessions Court, even if it is a defect would not in any way show that the confession was involuntary: 1958 Cr.L.J. 238: A.I.R. 1958 S.C. 66.

Under S. 24, which is a rule of exclusion, it is not necessary that there should be decision in so many words that a confession is not irrelevant. In every case in which a confession is admitted in a criminal case, the fact that evidence of the confession is admitted is sufficient to make the confession evidence. It is open to the defence to object to the evidence of confession going in, but till such objection is raised, there is no need for the Court to pronounce a formal decision on the question of the relevancy of the confession. The actual fact of admission of the confession is sufficient for the purpose: 48 Mad.L.W. 777: (1938) 2 M.L.J. 1065.

The rule which excludes confessions not having been made voluntarily is a rule of policy. No formal proof by prosecution as to the voluntary nature of the accused's statement is necessary: 1957 M.L.J. (Cr.) 520: (1957) 2 M.L.J. 358.

There is no onus upon an accused in a criminal case to prove that he did not voluntarily make a confession which he is alleged to have made. Before a confession is taken into consideration, the Court has not only to be satisfied that it was genuinely made but has also to be satisfied that it was made freely and voluntarily. It is, therefore, for the prosecution to satisfy the Court on these points. The words 'appears to the Court' in S. 24, however, show that positive proof of the fact that there was any inducement, threat or promise is not necessary. The confession itself, the evidence adduced on behalf of the prosecution and the defence, if any, and all the circumstances of the case have to be taken into consideration. If, upon such consideration, the Court feels that the accused made the confession as a result of any inducement, threat or promise having reference to the charge, or even if the Court feels that there is reasonable doubt that there was such inducement, threat or promise, it cannot be satisfied that the confession is free and voluntary and hence it has to exclude the confession from consideration. But the Court cannot exclude a confession on mere conjecture or surmise, *i.e.*, in other words, on mere assumption without any basis that inducement, threat or promise must have been used: 1958 B.L.J.R. 6: A.I.R. 1958 Pat. 166.

The prolonged custody immediately preceding the making of the confession is sufficient unless it is properly explained to stamp it as involuntary. The fact that the accused made various suggestions in the cross-examination of the C.I.D. Inspector such as that he was given bhang and liquor, or shown pictures, or promised to be made an approver, and they have been rejected as unfounded does not relieve the prosecution from its duty of positively establishing that the confession was voluntary, and for that purpose, it is necessary to prove the circumstances under which this unusual step was taken: A.I.R. 1956 S.C. 56: 1956 Cr.L.J. 152.

It is not necessary that the confession of the accused should be corroborated in all its particulars, but the law requires that the statement should be corroborated in its material particulars: 1973 Sim.L.J. 195 (D.B.).

It is for the prosecution to prove the voluntary nature of the confession on which it relies. If the confession is not voluntary and genuine but a tainted one, no question of its corroboration arises: I.L.R. 36 Pat. 141. It must be established that a confession is voluntary and also it is true. For the purpose of establishing its truth it is necessary to examine the confession and compare it with the rest of the prosecution evidence and the probabilities of the case: A.I.R. 1957 S.C. 637: 1957 S.C.J. 699: 1957 M.L.J. (Cr.) 672.

An accused's confession cannot be made the foundation of conviction; it can only provide support to other evidence. The proper way of appraisal is, first, to marshal other evidence against the accused (keeping out the confession altogether) and see whether, if believed, it justifies conviction; it may not then be necessary to call the confession in aid. But cases may arise where the Judge does not feel it safe to act on the other evidence; the Judge may then call in aid the confession and use it to lend assurance to the other evidence and convict the accused which but for the confession he would not be prepared to do: A.I.R. 1952 S.C. 159: 1952 S.C.R. 526: 1952 Cr.L.J. 839. Thus, the High Court's approach to make the confession a basis for ascertaining

the facts and then seek corroboration in material particulars by other evidence, *held*, is wrong: (1992) 1 S.C.C. 473.

Conviction on basis of confession by accused—When justified: 1981 Cr.L.J. 1408 (Gau.).

Correctness of confession not established—Such confession not sufficient for punishing the accused: 1982 M.P.W.N. 355.

If a confession is not voluntary in the wider sense of the term, *ex hypothesis* the person who made it did not do so with the desire to tell the truth. This fact, in itself, introduces an element of suspicion. In such circumstances if facts are proved which suggest, that an inducement of some kind, although outside the terms of S. 24 was in fact given, the Court may well refuse to accept the confession as true: I.L.R. 63 Cal. 1053: A.I.R. 1936 Cal. 316.

Where the Magistrate in whose presence a confession was made is called as a witness and swears that the statement was made before him freely and willingly and not in the presence of a policeman, the confession is voluntary and can be acted upon: 2 L.L.J. 653.

Where the accused are unable to explain their confessions which clearly indicate their guilt, the confessions alone are sufficient for their conviction: 5 O.W.N. 968. The evidence of an admission of guilt to villagers may be as strong evidence against an accused as a confession before a Magistrate. It requires no corroboration: 5 O.W.N. 698: A.I.R. 1928 Oudh 393; A.I.R. 1929 Oudh 272.

Confession against himself to a witness is valid and admissible: A.I.R. 1929 Mad. 92. The confession of an accused person is substantive evidence and a conviction can be based solely on a confession: 1960 Cr.L.J. 520: A.I.R. 1960 Raj. 101.

Where a confession was approved to have been made without any sort of influence or tutoring and the same was not contradicted by other evidence, *held*, that the accused could validly be convicted on the strength of the confession alone: 114 I.C. 771: A.I.R. 1929 Oudh 167. *See* also (1936-37) 41 Cal.W.N. 183: A.I.R. 1937 Cal. 39; 38 Cr.L.J. 84: 165 I.C. 795.

Where the main foundation for the conviction is the confession alleged to have been made by the accused, there are three things which the prosecution must establish: (*a*) that a confession was made, (*b*) that evidence of it can be given, and (*c*) that it is true: 29 Sind L.R. 1: A.I.R. 1934 Sind 172; A.I.R. 1957 All. 459: 1957 Cr.L.J. 803.

When a confession is made the foundation for conviction, the Court must be satisfied that it is true. In law it is open to the Court to give effect to the sound presumption that what a person wilfully states against his interest is likely to be true and to convict him on his confession alone. But in practice, Courts following the English system of jurisprudence try to guard themselves particularly in cases of serious offences, against the danger demonstrated by experience of persons falsely implicating themselves for reasons which may not be apparent. The truth of falsity of a confession has, therefore, to be weighed by the Court in the light of all the facts and surrounding circumstances: 1958 An.L.T. 1125: A.I.R. 1959 Andh. Pra. 419.

Where an accused confesses to having caused the death of a woman and admits having robbed her after her death, but during that confession introduces into it circumstances with a view to excuse himself from a conviction for murder, it cannot be contended that the confession must be accepted as it is and that so taken it is not sufficient for a conviction. Such a contention is wholly unacceptable and is contrary to practice and authority. When the confession is shown to be voluntary and made with due apprehension of what was said and of the consequences, the confession must be accepted and acted upon alongwith other circumstances as a whole, including the other evidence, in the case: 187 I.C. 481: 1940 Mad.W.N. 169.

In the absence of any evidence to show that any threat, promise or inducement was made to the accused and when he had not been continuously questioned all the time but only at intervals during the period the mere fact that it took two to three hours from the time that the accused was brought to the house of the mukhia to the time when he made the confessional statement cannot make his confession one other than free and voluntary: A.I.R. 1959 S.C. 18.

The rule of prudence does not require that each and every circumstance mentioned in the confession with regard to the participation of the accused person in the crime must

be separately, and independently corroborated, nor is it essential that the corroboration must come from facts and circumstances discovered after the confession was made. If the rule required that each and every circumstance mentioned in the confessional statement must be separately and independently corroborated, then the rule would be meaningless inasmuch as the independent evidence itself would afford sufficient basis for conviction and it would be unnecessary to call the confession in aid: 1957 Cr.L.J. 481: (S.) A.I.R. 1957 S.C. 216.

Where the accused persons are charged with offences under Ss. 302, 364 and 386, I.P. Code and the Court has considered it unsafe to act upon the confession as basis for the conviction in respect of murder, there is no reason why the confession in so far as it relates to the two offences of kidnapping and extortion should not be taken into consideration as against the accused to lend assurance to conclusion against them in so far as these offences are concerned based on circumstantial evidence: 1957 Cr.L.J. 559: A.I.R. 1957 S.C. 381.

Where the case against the accused depends mainly upon an alleged confession and there is a conflict as to the manner in which the confession had been obtained by the prosecuting agency, the accused is justified in asking the Court to give him the benefit of the doubt: 119 I.C. 420: 30 Cr.L.J. 1080: A.I.R. 1930 Lah. 88. Where the confession as a whole is unreliable, the discovery which is but a part of that confession should also be held to be unreliable: 177 I.C. 617; (1938) 40 Punj.L.R. 890: A.I.R. 1938 Lah. 594.

Antecedent recoveries cannot in any way be used to corroborate or to test the truth or otherwise of a confessional statement. At the most these can be taken as a part of the statement and cannot in any way add to its weight: 1953 Cr.L.J. 1865: A.I.R. 1954 J.&K. 1. But *see infra*. It is not necessary that the corroboration must come from facts and circumstances discovered after the confession: 1958 Ker.L.T. 761: 1958 M.L.J. (Cr.) 869: A.I.R. 1959 Ker. 46.

The statements of the accused are of two kinds, namely, exculpatory statements and inculpatory statements. Inculpatory statements should be accepted with a great deal of caution and unless the law permits it, they should be excluded from consideration. But exculpatory statements cannot be placed on the same footing. An exculpatory statement is the defence of the accused and not a statement from which any inference of guilt can be drawn against him. Therefore, such statement cannot be excluded from consideration: I.L.R. (1959) 1 All. 508: 1959 Cr.L.J. 924: A.I.R. 1959 All. 483.

The accused goes on making a confessional statement in his own way. It is not subjected to cross-examination or clarification by re-examination and the accused cannot be directed to follow the chronology exactly in the manner it happened. If the contradiction goes to the root of the matter on a material link of the case, it may be vital. A part of the confessional statement might, however, be rejected and other part accepted if the part to be rejected is proved to be false by other prosecution evidence. No hard and fast rule can be laid down. The ultimate conclusion will depend upon the facts and circumstances of each case: (1965) 2 Cr.L.J. 520: A.I.R. 1965 Ori. 175.

Where there was a material contradiction in the evidence of recording officer and the panch witness, *held*, such contradiction was sufficient to impeach the veracity of the alleged confessional statement: 1977 Cr.L.R. 43 (Mah.).

9. Confession in Police custody—Inadmissibility of.—Question of admissibility of confession comes when statement is made to Police Officer or while in Police custody: A.I.R. 1929 Cal. 539.

Statements of accused made to the Police or while in the custody of the Police Officer about his committing the offence and his pointing out the place where he committed the offence are not admissible under S. 26, Evidence Act: A.I.R. 1955 Manipur 1: 1955 Cr.L.J. 139.

Prisoner in custody of Head Constable even after order to send him to judicial lock-up—Custody is illegal—Prisoner held kept in illegal custody to extort confession—Confession held inadmissible. *See* A.I.R. 1955 Pepsu 33: I.L.R. (1954) Pepsu 317.

When a confession was made after being in Police custody for several days and protracted consultation between the accused and the Investigating Officers and was subsequently retracted, the confession is inadmissible: 53 I.C. 929: (1918-19) 23 Cal.W.N.

886. *See* also A.I.R. 1937 Cal. 39: (1936-37) 41 Cal.W.N 183; 5 L.L.J. 128; 21 Cr.L.J. 177: 54 I.C. 881 (P.C.); 18 Cr.L.J. 106: 10 Bur.L.T. 270; 17 Cr.L.J. 402: 35 I.C. 932.

The accused must be free and unhampered at the time when his confession is recorded and should not be subject to the influence of the Police. Where a Police constable was standing guard when the confessions of accused persons were recorded, and two of the accused were hand-cuffed when their confessions were recorded, it cannot be said with confidence or certainty that the accused were not under the influence of the Police: I.L.R. (1948) Nag. 147: A.I.R. 1948 Nag. 344: 1948 Nag.L.J. 489.

The immediate presence of a Policeman or Police Officer is not necessary to prove that the accused was in the custody of the Police. Even temporary absence of a Policeman or a Police Officer would not terminate his custody and the accused shall be deemed to be in the custody of the Police even in such circumstances. No statement made by the accused under these circumstances can be held to be voluntary: 1958 All.L.J. 660: 1959 Cr.L.J. 940: A.I.R. 1959 All. 518. Moral exhortation is not objectionable: I.L.R. 4 Pat. 646: A.I.R. 1925 Pat. 772.

The mere fact of the accused being in Police custody is no reason for presuming that his confession was induced by threat or promise. 98 I.C. 250: A.I.R. 1926 Oudh 622. Where the threats made do not influence the accused's confession it is admissible: I.L.R. 49 Bom. 642: A.I.R. 1925 Bom. 529.

Statements leading to discovery are admissible under S. 27, Evidence Act, although they are statements made to the Police in the course of investigation. But the principle of S. 24 applies to the statements under S. 27 and if the statement is involuntary, it would be excluded. Where the statements leading to discovery were made to the Police as a result of harassment and continuous interrogatories for several hours after the person is treated as an offender and accused, such statements must be regarded as involuntary and must, therefore, be excluded from the evidence. The statements do not fall under S. 161, Cr.P.Code because a person treated by the Police as an offender and accused cannot come within the category of any person supposed to be acquainted with the facts and circumstances of the case. Moreover, statements made by the accused person after long interrogation by the Police and admitted under S. 27, Evidence Act, would be hit by Art. 20(3) of the Constitution of India: 1960 Nag. L.J. 390: 1960 All.W.R. (Supp.) 41: 1960 All. Cr.R. 264: 1960 Cr.L.J. 1429: A.I.R. 1960 Bom. 488: I.L.R. (1960) Bom. 664.

Whether the accused was in Police custody when his confession was recorded, the crucial test is whether at the time when an accused makes a confession he is a free man or his movements are controlled by the Police either by themselves or through some other agency employed by them for the purpose of securing such a confession. The immediate presence of a Policeman or Police Officer is not necessary to prove that the accused was in the custody of the Police. Even temporary absence of a Policeman or a Police Officer, would not terminate his custody and the accused shall be deemed to be in the custody of the Police even in such circumstances. No statement made by the accused under these circumstances can be held to be voluntary: 1959 Cr.L.J. 940: A.I.R. 1959 All. 518: I.L.R. (1958) 2 All. 213.

The confession was recorded some five days after the arrest of the accused and during all this time he was nominally in judicial lock-up which was inside the Police thana itself. The record of the confession did not disclose that the Magistrate made any real attempt to satisfy himself that the accused was confessing voluntarily. On the other hand, the language in which some questions were put by the Magistrate to the accused and the answers which were given by him led one to believe that the accused did not understand these questions and did not really give the answers attributed to him. *Held*, that the confession must be excluded from evidence; however, the exclusion of confession did not affect the value of the strong circumstantial evidence against the accused: 1957 Jab.L.J. 460.

Where disclosure statement was made by accused after a lapse of 22 days of continuous interrogation and further Police was already in possession of the information before the statement of the accused was recorded in the presence of witnesses, *held*, it was inadmissible in evidence: 1994 Cr.L.J. 894 (Him. Pra.) (D.B.).

Confession recorded while accused was in Police custody—Confession not read over

or explained to accused—Effect: I.L.R. (1959) Ker. 319.

10. Confession under inducement, threat, etc.—If one makes a statement after being told by the Police 'I need to take a statement from you', then obviously some inducement in the colloquial sense is held out to one to make it; but an inducement of that nature is not a sufficient inducement in law to render inadmissible a statement resulting from it. To render a confession or admission admissible the prosecution must prove affirmatively that no inducement relating to the charge or accusation was held out to the accused to make it. A confession or admission must be excluded if it is made: (*i*) in consequence of, (*ii*) any inducement, (*iii*) of a temporal character, (*iv*) connected with the accusation or relating to the charge, (*v*) held out to the accused by a person having some authority over the subject-matter of the charge or accusation. The words, 'I need to take a statement from you', or even words covering a suggestion that a man will have to come to the Police Station because the Police need to take statement from him when he gets there, is not an inducement in any way relating to the charge or accusation. An oral admission made by the accused, in response to the suggestion is admissible against the accused: (1957) 3 All E.R. 623. The expression 'you had better tell the truth' has always been held to import a threat or promise unless the words are qualified in some manner. The words do not mean mere exhortation to tell the truth for the accused had already been questioned by the Police. The words are susceptible of the interpretation that the accused was told that it would be better for him if he told the truth and that amounts to an inducement: 152 I.C. 998: A.I.R. 1934 Lah. 417. *See* also 167 I.C. 795; A.I.R. 1937 Cal. 39: (1936-37) 41 Cal.W.N. 182; A.I.R. 1938 Pat. 308: I.L.R. 17 Pat. 369; A.I.R. 1940 All. 46; 1941 Mad.W.N. 956: A.I.R. 1942 Mad. 237; A.I.R. 1942 Mad. 49: (1941) 2 M.L.J. 1070; I.L.R. (1943) Mad. 224: A.I.R. 1943 Mad. 710: (1943) 2 M.L.J. 293.

A confession can be acted upon by Courts only if it is a genuine one and the Court is satisfied that it is voluntary and that it does not appear to have been brought about by inducement, threat or promise as contemplated by S. 24. [A.I.R. 1971 S.C. 1871, Rel. on]: (1972) 1 Mys.L.J. 499: 1972 M.L.J. (Cr.) 374 (D.B.). *See* also 1979 Cr.L.R. 366 (Guj.).

Mere exhortation to speak out the truth in the name of God cannot of itself amount to an inducement. Such exhortation is merely a moral exhortation and is not objectionable so as to render the statement made in consequence thereof inadmissible: 1976 Kash.L.J. 253: 1976 Cr.L.J. 1310 (D.B.); 1991 Cr.L.J. 3054 (Madh. Pra.) (D.B.).

The question whether the words used were intended to convey to accused an inducement, etc., must depend on surrounding circumstances, in which those words were used. The burden is on prosecution to prove that the confession was not improperly induced: A.I.R. 1933 Sind 409. Where accused is told by a person in authority that if he makes a voluntary confession which is considered to be full and true his prayer for being made an approver will receive due consideration, the confession made under such circumstances is inadmissible: I.L.R. 45 All. 633: 21 All.L.J. 585.

Confession induced by promise of being made an approver—Not admissible: A.I.R. 1956 Raj. 67: 1958 Cr.L.J. 550. *See* also 1959 Ker.L.T. 167: I.L.R. (1959) Ker. 319: 1959 Ker.L.J. 222, cited in Note 3, *supra.*

It is not correct to assume that a person would not make a confession of his guilt, which will be prejudicial to his interest unless some pressure is exerted on him. If a Court has any reason to doubt the free and voluntary nature of the confession, then it is for the prosecution to prove that it was made without threats or promises or inducements: 52 Cr.L.J. 50: A.I.R. 1951 Him. Pra. 1.

Where there is good reason for the suspicion that a confession has been caused by inducement having reference to the charge against the accused person proceeding from a person in authority, the confession is inadmissible in evidence: A.I.R. 1950 Cal. 427. Confession made under inducement of promise of release from the custody, *held*, is irrelevent and inadmissible: 1971 B.L.J.R. 641.

S. 24 makes a confession inadmissible if it appears to have been caused by any inducement or promise: I.L.R. 45 All. 300: A.I.R. 1923 All. 352; A.I.R. 1929 Sind 245; A.I.R. 1930 All. 29; A.I.R. 1942 Mad. 237 (Asking accused to produce weapons coupled with a promise that nothing would happen if they produced the weapons).

The expression used in S. 24 is not 'proved' but 'if it appears' which is not as strong an expression as 'proved'. Though the accused has not adduced evidence to substantiate the allegation that the confession was obtained by threat or inducement, it is still open to him to show that the circumstances under which it was made would justify that inference. *Quaere:* whether the onus of proving that a confession is voluntary is on the accused or the prosecution: (1928-29) 33 Cal.W.N. 1112: A.I.R. 1929 Cal. 726; I.L.R. 61 Cal. 339: A.I.R. 1934 Cal. 636.

Assuming that it is for the accused to prove his allegation that the confession is made by him under threat and pressure of the Police, the burden of this proof on the accused is very light. This question of the onus is not free from difficulty. However, the words used in S. 24, Evidence Act, are 'appears to the Court'. It is really not the strict proof which is required from the side of the accused to show that the confession was the result of inducement, threat or promise. If it appears to the Court that it was so it is sufficient for the purposes of holding that such confession is irrelevant: A.I.R. 1952 Pepsu 19: I.L.R. (1951) Pepsu 277.

To justify a Court in holding that a confession is irrelevant on the ground of its having been caused by an inducement, threat or promise it is not necessary that it must be strictly proved to have been so caused. All that is necessary is that it must appear that it was caused by inducement, etc. The word 'appears' in S. 24 of the Evidence Act indicates a lesser degree of probability than is necessary for 'proof' as defined by S. 3. If in the circumstances of a case there is, in the opinion of the Court, reason to suspect that a confession was obtained by inducement, threat or promise, that would render the confession inadmissible. The prosecution in order to have it admitted must show that it was freely made: I.L.R. (1951) Mys. 239: A.I.R. 1950 Mys. 82.

The word 'appears' in S. 24 indicates a lesser degree of probability than the word 'proof' as defined in S. 3 of the Act. S. 24, therefore, does not require positive proof of improper inducement, etc., to justify its rejection. A well grounded suspicion is sufficient to exclude confessions from consideration: I.L.R. (1954) Patiala 317: A.I.R. 1955 Pepsu 33.

S. 24 does not require that there should be positive proof of improper inducement, threat or promise to justify the rejection of the confession. A well-grounded conjecture reasonably based upon circumstances disclosed in the evidence would be sufficient: I.L.R. (1948) Nag. 147: A.I.R. 1948 Nag. 344.

It is true that it is not necessary for the accused to prove definitely that the confession was brought about by any inducement, threat or promise and if it can be gathered from the circumstances that such inducement, threat or promise was held out, the confession would not be acted upon. But there must be something to show that there was any such inducement, threat or promise. When the confession is quite clear and cogent and has been made after due formalities and sufficient caution, there must be some such circumstances from which inducement, etc., may be reasonably inferred: 1952 Raj.L.W. 103. It is not possible for a Court to say that the making of the confession "appears" to it to have been caused by any inducement, threat or promise, except upon evidence which is before the Court: 4 Pat.L.T. 186: 72 I.C. 961: A.I.R. 1923 Pat. 13; A.I.R. 1928 Lah. 676.

Under S. 24, unless it appears to a Court that an inducement, threat or promise was held out by a person in authority a confession would be relevant without any formal proof of the voluntary nature of the statement and formal evidence that the statement was voluntary is not required from the prosecution in practice: (1941) 2 M.L.J. 1070: A.I.R. 1942 Mad. 19.

Where the accused whose confession is being recorded informs the Magistrate that he is making the confession under inducement, the confession is not admissible and cannot be allowed to go to the jury. Whether there was inducement or not is immaterial: I.L.R. 45 Bom. 1086: 60 I.C. 1006. A confession by an accused to a Magistrate who did not record or administer any of the necessary warning or adopt any of the safeguards, made after the Police had threatened him and retracted at the earliest possible moment after the accused got out of the influence of the Police, is inadmissible and insufficient in itself to base a conviction: 1933 Mad.W.N. 723.

Where a confession is positively proved by the record of the Magistrate that it was

voluntary, the mere fact that the accused confessed in the hope of pardon will not justify his rejection as being improperly induced, in the absence of evidence to suggest that any Police Officer or other person in authority did or said anything which could possibly be construed into holding out a hope of pardon: (1932) 34 Punj.L.R. 704: A.I.R. 1933 Lah. 388.

Where the Magistrate has not put the necessary preliminary questions to the accused with a view to satisfy himself that his statement was voluntary, the irregularity can be cured under S. 533 of the Cr.P.Code, provided the omission has not injured the accused in his defence on the merits. In other words, the Court is enabled under S. 533 to take evidence to prove that the confession was 'duly made', *i.e.*, in accordance with Ss. 164 and 364. If the questions were not put at all the confession is not 'duly made'. But it is not necessarily irrelevant. The Court may satisfy itself that there was necessarily no inducement or threat and so fulfil the requirements of S. 24. The weight to be attached to it depends on the facts of each case: 1933 All.L.J. 1551: A.I.R. 1934 All. 81: I.L.R. 56 All. 302 (F.B.).

A confession made by the accused during the course of investigation is inadmissible. Thus, when there is no evidence save the confession of the accused, the proceedings against the accused are liable to be quashed: 1994 Cr.L.J. (N.O.C.) 423 (Mad.).

The statements made by the accused in the trial of the Police Officer concerned in the investigation of the case could be admitted in evidence against him on his own trial for murder: 59 I.C. 324: (1920) 22 Bom. L.R. 1247.

A confession made by an accused person under fear, encouraged by a Police Officer in a subtle way in the hours that elapsed before the accused reached the Magistrate, is inadmissible in evidence: 60 I.C. 417: 32 Cal.L.J. 204.

Where the accused who had surrendered in Court and had been granted bail was subsequently brought to Court in custody for the purpose of recording of confessional statement, *held*, such a confessional statement was unreliable as it would be deemed to have been made under coercion: 1994 Cr.L.J. (N.O.C.) 428 (All.) (D.B.).

A confession made by an accused person on an inducement by a Police Officer that he would be offered a pardon is inadmissible in evidence: 60 I.C. 417: 32 Cal.L.J. 204.

The fact that a Police Officer got by means of threat information from a prisoner as to a circumstance incriminating the latter does not render that information inadmissible in evidence: 17 Cr.L.J. 32: 31 I.C. 321.

The influence may be suggested by the confession itself or by the prosecution evidence or by the evidence adduced by accused or by surrounding circumstances which the Court is bound to take into consideration: 72 I.C. 961: 4 Pat.L.T. 186.

It cannot be stated as a proposition of law that no statement made on oath can be a voluntary statement that would be admissible under S. 24, which says nothing about voluntary statement. A statement made on oath may be said in certain cases to be made as the result of the holding out of a threat; but that is a question of fact. The administering of an oath is not necessarily or always tantamount to a threat to the person under oath: A.I.R. 1942 Mad. 654: (1942) 2 M.L.J. 112.

Where an application to be made as an approver was made from jail by an accused and he also expressed a wish to make a statement, it was held that though it might be an indication of an anxiety on the part of the accused to earn a pardon by becoming an approver, it was not a reason to hold that any inducement was held out to the accused to make a confession: 1943 O.W.N. 88: A.I.R. 1943 Oudh 269.

An answer in the affirmative to a leading question by a person in authority renders the confession unacceptable to support a charge of a serious offence. Thus, where there was no record of the specific words spoken by the accused regarding the offer made in the circumstances and the reasons alleged by the authority and there were reasons to believe that the confession was due to fear under express or implied threat proceeding from the authority, *held*, the confession was inadmissible in view of S. 24: 1975 Cr.L.J. 1335 (Goa); 1984 Cr.L.J. (N.O.C.) 121 (Ori.).

The lengthy character of the judicial confessional statement containing unnecessary details coupled with the fact of its retraction before commencement of the trial, *held*, reasonably lead to an inference that it was neither voluntary nor truthful: 1983 W.L.N. (U.C.) 580 (Raj.).

Applicability—Coercion or inducements—*Locus standi* to complain: 1970 Mah.L.J. 947 (S.C.): 1970 M.P.L.J. 931.

Under S. 24 a confession would be irrelevant if it should appear to the Court to have

been caused by any inducement, threat or promise. The crucial word is the expression 'appears'. The appropriate meaning of the word 'appears' is 'seems'. It imports a lesser degree of probability than proof. A *prima facie* opinion based on evidence and circumstances may be adopted as the standard laid down. It is not possible or advisable to lay down an inflexible standard for guidance of Courts.

Under particular circumstances whether a statement made by the person in authority (that if the whole truth did not come out, he would hand over the inquiry to the Police) appears to the Court to be a threat or not is a question of fact. Where the three lower Courts concurrently held that in the circumstances of the case the statement did not appear to be a threat within the meaning of S. 25 of the Evidence Act, but was only a general statement which any person who lost his property and was not able to find out the culprit would make, in exercising the powers under Art. 136 of the Constitution, the Supreme Court was not prepared to differ from the finding: (1963) 1 S.C.R. (Supp.) 689: (1963) 2 Cr.L.J. 178: A.I.R. 1963 S.C. 1094.

Under S. 24 there must be something from which the Court can infer that the inducement or promise was given to the accused by some person who had authority to give it. It must be shown that hope was directly inspired by some one who had authority to make the promise: 109 I.C. 225: A.I.R. 1928 Cal. 500.

An approver's disclosure is in its very nature always the result of an inducement or promise, namely, the inducement to confess upon a promise of pardon; but should it appear that it was extorted as the result of undue duress, such as threats of violence, to that extent the provisions of S. 24 would be applicable and the confessional statement would have to be ruled out of evidence: I.L.R. 9 Lah. 608: A.I.R. 1928 Lah. 320 (2). The mere fact that there was a race for pardon does not detract from the value of the confession, if that race of pardon does not appear to have been caused by an inducement or promise held out by one in authority: 11 L.L.J. 5: 30 Cr.L.J. 49. It is open to the High Court to rule out a confession caused by any inducement, threat, etc.: I.L.R. (1943) 1 Cal. 487: A.I.R. 1943 Cal. 625.

The accused was charged with an offence of storing without a licence large quantities of mill made cloth for sale, the evidence against him being primarily the statement made by him to the Textile Control Officer, and the quantity of cloth seized. The trial Magistrate refused to attach importance to the statements and discharged the accused. On a revision filed by the Crown, the Sessions Judge while agreeing with the Magistrate in the appreciation of evidence in regard to other particulars, came to the conclusion that the statements of the accused and the quantity of cloth seized were sufficient legal evidence which rendered the order of discharge unreasonable and ordered further enquiry: *Held*, in revision (1) that the mere fact that the Textile Control Officer asked the accused to tell the truth did not amount to a threat or inducement within the meaning of S. 24 and the statements were, therefore, admissible; (2) where the trial Magistrate thought there was no legal evidence from which it could be inferred that the large quantity found with the accused was stored for sale but the Sessions Judge found that there was legal evidence, it was certainly permissible for the Sessions Judge to set aside the order of discharge and direct further enquiry: A.I.R. 1948 Mad. 324: (1947) 2 M.L.J. 359.

A Superior Officer can always extract a self-incriminating confessional statement by merely putting the threat of prosecution and dismissal and any employee who is confronted with such a disastrous possibility will easily succumb to the pressure of making a confession in the hope of avoiding the prosecution and/or disciplinary action: 1991 Cr.L.J. 922 (Cal.) (D.B.).

Where the Postal Superintendent admitted that he did hold out an inducement of promise that only departmental enquiry would be held, *held*, in such circumstances the accused will be in a position where he would feel that by making confession, he would avoid criminal proceedings likely to be filed against him; no reliance could be placed on such confession: 1983 Cr.L.R. 188 (Guj.).

Where a School Principal, charged for drawing certain amounts on the contingent bills, in order to misappropriate it, was alleged to have made a confessional statement to his superior officer on oath, even though said officer was not empowered to administer any oath, *held*, this circumstance by itself would amount to a concealed threat, because if the statement was found to be false, the accused might have entertained a genuine belief that

he might be prosecuted; such a statement was clearly inadmissible under S. 24: A.I.R. 1979 S.C. 1080.

Inducement, etc., proceeding from person in authority—Police Officer being one of the party and not protesting when others offered inducement: I.L.R. (1964) Guj. 954: (1965) 1 Cr.L.J. 30: (1965) 6 Guj.L.R. 129: A.I.R. 1965 Guj. 5.

Where the total period of interrogation, made in the presence of many persons, was about two hours and was regarding discovery of the knife handle, the blade whereof was found lying near the dead body, *held*, the High Court was not justified in holding that the accused was interrogated for several hours and his disclosure statement was involuntary and hit by S. 24: A.I.R. 1978 S.C. 1183: (1978) 3 S.C.C. 279.

Where the confessional statement was outcome of Police beating, *held*, it could not be relied upon: 1982 Jab.L.J. (Notes) 46.

Both the physical condition of the accused as well as the treatment meted out to him by the authorities in whose custody he is, are relevant in determining whether the confessional statement is free and voluntary; thus, where the person under arrest of the customs authorities was a heart patient, having a pacemaker inside his chest, *held*, it was the tribunal's duty while imposing penalty to see whether the possible authoritative influence of the Customs Officers was completely removed from the accused's mind and whether he had sufficient time to regain his composure before he made the confessional statement: 1992 Cr.L.J. 1190 (Cal.).

Where the accused himself was not assaulted but the person in authority assaulted another person in the accused's presence, *held*, it would have definitely put the accused in fear of being subjected to a similar treatment; a confession made by the accused in such circumstances is nothing but procured by threat: (1991) 51 E.L.T. 295 (Bom.).

Where the accused had made and signed a confession of having stolen and concealed the Railway property before an officer of the Railway Protection Force and did not either explain in his statement before the Court or cross-examine the officer that the confession was procured from him under threat or inducement, *held*, the confession was voluntary. [A.I.R. 1959 S.C. 18 and A.I.R. 1956 S.C. 217, Rel. on]: 1980 M.P.L.J. 483: 1980 Cr.L.J. 1024.

Where the accused's brothers-in-law forced the accused to tell them the truth as to where their sister (who had been murdered) was, and both of them promised the accused that they would not take any action, *held*, the confession made to them by the accused was brought about by compulsion and promise of immunity from further action and, therefore, could not under S. 24 be acted upon against the accused. [A.I.R. 1971 S.C. 1871, Rel. on]: 1972 M.L.J. (Cr.) 374: (1972) 1 Mys.L.J. 499 (D.B.).

Inadmissible confession—Inadmissible confession would be inadmissible wholly: 38 I.C. 767: 18 Cr.L.J. 383 (Bur.).

11. Confession of co-accused.—It is well settled that unless the co-accused's confession is self-inculpatory, it cannot be used as a confession against the other co-accused; it would be only a mere statement: (1988) 2 Bom.C.R. 42.

When an accused makes an exculpatory confession implicating the other accused, that sort of confession cannot be the legal basis for the conviction of other accused. The confession of a co-accused has not been defined in the Evidence Act. But if a self-inculpatory confession in support of a co-accused is there, and it is corroborated by other evidence, then this sort of confession or corroboration may be used to supplement or corroborate or support the other evidence: (1991-2) 39 B.L.J.R. 953: (1991) 3 Crimes 404 (D.B.).

Confession of co-accused—Approver's evidence—Extent of corroboration—Duty of Court: I.L.R. (1979) Bom. 380 (D.B.).

Confession of co-accused—Admissibility: 1968 Cr.L.J. 347: A.I.R. 1968 Ker. 66.

Where but for the confession of his co-accused, there is absolutely no material on record against the accused, the Magistrate may in an appropriate case refuse to issue process at the threshold itself; it is, of course, different if the accused's own confession is on record: (1988) 38 E.L.T. 271 (Bom.).

Confession of co-accused cannot be treated as substantive evidence. In dealing with a case against the accused person, the Court cannot start with the confession of a co-accused. It must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt if the judicial mind is about to reach on the said other evidence. In other words, confession by a co-accused can be pressed into service only when the Court is inclined to accept

other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence: 1995 Cr.L.J. 1762 (Ori.).

Confessional statement of the co-accused cannot be the foundation even for the purpose of framing of the charge against the accused: (1985) 2 Bom.C.R. 499.

Self-inculpatory extra-judicial confession implicating the co-accused also—Corroborated by the recovery of dead body and discovery of weapon of offence—*Held*, conviction was justified so far as accused was concerned: A.I.R. 1987 S.C. 1572: (1987) 3 S.C.C. 227.

Confession of co-accused can be used against other co-accused of the case only when they are being tried jointly for the same offence: (1992-1) 40 B.L.J.R. 293.

12. "Persons in authority".—(*See* also S. 25, Note 4, *infra*). There is no statutory definition of the words 'person in authority', but it is well settled that the words have reference to a person who has authority to interfere in the matter under inquiry. Generally speaking a 'person in authority' is one who is engaged in the apprehension, detention or prosecution of the accused or one who is empowered to examine him: I.L.R. 12 Pat. 241: A.I.R. 1933 Pat. 149 (S.B.).

Expression 'person in authority' in S. 24 should be interpreted liberally. If such a person is interested or is concerned with the investigation of a case it would be sufficient to give him that authority: A.I.R. 1955 Pepsu 33.

S. 24 refers only to a person in actual authority, the test being the possession of some power or control over the accused with reference to his case: 18 Cr.L.J. 58: 10 Sind L.R. 140.

The belief of an accused that the persons to whom he made a confession were 'persons in authority' is not sufficient to bring them within the term. The test is: Had the person authority to interfere with the matter ? Whether a certain person is a person in authority would largely depend upon the circumstances of each particular case. Mukhias to whom confession was made by accused were held to be not persons in authority: 152 I.C. 1032: A.I.R. 1934 Sind 172.

The expression 'person in authority' has a wider meaning than the actual prosecutor and the test is, has the person any authority to interfere in the matter and any concern or interest in it sufficient to give him authority: 43 I.C. 605: 19 Cr.L.J. 189 (M.). *See* also I.L.R. 40 Bom. 220: (1915) 17 Bom.L.R. 1059. Police Patel in a village is such a person: I.L.R. 40 Bom. 220: (1915) 17 Bom.L.R. 1059; 1959 M.P.L.J. 1211: A.I.R. 1960 Madh. Pra. 132. So also a Mukhia of a village: I.L.R. 49 All. 57: A.I.R. 1926 All. 737; 1947 All.L.J. 560: A.I.R. 1948 All. 101. But *see* A.I.R. 1934 Sind 172. Also village Chowkhidar: 1936 All.L.J. 999: A.I.R. 1936 All. 753 (F.B.). *See* also I.L.R. 17 Pat. 369: 174 I.C. 524: A.I.R. 1938 Pat. 308; A.I.R. 1947 Pat. 146: 48 Cr.L.J. 412. The words 'person in authority' may also include the prosecutor: A.I.R. 1945 Cal. 360: 79 Cal.L.J. 149: 46 Cr.L.J. 683; (1921-22) 26 Cal.W.N. 54: A.I.R. 1921 Cal. 458.

A person in authority within the meaning of S. 24, Evidence Act, should be one who, by virtue of his position, wields some kind of influence over the accused. It is not necessary that he should be a person having authority to interfere in the matter of the charge against the accused. In this view, the confession made to a Patel of the village as a result of influence is hit by S. 24 of the Evidence Act: 1960 Jab.L.J. 77: 1960 Cr.L.J. 605: A.I.R. 1960 Madh. Pra. 132.

Assistant Sale Tax Officer under Orissa Sales Tax Act conducting inspection, search and seizure of account books is a 'person in authority'—Statement of accused made to him—Inadmissible evidence as it is not voluntary: (1961) 3 Ori.J.D. 415: (1962) 1 Cr.L.J. 835.

The question as to whether a person to whom a confession has been made is a 'person in authority' would naturally depend on the circumstances of each case having regard to the status of the accused in relation to the person before whom the confession is made. The words 'person in authority' must be liberally construed. Even a superior officer of an accused is a 'person in authority'.

The House Surgeon of a Hospital Ward on whose recommendation the confirmation of a probationary nurse attached to the ward depends is a superior officer to the probationary nurse; he is 'a person in authority' within the meaning of S. 24, in relation to that nurse: (1961) 1 Cr.L.J. 258: A.I.R. 1961 J.&K. 11.

The expression 'person in authority' in S. 24 has not been defined. No illustration of the expression has been appended to the section. Generally speaking 'person in authority' is one who is engaged in the apprehension, detention or prosecution of the accused,

or one who is empowered to examine him. An *ex-gountia* is not a person having anything to do with the apprehension, detention or prosecution of the accused. He is merely an ordinary citizen and is not a person in authority. Confession made to him is admissible in evidence: 32 Cut.L.T. 402: 1966 Cr.L.J. 1180: A.I.R. 1966 Ori. 205.

An extra-judicial confession made before a *Gountia*, is not invalid, since the *Gountia* is not a 'person in authority' and especially so after abolition of *Gountia* system. In the absence of any proof to establish a case of threat, promise or inducement against such a person the extra-judicial confession will not be hit by S. 24 of the Evidence Act. Truth of the retracted extra-judicial confession as to commission of a murder can be established by the recovery of the dead bodies from the place of occurrence and of the weapon stained with human blood and the medical evidence corroborating the confession in material particulars both with regard to the *corpus delicte* and complicity of the accused though a general corroboration is sufficient. Statement of the accused in the committing Court which is to be read as evidence under S. 287, Cr.P.Code, can also be used to corroborate it: 32 Cut.L.T. 1170: I.L.R. (1966) Cut. 635.

'Person in authority'—'Gaothia'—Gaothia witness in murder case—Abolition of Gaothia system in Bihar—*Held*, Gaothia could not be said to be a 'person in authority': 1982 Cr.L.J. 2346 (D.B.).

Block Development Officer is a person in authority so far as a clerk-cum-cashier is concerned who worked under him. But the onus is on such person to establish that the confession was caused by inducement, threat or promise, and it has further to be proved that they were sufficient to influence him to make the confession by entertaining an idea that he would gain any advantage or avoid any evil of a temporal nature: (1975) 41 Cut.L.T. 1085.

'Person in authority' has not been given any statutory definition, but it is well settled that such a person is one who is engaged in the apprehension, detention or prosecution of the accused, or who is empowered to examine him. The Sarpanch is not possessed of any such general powers under the Orissa Gram Panchayat Act (XV of 1948): 1968 Cr.L.J. 697 (Ori.).

A collecting panchayat and an assistant panchayat are both persons 'in authority' within the meaning of the section: I.L.R. 50 Cal. 127: A.I.R. 1923 Cal. 458.

Extra-judicial confession made to panch of Gram-Panchayat, *held*, is admissible in evidence and the fact that it was made in the presence of the village chowkidar would not make it inadmissible: 1978 Cr.L.J. 1149: 1978 Jab.L.J. 488: 1978 M.P.L.J. 599 (D.B.).

Panchayatdars are not persons in authority within the meaning of S. 24: 45 M.L.J. 845: A.I.R. 1924 Mad. 230. The President of a panchayat who was to consider a case, is a person in authority: (1925-26) 30 Cal.W.N. 512: 33 I.C. 828. *See* also 1969 All.W.R. (H.C.) 377: 1969 All.Cr.R. 245, cited under Note 27, *infra*. Also the President of a Village Vigilance Committee: 49 Mad.L.W. 522: A.I.R. 1939 Mad. 515; I.L.R. (1940) Lah. 217: (1940) 42 Punj.L.R. 711: A.I.R. 1939 Lah. 534.

The extra-judicial confession made by an accused to the kotwar is admissible in evidence: (1993) 1 Crimes 732 (Madh. Pra.).

Whether a person who is merely the landlord of the village and a member of the Union Board is 'a person in authority' within the meaning of S. 24. *See* I.L.R. 63 Cal. 1089: A.I.R. 1936 Cal. 227. As to agent of landlord, *see* 164 I.C. 891: A.I.R. 1936 Lah. 264.

A confession made by an accused to the Superintendent of Excise in a trial for illicit possession of opium is admissible provided no inducement, threat or promise was held out to the accused for making the confession: (1917-18) 22 Cal.W.N. 451: 45 I.C. 284.

Superintendent of Mines, being the superior officer of the accused, an accountant, is a 'person in authority' within the meaning of S. 24: (1987) 1 Crimes 411 (Ori.).

The honorary Magistrate who is also a jaildar is a 'person in authority': 152 I.C. 998: A.I.R. 1934 Lah. 417.

A lambardar being a person in authority, a confession induced by him by the use of threats is inadmissible: 4 Lah.L.J. 235: A.I.R. 1922 Lah. 263; 26 Punj. Re. 1946 (Cr.); 34 I.C. 642; 1955 Cr.L.J. 537: A.I.R. 1935 Pepsu 33. A jaildar or lambardar is an officer who is to help the Police in their investigation: 14 Punj. Re. 1911 (Cr.): 12 I.C. 973. *See* A.I.R. 1929 Oudh 272; 1936 All.L.J. 376: A.I.R. 1936 All. 470; I.L.R. 18 Lah. 794: (1936) 40 Punj.L.R. 186. *See* also A.I.R. 1928 Lah. 476 (Where a villager was directed by the Police to make the accused to confess by inducement).

The head of a Matha in Balliguda Sub-Division holds an important position and if an accused while kept tied up was threatened

with sound beating and then he confessed to having committed a crime, it may be reasonably inferred that the confession was extorted by threat from the person who in the opinion of the accused had sufficient authority to put him in the imminent fear of his life or at any rate to seriously injure him unless he confessed his crime: I.L.R. (1952) Cut. 620: A.I.R. 1953 Ori. 149.

A confession made to Thugyi by an accused who had been sent for by the former after being told that he would not be punished if he was not a party to the offence is irrelevant and inadmissible in evidence as the Thugyi is a person in authority within the meaning of S. 24: 26 I.C. 129. Other answers and questions based on the inadmissible statement are also inadmissible. (*Ibid*). Neither a co-villager nor a zamindar, is a person in authority unless the zamindar is directed by the Police to investigate: 37 I.C. 42: 18 Cr.L.J. 58; 9 I.C. 718: 12 Cr.L.J. 119.

Where an accused charged with murder is alleged to have made a confession of his guilt to a Mukhia and Ziledar who were among the party deputed by the Sub-Inspector, the Investigating Officer, to arrest the accused, upon an assurance that he would be set free if he spoke the truth, such a confession would be inadmissible in evidence against the accused as the Mukhia and Ziledar are 'persons in authority' within the meaning of S. 24: 1947 All.L.J. 560: 1947 All.W.R. (H.C.) 390. Katware in C.P. is not a Police Officer: 25 Cr.L.J. 147: A.I.R. 1924 Nag. 29. (*See* also notes under S. 25, *infra*).

A confession to a Jail Warden is not admissible: 1930 Mad.W.N. 1249.

Where a post office clerk begged of his superior to be saved if he disclosed everything and the latter having promised to help him the accused made a confession, *held*, that the confession was procured by inducement held out by a person in authority: I.L.R. 60 Cal. 719: A.I.R. 1933 Cal. 644.

A village headman is a person in authority but where accused made the confession of his own accord out of remorse and there was no proof of inducement, such confession is admissible: 6 O.W.N. 947.

S. 24 does not admit as legal evidence an incriminating statement to a headman at the latter's suggestion to speak the truth, lest witnesses on the other side may let it out when called: 18 Cr.L.J. 106: 37 I.C. 314.

An inamdar holds semi-official position and he is not a person in authority under this section: A.I.R. 1929 Lah. 558.

A village panch actively assisting the Police Officer is a 'person in authority' and a statement made to him under veiled threat and inducement is inadmissible: I.L.R. 8 Pat. 289: A.I.R. 1929 Pat. 275. Statement made to a Monigar on his asking accused to speak the truth is not one made under threat or promise and is admissible whether Monigar is 'a person in authority' or not: 1929 Mad.W.N. 791.

Expression 'person in authority'—Meaning—Expression has to be liberally construed—Person likely to interfere with prosecution of accused is a 'person in authority' —District Co-operative Officer is such a person with respect to a member of Co-operative Society: (1966) 7 Guj. L.R. 86.

Extra-judicial confession made to Postal Inspector—If Postal Inspector a Police Officer—Admissibility of such confession—Test of proof for admissibility under S. 24.

Held, that the Postal Inspector is not a Police Officer although he may have powers departmentally to investigate offences and irregularities committed by subordinates in the Postal Department. It is also well-settled that mere power to investigate into offences committed by subordinates would not necessarily attract the bar as to the admissibility of confession under S. 25 of the Evidence Act: 1968 M.L.J. (Cr.) 226: (1968) 1 Mys. L.J. 457.

Custom Officers.—Where statements by the accused persons before the Customs Officers, who must be taken to be persons in authority, were not made on account of any inducement, threat or promise, they would be admissible under S. 24. The statements would not be inadmissible under S. 25 as Customs Officers are not Police Officers: 1965 M.L.J. (Cr.) 98: (1965) 1 Cr.L.J. 490: A.I.R. 1965 S.C. 481; A.I.R. 1973 S.C. 62: (1973) 2 S.C.C. 401.

Authorities under the Foreign Exchange Regulation Act and Customs Act cannot be equated with Police Officers; S. 25 cannot apply to statements recorded by them: 1989 Cr.L.J. 2138 (Mad.) (D.B.).

The person summoned under S. 108 of the Customs Act, 1962 is, by the statute itself,

bound under threat of criminal proceeding to speak what he knows and state it truthfully; but such compulsion to speak the truth, even though amounting to a threat, emanates not from the Officer recording his statement, but from the provisions of the statute itself; S. 24 of the Evidence Act is, thus, not attracted: A.I.R. 1971 S.C. 1087.

A Customs Officer while holding an enquiry and recording statements under S. 108 of the Customs Act is not a Police Officer; he is only a Revenue Officer. The person against whom the enquiry is held does not become an accused till the Customs Officer lodges complaint before the Magistrate; thus, a confession made by such a person during the enquiry is not an accused's confession before a Police Officer; it is not hit by S. 162 of the Code of Criminal Procedure or by Art. 20(3) of the Constitution: 1985 M.L.J. (Cr.) 335; A.I.R. 1971 S.C. 44: (1970) 1 S.C.R. 821: (1983) 13 E.L.T. 1413; 1988 Raj.Cr.C. 462.

Conditions for applicability—Confessional statement recorded by Customs Officer under S. 171-A, Sea Customs Act—Not hit by S. 24, Sea Customs Act (1878), S. 171-A—Scope of: (1965) 67 Bom. L.R. 317: I.L.R. (1965) Bom. 648: A.I.R. 1965 Bom. 195.

Where the confessional statement of a Customs Officer made before three other Customs Officers carrying an endorsement in his own hand-writing of having read and understood its contents was later on retracted by him, *held*, in view of the consistent, cogent and convincing evidence of the three Customs Officers that the smuggled goods were found in the accused's possession, it was highly improbable for them to falsely involve a fellow Customs Officer; they were competent, not interested witnesses; conviction under S. 135(1)(*a*)(*ii*) and 135 (1)(*b*)(*ii*) upheld: (1991) 53 E.L.T. 178 (Bom.).

Where a customs enquiry was held pursuant to a Magistrate's order, *held*, the Customs authorities are not Police Officers; a confession made before them in such enquiries is not hit by S. 24; it is admissible: (1982) 3 S.C.C. 512: 1983 S.C.C. (Cr.) 109.

Where the accused in his statement under S. 108 of the Customs Act, 1962 stated that he was not aware that the packages loaded in the truck contained contraband goods nor were they loaded under his instructions, he merely being an innocent traveller in the truck, *held*, it did not amount to a confession within the meaning of S. 24 and the said statement was clearly admissible under S. 21 as an admission of incriminating facts: A.I.R. 1976 S.C. 1167: (1976) 2 S.C.C. 302: (1976) 3 S.C.R. 672.

Where the retracted confession made to the Customs officials was corroborated by the recoveries of the smuggled goods as proved by the search lists and the witnesses to the same, *held*, such confessional statement could validly be acted upon: A.I.R. 1980 S.C. 1224: (1980) 2 S.C.C. 239: 1980 Cr.L.J. 923.

Enforcement Officer.—Enforcement Officers under the Foreign Exchange Regulation Act, 1947, are not Police Officers and, thus, statements made to them can be acted upon, if it is voluntary: (1986) 99 Mad.L.W. 754 : (1986) 2 M.L.J. 433 (D.B.); A.I.R. 1981 Ker. 81: 1981 Ker.L.T. 833 (D.B.).

Forest Officer.—The statements made to Forest Officers are not hit by S. 25 of the Evidence Act. In the absence of a specific provision in the Madras Act conferring on the Forest Officer all the powers of the Officer-in-charge, of the Police Station he cannot be called a Police Officer.

In assuming the evidentiary value of the statement, it has to be borne in mind that it was recorded by an officer in the course of the investigation of the case, with none of the safeguards attendant on the recording of the judicial confessions and as such the Court should all the more insist on corroboration. In the total absence of acceptable evidence that the offence was committed much less that the accused had anything to do with it, the conviction of the accused based on the retracted confession is unsustainable: 1959 Ker.L.J. 593: I.L.R. (1959) Ker. 660: 1959 Ker.L.R. 599: 1959 M.L.J. (Cr.) 808; 1989 Cr.L.J. 2038 (Ker.).

Grama Rakshi.—A Grama Rakshi is not a Police Officer and, therefore, confession before him does not attract operation of S. 25. [1977 Cr.L.J. (N.O.C.) 132: (1977) 43 Cut.L.T. 512, *held* no longer good law in view of 1991 Cr.L.J. 97 (S.C.)]: 1993 Cr.L.J. 2374 (Ori.) (D.B.). *See contra* (1981) 52 Cut.L.T. 126: 1981 Cr.L.J. 1452 (D.B.); (1978) 46 Cut.L.T. 260; 1992 Cr.L.J. 762 (Ori.) (D.B.).

Village Police Patel.—S. 2(16) read with S. 130 of the Mysore Police Act, 1963 makes it abundantly clear that a Village Police Patel, appointed by the District Magistrate, is a

Police Officer; a confession made to him is hit by S. 25 and is inadmissible: (1972) 1 Mys.L.J. 499: 1972 M.L.J. (Cr.) 374 (D.B.). *See* also (1972) 2 Mys.L.J. 6; 1978 Mah.L.J. 244: 1978 Cr.L.J. 891; (1985) 5 Guj.L.H. 882; 1980 Cr.L.R. 154 (Guj.), cited under S. 25, Note 4, *infra*.

13. Duty of Court.—The Judge should satisfy himself by putting searching questions to such witnesses who had anything to do with the confession. The first question that ought to strike every Judge is "why the accused made the confession"? It is important to ascertain from those in whose custody the accused was, the circumstances in which the question of confession first arose, how the accused expressed his willingness to be placed before the Magistrate and his readiness to make a confession. Similar questions arise as regards retraction. It is only if circumstances make it reasonable to believe that the accused voluntarily made the confession and agreed to make it before the Magistrate that an inquisitive mind can be satisfied: I.L.R. 55 All. 91: A.I.R. 1933 All. 31.

It is for the Judge to decide for himself whether *prima facie* the confession of the accused appears to him to have been induced by threat or promise and for that reason to be inadmissible. It is not the province of jury to decide the question of admissibility of evidence. If the Judge considers the confession admissible, it is his duty to point out to the jury that the fact that he considers the confession admissible does not necessarily mean that it is true and it is for jury to make up their minds whether they should accept the confession, and in doing so they should naturally be guided by their opinion on the question whether the confession was voluntary or not: 142 I.C. 639: A.I.R. 1933 Cal. 187. *See* also I.L.R. (1943) 1 Cal. 487: A.I.R. 1943 Cal. 625.

If the circumstances are such as to raise a strong suspicion in his mind that the confession has been induced by threats or promise of the nature described in that section, then the confession is irrelevant. It is not necessary for the defence to establish conclusively that there was such inducement or threat. It is sufficient if the circumstances afford reasonable grounds for believing that there was such an inducement or threat: (1938-39) 43 Cal.W.N. 893: A.I.R. 1939 Cal. 610.

When the prosecution demands a conviction primarily on the basis of confession recorded under S. 164, Cr.P.Code, the Court must apply a double test:—(*1*) Whether the confession was perfectly voluntary? (2) If so, whether it is true and trustworthy?

Satisfaction of the first test is a *sine qua non* for its admissibility in evidence. If the confession appears to have been caused by any inducement, threat or promise such as is mentioned in S. 24, it must be excluded and rejected *brevi manu*. In such a case, the question of proceeding further to apply the second test, does not arise. If the first test is satisfied, the Court must before acting upon the confession, reach the finding that what is stated therein is true and reliable. For judging the reliability of such a confession, or for that matter of any substantive piece of evidence, there is no rigid canon of universal application. Even so, one broad method which may be useful in most cases for evaluating a confession may be indicated. The Court should carefully examine the confession and compare it with the rest of the evidence, in the light of the surrounding circumstances and probabilities of the case. If on such examination and comparison, the confession appears to be a probable catalogue of events and naturally fits in with the rest of the evidence and the surrounding circumstances, it may be taken to have satisfied the second test: A.I.R. 1978 S.C. 1248; (1978) 46 Cut.L.T. 496; 1982 Cr.L.R. 228 (Raj.).

An unambiguous confession, if admissible in evidence, and free from suspicion suggesting its falsity, is a valuable piece of evidence which possesses a high probative force because it emanates directly from the person committing the offence. But in the process of proof of an alleged confession, the Court has to be satisfied that, it is voluntary, it does not appear to be the result of inducement, threat or promise as contemplated by S. 24, and the surrounding circumstances do not indicate that it is inspired by some improper or collateral consideration suggesting that it may not be true. For this purpose, the Court must scrutinise all the relevant factors, such as, the person to whom the confession is made, the time and place of making it, the circumstances in which it is made and finally the actual words used: A.I.R. 1971 S.C. 1871: 1971 Cr.L.J. 1314: (1971) 1 S.C.R. 215.

Confession under S. 164, Cr.P.Code cannot be acted upon unless it is found to be voluntary and true. To act on extra-judicial

confession or later retracted confession, the Judge would generally look for the corroboration: (1983) 2 Crimes 477 (Guj.).

Where the confession was taken at extraordinary length throughout a considerable number of days and it described in the greatest possible detail a whole series of crimes which had been committed and it further appeared that the confession was probably induced by some threat or promise, *held*, that the confession should not be admitted in evidence till there was a thorough enquiry that it had been made voluntarily: 145 I.C. 863: A.I.R. 1933 Cal. 835 (S.B.).

When once the voluntary character of a confession is challenged by the defence the Judge should make a thorough enquiry to see whether in fact the confession was voluntary: A.I.R. 1933 Cal. 835 (S.B.); A.I.R. 1939 Mad. 737: (1939) 2 M.L.J. 202; 17 Mys.L.J. 238; 1939 All.L.J. 966: 1939 All.W.R. (H.C.) 768.

Even if a confession is admissible in evidence, the Court has still to decide whether or not it is truthful. The Court should also satisfy itself whether or not the accused was a free man when he made the confession. The test is not whether he had formally been arrested; the Police custody in the real sense commences when the accused's movements are restricted or controlled by direct or indirect Police surveillance; and the Court has to take an overall comprehensive view as to the circumstances occurring before and after the confession: 1982 Cr.L.J. 2102 (Ker.) (D.B.).

14. Confession recorded by Magistrate.— While recording the confession, the Magistrate must take due care to ascertain whether the accused was mentally fit to make a voluntary incriminatory statement and understands its implications; he must tell the accused that he is a Magistrate and not a Police Officer; he must ask the accused pointed and searching questions to ascertain as to what impelled the accused to confession; he must further explain to the accused that the latter was not bound under law to make any statement; and the accused must be given sufficient time to reflect and decide whether he should make the confession. The trial Court must satisfy itself on materials on record that the Magistrate had taken all precautions; the warnings set out in S. 164 of the Code of Criminal Procedure in this behalf are illustrative, not exhaustive. [1981 Cr.L.J. 424 (Gau.) (D.B.), Foll.]: 1981 Cr.L.J. 430; 1982 Cr.L.J. (N.O.C.) 39 (Gau.). *See* also 1991 C.Cr.L.R. 43 (Cal.); 1991 C.Cr.L.R. 195 (Cal.).

The legal formalities complied with by the Magistrate are no sure guarantee of the truth of the confession. In assessing the value of a confession, the entire set up of the prosecution case and the surrounding circumstances and most of all the intrinsic value of the confession itself will have to be taken into account: 1961 Ker.L.T. 201.

There is no provision of law which forbids a Magistrate from recording a confession on a Sunday or any other holiday and at a place other than Court-house: A.I.R. 1930 Lah. 171. *See* also 165 I.C. 795: 38 Cr.L.J. 84.

In view of the fact that the confessions are generally not readily made, the Magistrate recording confession is duty bound to ask the accused reasons for making confession: 1983 W.L.N. (U.C.) 459 (Raj.).

Where a Judicial Magistrate was available, *held*, though it was desirable to get the confession recorded by him but that by itself is not sufficient to discard the evidence of Taluka Magistrate who had recorded the confession when same was found to be voluntary and was generally corroborated and did not suffer from any infirmities. [1973 M.L.J. (Cr.) 646 (Karn.), Affirmed]: A.I.R. 1979 S.C. 1924.

Confession recorded by Village Magistrate—Admissibility: A.I.R. 1959 Mad. 175: 1959 Cr.L.J. 603.

Where the learned Magistrate had taken all necessary precautions to ensure that the accused had sufficient time to reflect before he made his confessional statement and that he was under no fear or threat or allurement before appearing in the Court to make the statement and the various questions put by the learned Magistrate to him indicated that he had taken all reasonable precautions to remove any trace of fear from the accused before he made the confessional statement, *held*, such a judicial confession could very well be relied on: (1994) 1 An.L.T. (Cr.) 695 (S.C.); 1982 Cr.L.R. 228 (Raj.).

A voluntary and genuine confession is undoubtedly legal and sufficient proof of guilt. The confessing accused were in Police custody for a very short time before they confessed before the Magistrate. The Magistrate who recorded the confession duly followed the provision of law as enjoined in S. 164 of the Code of Criminal Procedure and gave

him due caution and warning. Further, he gave more than three hours' time for reflection and after reflection the due caution and warning was repeated and he recorded his statement. *Held*, that the accused persons were in custody for a short period and such a stay in the Police custody did not *prima facie* warrant the conclusion that the ingredients as stated in S. 24 of the Evidence Act were not complied with or that any threat, inducement or tutoring was done in the case of these accused persons. Furthermore, the Magistrate whose duty was to record a confession did so in his judicial capacity and he was satisfied as to the voluntary nature of the confession. There was no material on record to show that any threat, coercion or inducement was offered by the Police to the accused persons before they made their confession during their short stay in the Police custody. The Magistrate was also satisfied that three hours' time for deliberation was sufficient for making a voluntary confession in the instant case. The confession as recorded by the Magistrate was voluntary: 1966 Cr.L.J. 323 (2) (Cal.).

If the Magistrate has put to the accused all the necessary questions to satisfy himself that the confession was voluntary and also appended the necessary certificate, *held*, it was not necessary to examine the Magistrate as a witness, in absence of anything justifying his examination: A.I.R. 1981 S.C. 1165: 1981 Cr.L.J. 628: (1981) 2 S.C.C. 224.

Where soon after the occurrence the accused was taken in custody and produced before the Magistrate and was sent to jail for reflection and was again produced before him on the next day and the Magistrate duly recorded his confession which was corroborated in material particulars in regard to the nature and number of injuries by medical evidence, *held*, the fact that accused made a retraction in examination under S. 313, Cr.P.Code and Magistrate who recorded the confession was not examined could not make the confessional version unreliable: 1988 Cr.L.J. 24 (Gau.) (D.B.).

Where an accused, who wanted to make a confessional statement, was produced, the Magistrate did not record the statement on the same day but committed him to judicial lock-up with a direction that he should be produced on the next day. When he was so produced, the Magistrate got the handcuffs removed and sent away the Police from the premises of the Court. Then he explained to the accused that he was not bound to make a confessional statement and if he made one, it might be used as evidence against him. He also assured the accused that after recording of his statement, he would be committed to the judicial lock-up and not to the Police custody. After explaining him these points the Magistrate gave about one and half hours to the accused for reflection whether or not he should make a statement. After that interval the accused again expressed his desire to make the confession and made the statements. He was committed to judicial lock-up after the recording of the confession. A comparison of the confession with the rest of the prosecution evidence and the probabilities of the case also showed that the confession was true.

Held, in the circumstances of the case, that the confession made by the accused was a voluntary and true one and not made on account of Police beating and coercion and hence could be acted upon even if it was subsequently retracted: (1965) 1 Cr.L.J. 35: A.I.R. 1965 Him. Pra. 1.

The accused was kept in remand for about a fortnight after his arrest. Thereafter he was kept in jail custody for three days and then on fourth day he was produced before the Executive Magistrate for recording confession. The Magistrate made the preliminary questioning of the accused, gave him a warning and sent him back to jail. On the next day the accused was produced before the Magistrate and the confession was recorded. During the trial, the accused in answer to question regarding the confession merely said that he did not make the confession. He did not say that it was made on account of any inducement or coercion on the part of Police. On the contention that the confession was not voluntary as the accused was in prolonged Police custody for at least a fortnight before making the confession.

Held, that the confession of the accused was voluntary. It was clear that he had spent four days in judicial custody and he was not under the influence of the investigating agency for at least four days. Again he had 24 hours to think after he was told by the Magistrate that he was not bound to make any confession and if he made one it would be used against him: 1970 Cr. L.J. 373: A.I.R. 1970 S.C. 283.

Where confession was recorded by a competent Magistrate after observing the due formalities and also satisfying himself that it was voluntary and truthful and the accused was produced before him from judicial custody, *held*, the confession is admissible to prove the charge of murder. [1969 Cr.L.J. 671 (S.C.), Rel. on]: 1977 Cut.L.R. (Cr.) 239: 1978 Cr.L.J. 276; 1980 Cr.L.R. 147 (Raj.); A.I.R. 1978 S.C. 1248, affirming 1976 Raj.L.W. 275: 1977 Cr.L.J. 684.

Where the accused was produced from judicial custody before the Magistrate for making confessional statement and the Magistrate recorded the statement after being satisfied that the accused wanted to give the statement voluntarily and in the absence of any pressure on him and further every page of statement contained the signature of the accused, and he was again remanded to judicial custody after statement, *held*, the confessional statement was correctly recorded which could be used against the accused notwithstanding its retraction by the accused in his statement under S. 313, Cr.P.Code which was an after thought: 1992 Cr.L.J. 3251 (Him. Pra.) (D.B.). *See* also 1980 Cr.L.R. 210 (Bom.).

Where judicial confession made by the accused to the Magistrate was recorded in the form of questions and answers and he was virtually cross-examined and whatever he said was in answer to leading questions put by the Magistrate, *held*, such a confession was rightly excluded from consideration: A.I.R. 1981 S.C. 2007: 1981 Cr.L.J. 1688.

Necessity to record confession in manner prescribed: I.L.R. (1959) Ker. 319.

A confession recorded by a Magistrate without conforming to the provisions of S. 164 or S. 364 of the Cr.P.Code is inadmissible in evidence. [A.I.R. 1936 P.C. 253 (2): 71 M.L.J. 476, Rel. on]: (1956) 1 M.L.J. 306: A.I.R. 1956 Mad. 425.

Record of confession—Omission to apprise accused of free atmosphere of Court under S. 164, Cr.P.Code—Effect: A.I.R. 1957 Mys. 50: 1957 Cr.L.J. 521.

Requirements of S. 164(3)—Compliance—Confession—Evidence of—Admissibility: 1967 Cr. L.J. 125: A.I.R. 1967 Tripura 1.

Confessions—Mode of recording and procedure—Confession not recorded in accordance with S. 164—Admissibility—Magistrate failing to state that he was Magistrate and failing to record that he complied with provisions of S. 164(3)—Statements of accused put in question-answer form—Some questions of leading nature—Confession inadmissible as evidence: (1964) 2 Cr.L.J. 105 (Ori).

Magistrate not following precautions before recording confession—Though made independently of Police investigation cannot be taken into consideration: (1965) 1 Cr.L.J. 4: A.I.R. 1965 All. 40.

Confession recorded after charge sheet—Admissibility: A.I.R. 1957 All. 184: 1957 Cr.L.J. 344.

Before a confessional statement made under S. 164, Cr.P.Code can be acted upon, it must be shown to be voluntary and free from Police influence. Thus, where the confessional statement made by the accused under S. 164, Cr.P.Code suffered from serious infirmities, *i.e.*, (*a*) there was no contemporaneous record to show that the accused was actually kept in jail as ordered by Judicial Magistrate; (*b*) the Judicial Magistrate who recorded the confessional statement did not question him as to why he was making the confession and (*c*) there was also nothing in the statement of the said Magistrate to show that he told the accused that he would not be remanded to the Police lock up even if he did not confess his guilt, *held*, the confessional statement of the accused could not be taken into account: A.I.R. 1978 S.C. 1544.

Accused produced before Magistrate from Police custody—Accused in handcuffs during recording of their confessions—Only 15 to 20 minutes given to accused to compose themselves—Magistrate making no record of time given—No question put to accused as to why they were making confessions—Magistrate explaining to accused difference between Magistrate and Police Officer but not expecting them to understand difference—Confessions *held* came within mischief of S. 24: 1953 Cr.L.J. 708: A.I.R. 1953 Bilaspur 3.

Where an accused, charged with murder and subjected to Police torture, was produced before the Magistrate 10 days after his arrest without any explanation for the delay, his confession was recorded two days thereafter without the Magistrate complying with the necessary formalities and safeguards and the accused, though remanded to judicial custody, was presented to the Magistrate by the Police, *held*, the confession, being involuntary

and obtained under Police pressure, was hit by S. 24; and was thus inadmissible: 1976 Cr.L.J. 96: 1975 J.&K.L.R. 323 (D.B.).

Where the Magistrate had no idea about the mode of, and precautions to be taken for recording the confession and nothing on record showed whether or not any Police Officer was then present inside the Court room, *held*, no reliance could be placed on such confession; it had to be discarded: 1981 All.W.C. 687: 1981 All.Cr.R. 353: 1981 All.L.J. 1153. *See* also 1981 Cr.L.J. 424 (Gau.) (D.B.); 1992 C.Cr.L.R. 366 (Cal.).

If an economically poor and socially backward accused is not fully explained and made to understand full implications of making the confession, the same should not be accepted. [1981 Cr.L.J. 424 (Gau.) (D.B.), Foll.]: 1981 Cr.L.J. 430.

Where in a murder case the accused made a confessional statement but without the Magistrate assuring him that he would not be sent back to Police custody even if he declined to confess, *held*, such a lapse by itself would not vitiate the confessional statement; it would still be admissible: 1982 Cr.L.J. 2158: 54 Cut.L.T. 195.

Where an accused, a step-mother, in a case under S. 307 of the Indian Penal Code had, in reply to the Magistrate's questions, stated that he had not been tutored, she did not mention any threat or torture or inducement by Police and she was never sent to Police custody, and she made a detailed catalogue of events, *held*, her confession was free and voluntary even if the Magistrate had neither asked her the reason for making the confession nor assured her that she would not be sent to Police custody even if she declined to confess; her confession was prompted by repentance: 1989 Cr.L.J. (N.O.C.) 4 (Cal.) (D.B.).

Accused, in Police custody, making two applications expressing desire to make a confession—Though the Magistrate warned him that he was not bound to make any statement and that the statement made could be used against him as evidence, he proceeded to record the confession without giving any time to accused to reflect upon his warning—Doors of the Court-room, where the confession was being recorded, were not closed—Police Officers were present outside the Court and the possibility of their over-hearing the confession, or at any rate of the accused believing that they could over-hear it, could not be ruled out—*Held*, no reliance could be placed upon the confession because these circumstances clearly detract from the confession being voluntary and genuine: 1990 Cr.L.J. 385 (P.&H.) (D.B.).

Where an accused in Police custody was neither sent to judicial custody nor given sufficient time to be free from Police influence before recording his confession, *held*, his confession could not be voluntary; it was not admissible in evidence: 1972 Cr.L.J. 362.

Judicial confession obtained after a long 14 days Police custody, *held*, cannot be said to be voluntary: 1993 Cr.L.J. 1679 (Mad.) (D.B.). *See* also 1981 Cr.L.R. (Raj.) 462; 1982 Cr.L.R. (Raj.) 489.

15. Time for reflection.—A statement made by the accused under S. 24 of the Indian Evidence Act must be voluntary and true to be entitled to any consideration. The voluntary nature of the statement can only be gathered from the circumstances of the case. When an accused makes statement immediately on being produced from Police custody, that statement is not likely to be voluntary notwithstanding any assertion to the contrary made by the accused. It has, therefore, been laid down in the Criminal Rules of Practice that sufficient time should be given to the accused for deliberation. What amounts to sufficient time in a particular case has to be adjudged from the circumstances of the proceedings. Though sufficient time is given to accused for deliberation, if it appears from the answers given by the accused on the date his statement was recorded that he had not completely got over the warning and the inducement offered by the Police, then notwithstanding the endorsement of the recording Magistrate that the statement made by the accused was voluntary, the Court will not be inclined to accept it as such: 1968 Cr.L.J. 1345: (1968) 2 An. W.R. 86: 1968 M.L.J. (Cr.) 453.

Recording of confession—Sufficient time to be given to accused for reflection before making confession: (1965) 1 Cr.L.J. 393 (Punj.).

No invariable rule as to the time to be given for reflection can be laid down. The length of time to be given for reflection varies with the circumstances of each case. Where the Sub-Divisional Magistrate was satisfied that the accused was completely out of Police

pressure or influence and immediately preceding the recording of the confession he was in judicial custody for two days and during this period he was kept cut off all access to the Police investigating the case to ensure that any fear or influence of the Police was dispelled from his mind and the Sub-Divisional Magistrate after asking preliminary questions at 10.40 A.M. gave him time for reflection upto 11.30 A.M. during which period he remained in the Court under supervision of the Court peon and no Police Officer was allowed any access to him, *held*, his confession was voluntary: 1979 Cr.L.R. 286: 1979 Raj.L.W. 401: 1979 W.L.N. 247.

Time for reflection—No hard and fast rule can be laid down regarding the time to be given to the accused for reflection—One hour's time held sufficient: (1964) 2 Cr.L.J. 487 (Ori.).

The confessional statements cannot be rejected merely because only three hour's time had been given for reflection if they are otherwise acceptable, even though the Judicial Magistrate would have been well advised if he had given more time for reflection to the accused. [1983 Cr.L.J. (N.O.C.) 146 (Gau.), Affirmed]: A.I.R. 1985 S.C. 823. Where the interval between the preliminary examination of the accused and the recording of his confessional statement was about 15 minutes though, he had been in judicial custody for 38 hours, *held*, confessional statement made by him could be relied on. [1977 Cr.L.J. 684 (Raj.), Affirmed]: A.I.R. 1978 S.C. 1248.

Recording of confessional statement just on the next day of incident, *held*, is a sheer mistake: 1980 Cr.L.R. 147 (Raj.).

16. Retracted confession—Evidentiary value of.—In law it is always open to the Court to convict an accused on his confession itself though he has retracted it at a later stage. Nevertheless usually Courts require some corroboration to the confessional statement before convicting an accused person on such a statement. What amount of corroboration would be necessary in such a case would always be a question of fact to be determined in the light of the circumstances of each case: A.I.R. 1957 S.C. 637: 1957 M.L.J. (Cr.) 672.

Regarding the impact of the retracted confession against the author of the maker it is now well settled that the Court at the threshold must be satisfied that the same is voluntary in character and truthful in its contents and it is thereafter that inspite of the existence of these features as a matter of prudence the Court would normally insist on corroboration though such degree may vary in the context of the quantum of corroboration: (1988) 2 Bom.C.R. 42.

A confession which is properly and legally recorded does not lose its worth merely because the accused retracted from it as wisdom dawned on him later. Where confession made by accused person was properly recorded by the Magistrate and there was no evidence to hold that the accused made the confession as a result of threat or intimidation or under the influence of Police but later on he retracted from it, *held*, said confession could be accepted against the accused especially when there was corroboration: 1994 Cr.L.J. 555 (Ker.) (D.B.).

If the Court, after scrutiny finds that confession is on the basis of his voluntary and free will and is not suffering from the vice of temptation, coercion, duress, false promise, etc., then the Court can rely upon the same even if retracted and the same can form the basis for conviction: (1991-2) 39 B.L.J.R. 953(D.B.); (1992) 3 S.C.C. 178.

A retracted confession may form the legal basis of a conviction if the Court is satisfied that it is true and was voluntarily made. The Court may in a particular case, be convinced of the absolute truth of the confession and act upon it without corroboration: 1974 Cr.L.J. 1123 (D.B.); A.I.R. 1988 S.C. 1883; 1985 Cr.L.J. 1416 (Raj.); 1985 Guj.L.H. 559; 1981 Cr.L.J. 1452: (1981) 52 Cut.L.T. 126; I.L.R. (1976) 26 Raj. 453: 1976 Raj.L.W. 150: 1976 W.L.N. 118; I.L.R. (1973) 23 Raj. 919: 1973 Raj.L.W. 535: 1973 W.L.N. 463; I.L.R. (1979) 29 Raj. 870: 1979 Raj.L.W. 314: 1979 W.L.N. 324; 1989 Cr.L.J. 2058 (Gau.) (D.B.) [A person can be convicted solely upon his own confession even if retracted if the Court believes it to be true].

There is nothing to prevent the Court from convicting an accused on his confession, though it has been resiled from at the trial, provided the confession is held to be voluntary and believed to be true, but, as a general rule of prudence, the prosecution is required to adduce some independent evidence in corroboration of the confession. The nature and the amount of corroboration, however, depends on the circumstances of each case and no hard and fast rule can be laid down in this

behalf. It is not essential that each and every circumstance mentioned in the confession must be substantiated by independent evidence because in that case conviction can be based on the corroborative evidence itself without having recourse to the confessional statement. If there is some evidence coming from independent source which lends assurance to what is contained in the confessional statement, it will serve the purpose of corroboration: 1979 Raj.L.W. 401: 1979 W.L.N. 247 (D.B.); A.I.R. 1973 S.C. 264: 1973 Cr.L.J. 280: (1973) 4 S.C.C. 17; (1980) 2 M.P.W.N. 93; (1981) 52 Cut.L.T. 276: 1981 Cr.L.J. 1461; 1982 Cr.L.J. 2040 (Del.); 1982 Cr.L.J. 2158 (Ori.); (1985) 59 Cut.L.T. 391; A.I.R. 1994 S.C. 1594.

No hard and fast rule can be laid down regarding the necessity of corroboration in the case of a retracted confession in order to base a conviction thereon. But apart from the general rule of prudence where the circumstances of a particular case cast a suspicion on the genuineness of the confession it would be sufficient to require corroboration of the retracted confession. A confession should not be accepted merely because it contains a wealth of detail which could not have been invented. Unless the main features of the story are shown to be true, it is unsafe to regard mere wealth of uncorroborated detail as a safeguard of truth: A.I.R. 1954 S.C. 4.

Retracted confession—Evidentiary value: (1963) 2 Cr.L.J. 562 (Manipur); (1967) 2 An.W.R. 340.

Law does not prohibit basing conviction on a retracted confession though prudence requires some general corroboration in material particulars; if contradicted by prosecution witnesses, it would not be safe to act upon confession: 1977 Cr.L.J. 1309 (D.B.).

A retracted confession can be used only when conviction can safely be based on the other evidence available: (1992-1) 33 Guj.L.R. 554.

Doubtless, any extra-judicial confession is generally considered as a very weak piece of evidence but where an accused adheres at the trial to a previous extra-judicial confession, it may, if the Court so chooses, be acted upon without corroboration. When a retracted confession is given in evidence, the Court has first to see if it is admissible. From the point of view of admissibility alone the mere fact that the confession is retracted is immaterial, unless it is shown that it is improperly induced. When a confession is held to be admissible, then only comes the question what weight should be given to it. As a matter of prudence and caution which has sanctified itself into a rule of law, a retracted confession cannot be made the sole basis of conviction. If, however, the making of the confession is proved beyond question, it should be a strong piece of evidence because no man would make a confession against himself if in fact the confession was not true. When a confession, therefore, is found to be voluntary and true, there is no reason why it cannot even afford the sole basis of conviction: (1973) 39 Cut.L.T. 1211 (D.B.).

The fact of retraction by itself casts a doubt on the truth of the confession. Hence, an additional rule of caution has been laid down for basing convictions on retracted confessions, *viz.*, that the confession must be corroborated. The nature and extent of corroboration necessary must naturally depend on the object with which it is required. The object may be to dispel any doubt raised by the retraction that the confession may be untrue and the maker may have falsely implicated himself; it may be to rebut the presumption applicable to an accomplice that he is likely to falsely implicate other persons. The point of contrast between 'general corroboration' and 'corroboration in material particulars' seems to be that the latter expression requires independent evidence which in some way reasonably connects or attempts to connect the accused with the crime: 1958 An.L.T. 1125: A.I.R. 1959 Andh. Pra. 419.

Confession recorded since retracted—Corroboration: 1960 Cr.L.J. 1108: A.I.R. 1960 Mys. 199: 1960 M.L.J. (Cr.) 565.

Confession though retracted could be relied upon: (1969) 71 Punj.L.R. (Del.) 198.

Where the confession was a retracted one it could be acted upon only if substantially corroborated by independent circumstances; however, it is not necessary that a retracted confession should be corroborated in each material particular, but it is sufficient that there is a general corroboration of the important incidents mentioned in the confession: A.I.R. 1978 S.C. 1770. *See* also 1982 Cr.L.R. 52 (Raj.).

A retracted confession need not be totally rejected; it has to be considered in the context

of various factors, such as whether it was untrue or there was independent corroboration for its general particulars, etc.: 1989 Cr.L.J. 2138 (Mad.) (D.B.).

Retracted confession—Value of—Corroboration—Necessity: (1960) 62 Punj.L.R. 781.

Where the confessions, judicial and extra-judicial, were voluntary but they were retracted by the prisoner, it is necessary to look for an independent corroborative evidence. The weight to be attached to such confessions depends upon the circumstances under which they were made and later retracted including the reasons given by the prisoner for retracting them. Without sufficient and substantial corroboration in material particulars it is not safe to convict the accused on retracted confession alone: I.L.R. (1954) Patiala 316: A.I.R. 1955 Pepsu 33.

Even if a confession is inculpatory, corroboration is necessary if the confession is retracted: A.I.R. 1956 S.C. 9: 1956 Cr.L.J. 126. Where the confession has been retracted, material corroboration must be forthcoming before it can be acted upon: 1958 B.L.J.R. 6: A.I.R. 1958 Pat. 166; 1957 M.L.J. (Cr.) 368: (1957) 2 An. W.R. 63; A.I.R. 1959 Him.Pra. 3.

A retracted confession uncorroborated in material points by other reliable evidence, is of no value. Conviction on it would be bad: 58 I.C. 49: 5 P.L.J. 430. *See* also 30 I.C. 436; 16 Cr.L.J. 612; 75 I.C. 152: 24 Cr.L.J. 304; A.I.R. 1929 Lah. 597 (whether against himself or co-accused); A.I.R. 1933 Sind 313: 146 I.C. 180; 11 O.W.N. 851: A.I.R. 1934 Oudh 405; I.L.R. 63 Cal. 1053: 63 Cal.L.J. 232: A.I.R. 1936 Cal. 316; A.I.R. 1937 Lah. 208; 163 I.C. 319: A.I.R. 1936 Nag. 88.

A retracted confession by an accused may form the basis of a conviction of that accused if it receives some general corroboration from other independent sources: A.I.R. 1985 S.C. 866: 1985 Cr.L.J. 1173: (1985) 2 S.C.C. 341; (1985) 59 Cut.L.T. 391; 1981 Cr.L.J. 430.

Conviction on a retracted confession if it was voluntarily made, is not legally barred. But the rule of prudence and practice requires that to base a conviction thereon, a retracted confession should be corroborated in material particulars, by independent evidence. It is not enough to have general corroboration: 1967 Cr.L.J. 62: A.I.R. 1967 Him. Pra. 10.

It is unsafe for a Court to rely and act in a confession which has been retracted unless, after a consideration of the whole of the evidence in the case, the Court is in a position to come to the unhesitating conclusion that the confession is true: (1921-22) 26 Cal.W.N. 1010: 71 I.C. 497; A.I.R. 1928 Lah. 329 (2); A.I.R. 1930 Cal. 141; A.I.R. 1930 All. 29. *See* also A.I.R. 1938 Lah. 731; I.L.R. (1939) 1 Cal. 1: A.I.R. 1939 Cal. 65.

Though a conviction based on a retracted confession is not strictly illegal, still it is a rule of prudence to base a conviction only if the same has been corroborated in essential particulars by other independent evidence. It is not necessary that the entire details of the confession should be corroborated. If the confession is proved to be true by a reference and recourse to other facts and circumstances, then the confession can be accepted: 1954 Cr.L.J. 1545: A.I.R. 1954 Mad. 1006.

It is very unsafe to convict an accused person upon a retracted confession unless the confession is confirmed by other evidence: 36 I.C. 133: 17 Cr.L.J. 453. *See* also 151 I.C. 716: A.I.R. 1934 Lah. 715; 196 I.C. 597; 23 Pat.L.T. 387: A.I.R. 1942 Pat. 90; A.I.R. 1941 Nag. 86.

A Court should not convict a person upon a statement made by him owing to a promise of pardon but subsequently retracted in the absence of corroboration in material particulars unless the peculiar circumstances of making the confession or the reasons of retraction show the genuineness of the confession in spite of its revocation: 31 I.C. 831: 16 Cr.L.J. 815; (1942) 44 Punj.L.R. 448: A.I.R. 1942 Lah. 271; A.I.R. 1944 Mad. 117: (1943) 2 M.L.J. 634 (F.B.). *See* also (1945) 47 Bom.L.R. 648: A.I.R. 1945 Bom. 484; A.I.R. 1955 Manipur 1: 1955 Cr.L.J. 139.

It is, however, not safe in general to convict on an uncorroborated confession from point of view of common experience and prudence, and when it is a question of a confession against a co-accused, the corroboration must not only confirm the general story of the crime but must clearly connect the co-accused with it: 30 P.R. 1914 (Cr.): 15 Cr.L.J. 626: 25 I.C. 634. *See* also 30 I.C. 436: 16 Cr.L.J. 612; I.L.R. 8 Pat. 289: A.I.R. 1929 Pat. 275; A.I.R. 1942 Lah. 271; (1945) 47 Bom.L.R. 648: A.I.R. 1945 Bom. 484.

There is no rule of law requiring a retracted confession to be supported by

corroborative evidence in material particulars. The use to be made of such a confession is more a matter of prudence than of law: 46 I.C. 1005: 19 Cr.L.J. 861 (N.): A.I.R. 1954 Sau. 155. *See* also (1920-21) 25 Cal.W.N. 1010: A.I.R. 1923 Cal. 217; 152 I.C. 1032: A.I.R. 1934 Sind 172; 151 I.C. 924: A.I.R. 1934 Lah. 89; 57 Cal.L.J. 213: A.I.R. 1933 Cal. 747 (F.B.).

Although a retracted confession if believed to be true and voluntarily made, may form the basis of conviction, the rule of practice and prudence requires that it should be corroborated by independent evidence, which however does not mean that each and every circumstance mentioned in the confession with regard to participation of the accused in the crime must be separately and independently corroborated. But it is necessary that there should be some independent evidence which would lend assurance to the truth of the confession that the accused is connected with the crime: 1969 Cr.L.J. 1174 (Ori.).

It is well established that there is no legal bar to base a conviction on a retracted confession if the same is voluntary and true. There is, however, a rule of prudence to look for corroboration of the same in order to assure the mind of the Court that it is safe to convict the accused on his retracted confession. The test for the evidence of an accomplice may not be appropriate for dealing with confession which is retracted. The standards of corroboration in the two are quite different. In the case of the person confessing who has resiled from his statement, general corroboration is sufficient, while an accomplice's evidence should be corroborated in material particulars: 1970 Cr.L.J. 781 (Assam).

The rule of prudence usually observed with reference to retracted confessions does not require that each and every circumstance mentioned in the confession with regard to the participation of the accused person in the crime must be separately and independently corroborated. In the case of the person confessing who has resiled from his statement, general corroboration is sufficient. In addition the Court must feel that the reasons given for the retraction in the case of a confession are untrue: 1958 Ker.L.J. 935: A.I.R. 1959 Ker. 46.

Although the Court comes to the conclusion that the confessions are voluntary although they have been retracted, nevertheless the Court should see as a rule of prudence whether the confessions have been corroborated in some particulars by other independent evidence: 6 Sau.L.R. 473: A.I.R. 1954 Sau. 129; A.I.R. 1954 J.&K. 1.

Every retracted confession, judicial or extra-judicial, must be subjected to two tests; (*i*) is it voluntary? and (*ii*) is it truthful? But an extra-judicial confession has to be subjected to a third, the most important test as well: was it indeed made? In fact, it must be the first test before the other two tests are applied because there can be no retraction unless there is a confession in the first instance. An extra-judicial confession is too easy to fabricate; many of the accused's victims and their associates would be too willing to satisfy their grudge. Thus, where a retracted extra-judicial confession is the sheet anchor or chief support of the prosecution, the Court must scrutinise the evidence with utmost care and look for the most reliable and unimpeachable proof of the confession having indeed be made. It is only after being so satisfied that the Court should proceed with the other two tests: (1980) 1 An.W.R. 450 (D.B.).

A retracted confession is admissible in evidence but it should have no weight unless either corroborated in material particulars or unless the tribunal comes to the conclusion that the statement as a whole is a truthful statement. In either of these cases, the retracted statement may be given full weight: I.L.R. 8 Pat. 262: A.I.R. 1929 Pat. 212; 1929 Mad.W.N. 791; (1932) 34 Punj.L.R. 703: A.I.R. 1933 Lah. 388; I.L.R. 11 Luck. 662: A.I.R. 1936 Oudh 156.

Accused fully alive to consequences—Concession unexplained—Conviction on basis of retracted confession is legal: A.I.R. 1929 Oudh 381. A retracted extra-judicial confession can in law be a sufficient basis to support a conviction: A.I.R. 1929 Sind 253. There is nothing in law to prevent a Court from convicting a person upon a confession which has been subsequently retracted provided that the Court is convinced that the statement is voluntary and true: A.I.R. 1930 All. 29. *See* also A.I.R. 1930 Cal. 141; 12 Mys.L.J. 353; 11 Mys.L.J. 407; 35 Cr.L.J. 1180: A.I.R. 1935 Lah. 280.

Court is at liberty to base a conviction on the retracted confession of the accused if it thinks that it has a ring of truth about it. But it

should be very slow to base a conviction upon such a confession which is not corroborated by any other satisfactory evidence, which does not impress the Court and which does not explain any strong motive or the crime: A.I.R. 1934 Oudh 388.

Where the confession is voluntary and not made under pressure, then there cannot be any doubt as to his guilt and conviction may be maintained even though it was subsequently retracted by him: 119 I.C. 420: A.I.R. 1930 Lah. 88; A.I.R. 1930 Oudh 353. Though under S. 133 of the Act a conviction is not illegal merely because it proceeds on the uncorroborated testimony of witnesses, *Illus.* (*b*) to S. 114 lays down that a Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. It is absolutely necessary that what he has deposed must be corroborated in material particulars. In contrasting this with the statement of a person making a confession who stands on a better footing, one need only find out when there is a retraction whether the earlier statement, which was the result of remorse, repentance and contrition, was voluntary and true or not and it is with that object that corroboration is sought for. The standards of corroboration in the two are quite different. In the case of the person confessing who has resiled from his statement, general corroboration is sufficient while an accomplice's evidence should be corroborated in material particulars. In addition, the Court must feel that the reasons given for the retraction in the case of a confession are untrue: 1958 Cr.L.J. 238: A.I.R. 1958 S.C. 66.

Where a confession is retracted subsequently, the proper approach is to consider each confession as a whole on its merits and use it against the maker thereof, provided the Court is in a position to come to an unhesitating conclusion that the confession was voluntary and true; and though a retracted confession, if believed to be true and voluntarily made, may form the basis of a conviction, the rule of practice and prudence requires that it should be corroborated by independent evidence. The evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. Thus, a retracted confession cannot be used against a co-accused without substantial and independent corroboration both as to the crime and the criminal.

Held, on facts and circumstances of the case, that the confession of three out of four accused persons was generally corroborated by strong circumstantial evidence. Their conviction on charge of murder must be upheld: (1965) 1 Cr.L.J. 458: A.I.R. 1965 Ori. 66.

An extra-judicial confession, even though subsequently retracted, may well form the basis of conviction of the maker, if it is found to be voluntary and true, even though it is not corroborated by any other evidence. But the rule of practice and prudence requires that such a confession should be corroborated by independent evidence: (1963) 2 Cr.L.J. 579 (Pat.).

There is no rule of law to prohibit reliance being placed on an uncorroborated confession to convict a person confessing. But it is only as a rule of prudence or practice that it is recommended that no conviction may be based only on the confession without any corroboration from other evidence on record. Where the conscience of the Court is convinced as regards the absolute truth or the voluntary nature of a confession it may be prepared to act upon it without corroboration. Thus, as a matter of law there is no prohibition, it is left to the conscience of the Court as to the nature of the corroboration it will require if at all to rely upon a confession and convict the accused. There is no measure as such that can be laid down to the extent of corroboration which a Court would expect before it acts on the confession and convict the accused. It will all depend upon the facts of each case and the facts and circumstances under which such a confession is retracted:

I.L.R. (1964) Guj. 804: (1964) 5 Guj.L.R. 897: (1965) 2 Cr.L.J. 753: A.I.R. 1965 Guj. 302.

A retracted confession may form the legal basis of a conviction if the Court is satisfied that it was true and was voluntarily made. But it has been held that a Court shall not base a conviction on such a confession without corroboration. It is not a rule of law, but is only a rule of prudence. It cannot even be laid down as an inflexible rule of practice or prudence that under no circumstances such a conviction can be made without corroboration, for a Court may, in a particular case, be convinced of the absolute truth of a confession and prepared to act upon it without corroboration; but it may be laid down as a general rule of practice that it is unsafe to rely upon a confession much less on a retracted confession, unless the Court is satisfied that the retracted confession is true and voluntarily made and has been corroborated in material particulars. Where the High Court having regard to these principles looked for corroboration of the retracted confession and found the same, the finding is one of fact: (1963) 1 S.C.R. (Supp.) 689: (1963) 2 Cr.L.J. 178: A.I.R. 1963 S.C. 1094.

There is no absolute rule that a retracted confession cannot be acted upon unless the same is corroborated. But as a matter of prudence and caution it has now been crystallised into a rule of law that a retracted confession cannot be made solely the basis of a conviction unless the same is corroborated. It does not, however, necessarily mean that each and every circumstance mentioned in the confession regarding the complicity of the accused must be separately and independently corroborated. Nor it is essential that corroboration must come from facts or circumstances discovered after the confession was made. It is sufficient that the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession. The corroboration in the case of an accomplice or approver must be in material particulars. But in the case of retracted confession of an accused it is only necessary to find out whether the retraction of the early statement which was the result of remorse, repentance and contrition was voluntary and true and it is with that object alone that corroboration is sought for. The standards of corroboration in the two are quite different. The Court must also feel that the reasons given for the retraction in the case of a confession are untrue: I.L.R. (1962) Cut. 516: (1963) 2 Cr.L.J. 229.

A confession of a crime by a person who is charged is usually the outcome of penitence and remorse and in normal circumstances is the best evidence against the maker. Where the confession has been retracted, though a conviction based on a retracted confession is not strictly illegal still it is a rule of prudence to base conviction only if the confessional statement is corroborated by other evidence. Regarding the nature of the corroboration that is required, the rule of prudence does not require that each and every circumstance mentioned in the confession with regard to the participation of the accused person in the crime must be separately and independently corroborated, nor is it essential that the corroboration must come from facts and circumstances discovered after the confession was made.

It would be sufficient that the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession: I.L.R. (1963) 2 Ker. 26: (1963) 2 Cr.L.J. 458.

A retracted confession cannot be relied on unless it is corroborated. The standard of corroboration required in the case of a retracted confession is not so high as that required in the case of the testimony of an accomplice: (1974) 2 M.L.J. 460: 1974 Cr.L.J. 857.

An extra-judicial confession, which has been retracted, cannot, in the absence of any independent evidence, either direct or circumstantial, corroborating the same, be said to be true or reliable. Even if voluntary, such a confession cannot be acted upon as it is not found to be true: (1974) 40 Cut.L.T. 1177 (D.B.).

In view of the fact that the extra-judicial confession has also been retracted, and that apart from there being no corroborative evidence of such confession, there are circumstances militating against its truth, it is difficult to place any reliance on such extra-judicial confession: (1971) 37 Cut.L.T. 477: (1971) 1 Cut.W.R. 960 (D.B.).

Retracted extra-judicial confession—It is of very little value—Independent corroboration is necessary: 1958 M.P.C. 604: 1958 Cr. L.J. 1402: A.I.R. 1958 Madh. Pra. 380.

Absence of any corroborative evidence—Conviction solely based on retracted confession is illegal: (1968-69) 73 Cal.W.N. 467: 1970 Cr.L.J. 403.

Even if statement is true and voluntary, it cannot be acted upon without corroboration: 1969 Mad.L.W. (Cr.) 68.

Retracted confession—No conviction to follow on such confession unless corroborated in material particulars by independent evidence: 1966 Cr.L.J. 323 (2) (Cal.).

Courts ordinarily consider it unsafe to convict any accused person on the basis of his retracted confession except where the truth of such confession is established by corroboration in material particulars by independent evidence. What is sufficient corroboration for this purpose has to be decided in each case on its own facts and circumstances. It may, however, be generally stated that where the prosecution by the production of reliable evidence which is independent of the confession and which is also not tainted evidence. The evidence of an accomplice or the evidence of a co-accused, establishes the truth of certain parts of the account given in the confession and these parts are so integrally connected with other parts of the accused's confession, that a prudent Judge of facts would think it reasonable to believe, in view of the established truth of these parts, that what the accused has stated in the confession as regards his own participation in the crime is also true, that is sufficient corroboration: (1963) 2 S.C.R. 890: 1963 M.L.J. (Cr.) 509.

A confession, though retracted at a later stage, can certainly, as a matter of statutory law, be accepted by a Court for sustaining the conviction of the confessor because there is no legal bar, but usually the Courts, by way of prudence and practice, require some independent corroboration of the confessional statement in material particulars before convicting the confessing accused thereon. The amount of corroboration necessary as a safeguard of truth and, therefore, for sustaining the conviction is always a question of fact to be determined in the light of the circumstances of each case.

The object of making a provision like S. 164 in the Code is to obtain an assurance of the fact that the confession is not caused by any inducement, threat or promise, as is referred to in S. 24 of the Evidence Act. The recording of confession is, thus, a very solemn act and the Magistrate performing his duty, has to take particular care to see that the confessional statement made is in fact and in substance voluntary. These questions must not become a matter of mere mechanical enquiry.

In case where the Magistrate who had recorded the confession had not applied his mind to the fact that the accused was in Police custody for nearly seven days and the questions and answers recorded also did not reflect any anxiety on his part to satisfy himself that the accused was voluntarily making a confession as a free agent, *held*, that it was not safe to convict him on the strength of the retracted confession. The accused had completely denied everything including that he knew the victim: (1969) 71 Punj.L.R. (Del.) 198.

Where the medical evidence corroborated the version given in confessional statement, *held*, such a statement, even if retracted, could certainly be relied on: 1994 Cr.L.J. (N.O.C.) 320 (Andh. Pra.).

17. Retracted confession—Standard of corroboration required.—Corroboration of a retracted confession need not be in material particulars, it would be sufficient if the general trend of the confession is established by some evidence which would tally with the contents of the confession. Each and every circumstance mentioned in the confession regarding the complicity of the accused is not to be separately and independently corroborated. For, in that case the conviction can be based on the independent evidence itself and not on the retracted confession. The corroboration may be obtained also from the facts and circumstances discovered before the confession is made: (1965) 2 Cr.L.J. 520: A.I.R. 1965 Ori. 175.

The rule of prudence usually observed with reference to retracted confessions does not require that each and every circumstance mentioned in the confession with regard to the participation of the accused person in the crime must be separately and independently corroborated. In the case of the person confessing who has resiled from his statement, general corroboration is sufficient. In addition the Court must feel that the reasons given for the retraction in the case of a

confession are untrue: 1958 Ker.L.J. 935: A.I.R. 1959 Ker. 46; (1965) 1 Cr.L.J. 393 (Punj.).

The amount of corroboration depends on the circumstances of each case: 145 I.C. 133: (1933) 35 Bom.L.R. 371: A.I.R. 1933 Bom. 230.

A retracted confession requires to be corroborated. The corroboration required is not only of material particulars but must be useful in connecting the accused with the crime. It is not the law that the confession should be corroborated in every respect. Otherwise the confession becomes superfluous. Nor it is necessary that the corroborating facts or circumstances should have been ascertained subsequent to the confession: (1970) 1 Mys.L.J. 149.

The standard of corroboration required for a retracted confession is somewhat different from the standard of corroboration required for the evidence of an accomplice. Where the existence of the dispute over the lands between the accused and the deceased as stated in the confession was well proved by the evidence of several prosecution witnesses, the subsequent conduct of the accused in going to the Police Outpost of his own accord with blood-stained clothes, must, in the circumstances, be held to amount to corroboration of the confession especially when the accused has given no explanation for his conduct apart from denying the incident altogether: (1963) 5 Ori.J.D. 145: (1964) 1 Cr.L.J. 464.

A Court is entitled to act upon a retracted confession as against the maker and his co-accused only if it is satisfied that it is voluntary and true and provided it is sufficiently corroborated by other evidence in the case. In the case of confession which is true and voluntary but which is retracted all that a Court need to look for is 'general corroboration' and not 'corroboration in material particulars'. It would be sufficient that the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession: (1961) 2 Cr.L.J. 229 (J.&K.).

Corroboration—Necessity—Unlike in case of accomplice where corroboration in material particulars is essential, general corroboration of retracted confession of accused is sufficient: (1969) 35 Cut.L.T. 201.

The corroboration ought to be of the kind that not only confirms the general story of the crime, but also unmistakably connects the co-accused with the crime: 19 Cr.L.J. 275: 44 I.C. 179.

Exent of corroboration required—Variation between confessional statement and evidence in case—Variation held not material: A.I.R. 1970 Ori. 54.

Retracted extra-judicial confession to form the basis for conviction should be corroborated both with regard to the story of the offence but also the complicity of the accused: 32 Cut.L.T. 1011: A.I.R. 1967 Ori. 24.

Retracted extra-judicial confession—Corroboration can be by the statements of the accused before the committing Court—Such statements are evidence under S. 287 of the Code: 32 Cut.L.T. 1011: A.I.R. 1967 Ori. 24.

Retracted confession—Conviction of—Corroboration in material particulars—Necessity—Extra-judicial confession made immediately after occurrence and subsequent conduct of accused—If sufficient corroboration: (1965) 2 Cr.L.J. 614: A.I.R. 1965 Assam 89.

Corroboration—Retracted confession can under certain circumstances be corroborated by evidence admitted under S. 288, Cr. P. Code: 1969 Cr.L.J. 1082 (Mad.).

The production of property, the subject of the offence, or some other article connected with the commission of the offence, will be sufficient corroboration: A.I.R. 1959 Mad. 175.

Accused making voluntary statement by retracting it—Confession corroborated by independent evidence—Confessional statement can form the basis of conviction: (1965) 1 Cr.L.J. 35: A.I.R. 1965 Him. Pra. 1.

18. Retracted confession—Use of against co-accused.—A retracted confession by an accused may form the basis of a conviction of that accused if it receives some general corroboration from other independent sources. It cannot, however, be the basis for convicting co-accused though it may be taken into consideration against co-accused also. It is entirely wrong to think that a confession can lead nowhere: A.I.R. 1985 S.C. 866: 1985 Cr.L.J. 1173: (1985) 2 S.C.C. 341.

Retracted confession—Use of against co-accused—Corroboration—Nature and extent of: 1963 Ker.L.T. 969.

A retracted confession of a co-accused can be taken into consideration against a non-confessing accused under S. 30 of the Evidence Act. It is true that, the confession of an accused person is not an evidence in the ordinary sense of the term as defined in S. 3 of the Evidence Act. It cannot be made the foundation of the conviction but can only be used in support of other evidence. The proper way is first to marshal the evidence against the accused excluding the confession altogether from consideration and then to see whether, if it is believed, a conviction can be safely based on it. If it is acceptable of belief independently of the confession, then, of course, it is not necessary to call the confession in aid—But cases may arise where a Judge is not prepared to act on other evidence as it stands even though, if believed it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to other evidence and thus fortify himself in believing that without the aid of the confession he would not be prepared to accept: I.L.R. (1962) Cut. 516: (1963) 2 Cr.L.J. 229.

As against the co-accused who has not made any confession, although a retracted confession may be taken into consideration, the rule is now established that its value against the co-accused is practically nil and cannot form the basis of a conviction without substantial corroboration, both as to the crime and the criminal: 1966 Cr.L.J. 323 (2) (Cal.).

Ss. 24, 30—Retracted confession—Admissibility against co-accused—A retracted confession can be used against a co-accused provided it gets material corroboration: (1962) 4 Ori.J.D. 156: I.L.R. (1962) Cut. 366: (1964) 2 Cr.L.J. 487.

The mere fact of the retraction of a confession is not in itself sufficient to make it appear that it was unlawfully induced but will be corroboration of the approver's statement: 113 I.C. 65: 30 Cr.L.J. 49—The confession of an accused although retracted, may be taken into consideration against a co-accused: 119 I.C. 325: 30 Cr.L.J. 1046; A.I.R. 1944 Cal. 249, and is admissible in evidence against co-accused: A.I.R. 1930 Lah. 667. But its value as a piece of evidence is almost nil: 1935 An.W.R. 48. *See* also 10 O.W.N. 405: A.I.R. 1933 Oudh 263. It can sustain a conviction if it is corroborated by the production of articles for which the accused can give no explanation. (*Ibid*). There is no absolute rule that a confession, having been retracted cannot be acted upon without material corroboration. If the reasons given by an accused person for having made a confession, which he subsequently withdraws, are, on the face of them, false, the confession can be acted upon as it stands and without any further corroboration: I.L.R. 53 Mad. 160: A.I.R. 1929 Mad. 837: 57 M.L.J. 681. *See* also A.I.R. 1930 All. 29 (confession by a person *sui juris* before a Magistrate but retracted later): A.I.R. 1942 Lah. 271.

There is no rule that a retracted confession cannot be used even for the purposes of corroborating other evidence against the co-accused in the case as it comes from a tainted source. It may even provide the basis of the conviction of the confessing accused, if the Court is satisfied that it is true and voluntary. It is a rule of prudence, not of law to accept the veracity of the confession only if it is corroborated by other evidence: 1967 Cr.L.J. 134: A.I.R. 1967 All. 64.

The Court should very carefully scrutinise the confession and then decide for itself whether it is reliable and trustworthy. When the Court finds that the confession is not true and is made with the sole object of implicating others without any intention to implicate himself it cannot be acted upon by the Court and a conviction cannot be based on it: I.L.R. 10 Luck. 151: 11 O.W.N. 1012: A.I.R. 1934 Oudh 418.

As against the co-accused, a retracted confession may be taken into consideration subject, however, to the rule that it cannot form the basis of a conviction without substantial and independent corroboration both as to the crime and the criminal. Further, a higher standard of corroboration in regard to a retracted confession must be demanded than in the case of the testimony of an approver because the testimony of an approver can be tested by cross-examination whereas the confession of an accused cannot be subjected to such a test: (1942) 44 Punj.L.R. 448: A.I.R. 1942 Lah. 271.

A retracted confession of co-accused has seldom any corroborative value: A.I.R. 1954 Manipur 6. Evidence brought on the records of the case under S. 288 can be made use of to corroborate a retracted confession: I.L.R. (1954) Trav.-Co. 158: A.I.R. 1954 Trav.-Co. 321.

A retracted confession should carry practically no weight as against a person other than its maker: (1921-22) 26 Cal.W.N. 1010: I.L.R. 71 Cal. 497; A.I.R. 1942 Lah. 271; A.I.R. 1944 Cal. 249.

If there is no other reliable evidence in corroboration, the evidence of the approver, coupled with the retracted confession of a co-accused is not sufficient for conviction: I.L.R. 55 All. 91: A.I.R. 1933 All. 31.

Confession of an accused cannot be used to corroborate the evidence of an approver because such a confession is a tainted piece of evidence and cannot be placed on a higher footing than the evidence of the approver itself but the retracted confession of the accused may be relied upon against himself along with other evidence to prove his guilt: 1977 W.L.N. 379 (Raj.).

Where out of seven accused only two were convicted but under different charges under Indian Penal Code, *held*, the retracted judicial confession of one accused could not be relied upon against the other accused: A.I.R. 1984 S.C. 1793: (1984) 2 Crimes 914.

19. Delayed retraction—Effect of.—No doubt if a retracting statement comes after a certain lapse of time its weight is naturally reduced. Thus, where an accused arrested under the Customs Act, 1962 made a confessional statement but five days after the release on bail, he retracted the same but the Tribunal while imposing penalty proceeded on the basis that because of delay for a few days, the retracted statement will not be considered at all, *held*, the decision arrived at by the Tribunal was to be set aside in writ jurisdiction: 1992 Cr.L.J. 1190 (Cal.).

Where the Magistrate had appropriately questioned the accused to satisfy himself that the confession was voluntary and true and the retraction of the confession was a belated one, the retraction being at the Sessions trial and no complaint regarding any coercion, threat or any inducement was filed before any authority at any prior point of time, *held*, said confession was voluntary and true: (1986-87) 91 Cal.W.N. 561 (D.B.)

Where the confession was retracted after several months at the time of his examination under S. 313, Cr.P.Code, *held*, the confession could not be said to be not voluntary. [1977 Cr.L.J. 684: 1976 Raj.L.W. 275, Affirmed]: A.I.R. 1978 S.C. 1248.

A judicial confession recorded after due precautions by an Executive Magistrate and retracted by the accused six months thereafter on the conclusion of prosecution despite having earlier opportunities and assistance of an experienced lawyer, *held*, found voluntary and corroborated on material particulars, is sufficient to set aside acquittal for murder: 1986 M.P.L.J. 72 (D.B.).

20. Retracted confession—Proof of.—Where a confession is retracted both before the committing Magistrate and the Sessions trial it cannot be used unless the Court is otherwise satisfied of its truth and voluntary character: 45 M.L.J. 613: A.I.R. 1924 Mad. 391. *See* also I.L.R. 6 Lah. 415: A.I.R. 1925 Lah. 605; A.I.R. 1933 Oudh 315: I.L.R. 8 Luck. 518; (1942) 44 Punj.L.R. 77: A.I.R. 1942 Lah. 271; A.I.R. 1942 Pat. 90.

A confession retracted before the committing Magistrate would be deemed to have been retracted, at the earliest opportunity. Confession so retracted even if it be after a lapse of time, cannot be relied upon without corroboration. If the confession be deemed to have been made, voluntarily, then, having been retracted, it would require independent corroboration on material particulars, before it can form the basis of conviction. On the other hand, if it was not voluntary, it would be irrelevant and inadmissible. (Confession held not voluntary): A.I.R. 1957 Him. Pra. 52: 1957 Cr. L.J. 1254.

Confessional statement—Correctness affirmed before committing Magistrate—Subsequent retraction in Sessions trial held will not carry any weight: 1970 Cr.L.J. 549 (Manipur).

The fact that the confession was retracted before the committing Magistrate would not deprive it of its voluntary character: 52 I.C. 50. *See* also 60 I.C. 789; 25 I.C. 634.

The Court has to determine in the first instance whether a retracted confession is voluntary or has been improperly induced. If upon weighing all the circumstances, the prisoners' denial and the probabilities, it appears to the Judge that the confession has been improperly induced, no matter how true it may be he is bound to exclude it. If he comes to the conclusion that the confession was not improperly induced, and admits it, then it becomes evidence in the usual way: 1958 An.L.T. 1125.

In the case of confessions which are reduced to writing and which are subsequently resiled from by the accused, the rule is that the Court may act upon the confession if in its opinion the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession. Where the Court has to decide whether the confession made by the accused in a criminal case has been proved, the law requires that the Court must be satisfied that the confession made was free and

voluntary and that it was not brought about by the influence of hope or fear: 1960 All.L.J. 28.

After the confession of an accused was recorded pardon was tendered to him and he was examined as witness for the prosecution. He denied all knowledge of the occurrence and also did not seem to recollect anything about the confession. His examination was, therefore, stopped by the Magistrate and the pardon withdrawn. But he was not tried jointly with the other accused and was examined as a prosecution witness in the Sessions Court. There also he denied all knowledge and made serious allegations against the Police. He was declared hostile and cross examined and for the purpose of contradicting him, the confession made by him was read over to him. *Held*, that the prosecution was not justified in reading the confession which he retracted and which according to him was not voluntary: I.L.R. 61 Cal. 399: A.I.R. 1934 Cal. 636. Where approver is tried on the basis of his statement which is retracted it must be corroborated by other evidence: I.L.R. 9 Lah. 608: A.I.R. 1928 Lah. 320 (2).

When a retracted confession is the sole evidence against an accused, it can be but of little value, especially remembering the competition for pardon where some persons suspected of an offence have already confessed or are believed to have confessed: 17 Cr.L.J. 226: 26 Punj. Re. 1916 (Cr.).

Where an accused when retracting a confession alleges ill-treatment and inducement by the Police to extract the confession, the onus is on him to prove such ill-treatment and inducement: 47 I.C. 811: 22 Cal.W.N. 809.

21. Retracted confession — Illustrative cases.—The prosecution witness deposed that the accused confessed before him that he assaulted his wife. Later on the confession was retracted. The witness told another person, also examined as a witness, about the confession and that other person went to accused's house and found the body lying with bleeding injuries. *Held*, the retracted confession stood corroborated by the fact that the other witness had seen the body with bleeding injuries and that, therefore, the retracted confession as deposed to could be relied upon: 35 Cut.L.T. 94: 1959 Cr.L.J. 1172.

Accused charged under S. 302, I.P. Code, for committing murder of his wife—Extra-judicial confession alleged to have been made by accused, retracted—Such confession cannot be acted on without sufficient corroboration—Accused, *held*, was liable to be convicted for having killed his wife on the dence which afforded sufficient corroboration to the confession: (1968) 34 Cut. L.T. 939.

Where the accused charged with throttling of his ten years daughter and throwing her dead body, tied with a stone, in a well was said to have voluntarily made an extra-judicial confession two days thereafter to the village frogman whom he had requested to retrieve the dead body and who had ascertained its presence in the well by diving down but upon the frogman's insistence that the body would be retrieved only in the presence of village elders whereupon the accused fled despite the frogman's pursuit to apprehend him, and the accused was said to have made a few more extra-judicial confessions but always made good his escape before the dead body could be recovered, the accused having retracted his confessions and there was no direct evidence of murder, *held*, it is well settled that a retracted extra-judicial confession requires corroboration in material particulars; apart from the evidence of death of the girl by throttling, there was no other evidence to corroborate the confessions; and the confessions do not inspire confidence as the accused's conduct in confessing, escaping and confessing several times is against human nature; conviction set aside: 1995 Cr.L.J. 2165 (Mad.) (D.B.).

Confessions amount to admissions so far as the makers of the confessions are concerned. Thus, the confessions of rape even though retracted when corroborated by the evidence are sufficient to establish guilt: (1963) 2 Cr.L.J. 562 (Manipur).

Where a foreigner, not well versed in English but living with his English wife, had signed in English every page of his English confession recorded by the Directorate of Revenue Intelligence, and had acknowledged receipt of the detention order by writing the words 'Received copy' in English, but wrote on the confession in Hebrew the words 'not understand', *held*, it did not amount to retraction of the confession; if he had any desire to do so, he could have simply written in English that he did not understand or accept the statement: 1979 Rajdhani L.R. 41 (D.B.).

Where in a confession, reduced into writing by gram panchayat secretary and not signed by village munsif, the scribe was not examined as prosecution witness and it was retracted by accused in the trial, *held*, no reliance can be placed on that document: 28 Cut.L.T. 47.

Where a confession had been made and properly recorded by a Magistrate after scrupulously going through all the formalities

held, if the accused at the trial totally denies that he had made the confession but makes no effort to prove the allegation, the confession should not be doubted as retracted: A.I.R. 1952 Manipur 11 (2): 54 Cr.L.J. 89.

Retracted confession—Accused giving version as to why he made confession—Plea of extortion under threat by Police not raised before Court of Sessions—Confession held could be taken into consideration: (1963) 5 Ori.J.D. 145: (1964) 1 Cr.L.J. 464.

Where in a case of an alleged poisoning of husband by wife, the wife retracted her confession which was voluntary and various articles stained with the poison were recovered in the viscera and vomits of the deceased, *held*, there was sufficient corroboration: I.L.R. 15 Lah. 310: A.I.R. 1934 Lah. 150 (2).

The appellant and her co-accused were tried for the death of the deceased persons, and it was alleged that the co-accused administered poison in the food of the deceased at the instigation of the appellant. One of the deceased, it was alleged, had stated before the death that he and the other deceased became sick after taking food prepared by the co-accused, and the co-accused confessed to it when confronted by the neighbours. She also made a confessional statement before a Magistrate, but later retracted and denied everything. The lower Court convicted them on the basis of this retracted confession. *Held*, that conviction could not be based on retracted confession without the fullest and strongest corroboration as to the factum of the crime and as to the identity and since these were not proved the appellant could not be convicted: (1968) 70 Punj.L.R. 363: 1968 Cur.L.J. 244.

A convicted prisoner undergoing a term of imprisonment made a statement before a Magistrate implicating the petitioner in the offence for which he had been convicted. But when he was examined as a witness he denied the implication of the petitioner. *Held*, the statement was not admissible in evidence: 54 I.C. 893: 21 Cr.L.J. 189: 18 All.L.J. 87. *See* also 62 I.C. 545: (1920) 22 Bom.L.R. 1274.

Where a confession is neither voluntary nor true and is subsequently retracted, it is not sufficient for the conviction of the maker especially on a capital charge of murder: 34 Cr.L.J. 1009: A.I.R. 1933 Oudh 265.

Where apart from the retracted confession made to the Magistrate, there was no evidence to even remotely suggest that the accused had any link or connection with the murder and further the medical evidence also contradicted the contents of the confession, *held*, conviction could not be based solely on such retracted confession: 1995 Cr.L.J. 2715 (Gau.) (D.B.).

Where in their lengthy confessional statements both the accused had attributed everything on each other and those statements were full of facts and minute details and found corroboration from circumstantial evidence, *held*, even if retracted, they could be acted upon: A.I.R. 1985 S.C. 823.

22. Extra-judicial confession—General.—An extra-judicial confession is usually looked upon as a weak type of evidence and therefore, whenever it is sought to be relied upon, the burden lies upon the prosecution to show its trustworthiness. In order to render such confession worthy of belief, regard must be had to:—(*i*) the person to whom it was made; (*ii*) the connection, if any, of the accused with him; (*iii*) the occasion or reason for the accused to go and make such a confession to him; and (*iv*) the circumstances in which it was made. Besides all this, the extra-judicial confession must be considered in the over-all context of the prosecution case and the evidence on record: 1990 Cr.L.J. 385 (P.&H.) (D.B.).

Extra-judicial confession to afford a piece of reliable evidence must pass the test of reproduction of exact words, the reason or motive for confession and person selected in whom confidence is reposed. [1982 Cr.L.J. (N.O.C.) 127 (Gau.), Reversed]: A.I.R. 1982 S.C. 1595: 1983 Cr.L.J. 149: (1982) 3 S.C.C. 351; (1985) 59 Cut.L.T. 488; (1987) 1 Crimes 295 (Ori.); 1995 Cr.L.J. 3002 (Him. Pra.) (D.B.).

Evidence of an extra-judicial confession, to be acted upon must satisfy the test of reproducing the exact words; the prosecution must also show the reason or motive for making the extra-judicial confession and whether the accused would repose confidence in the person before whom he made the confession. Thus, where one of the prosecution witnesses of extra-judicial confession had made no mention of it in his statement to the Investigating Officer and no material on record indicated the reason or motive for the accused to make the extra-judicial confession or that the witnesses were persons in whom the accused could repose confidence, *held*, the extra-judicial confession could not be relied upon: 1988 Cr.L.J. 1086 (Ori.) (D.B.).

The weight to be given to an extra-judicial confession would depend entirely upon the context of circumstances, the person to whom it was made and the actual condition under which it was made, which may

probabilise the voluntary nature and truth of the confession or otherwise. Where it was made spontaneously by the accused to a Magistrate who was not concerned with the investigation of that offence, who was not even aware of the identity of the person appearing before him or of the fact that any offence had been committed, the confession is certainly entitled to a very great weight unless there are any reasons suggested to the contrary by the defence: (1960) 1 M.L.J. 112: 1960 M.L.J. (Cr.) 127.

An extra-judicial voluntary confession has to be proved like any other fact; at times it may not be possible for the witness to reproduce the accused's actual words; and that is why the law insists that it be recorded by a Judicial Magistrate after administrating all necessary warnings to the accused that it would be used as evidence against him: A.I.R. 1990 S.C. 2140: (1991) 1 S.C.C. 286: 1990 Cr.L.J. 2289. *See* also 1973 Sim.L.J. 103.

An unambiguous, extra-judicial confession, has a high probative value; if free from suspicion and suggestion of falsity, it is admissible. But the Court has to be satisfied that the confession is voluntary; it is not obtained by inducement, threat or promises envisaged in S. 24 and there are no suspicious circumstances to attract the bar under Ss. 25 and 26. The Court has also to ascertain that the confession is not inspired by improper or collateral consideration or desire to circumvent the law; it must also scrutinise all relevant facts like the person to whom it is made and the time, place and other circumstances and finally the actual words used by the accused: A.I.R. 1990 S.C. 2140: (1991) 1 S.C.C. 286: 1990 Cr.L.J. 2289. *See* also 1973 Sim.L.J. 103.

The fact that a confession is extra-judicial and not judicial does not really make any difference. The only material difference between a judicial and an extra-judicial confession is that where as the former is recorded by a Magistrate with all the formalities provided by S. 164, Cr.P.Code in order to facilitate ascertainment of the confession having been given voluntarily, the aid of these formalities and the evidence of the Magistrate are not available in the case of an extra-judicial confession. All the same, if it could otherwise be ascertained that the extra-judicial confession has been made voluntarily and it was true, its probative value would be the same as that of a confession duly recorded under S. 164, Cr.P.Code. Further, when an extra-judicial confession is found to be both true and voluntary, there would, strictly speaking, be no bar to the conviction on the basis of that confession alone even though it was retracted by the accused subsequently: A.I.R. 1957 All. 388: 1957 Cr.L.J. 695.

Where the main foundation for the conviction is the confession alleged to have been made by the accused, there are three things which the prosecution must establish: (*1*) that a confession was made, (2) that evidence of it can be given; and (*3*) that it is true. Where there is conflict of evidence as to the manner and the time of it, the accused would be justified in asking the Courts to reject it: 1959 All.W.R. (H.C.) 602: 1959 All.Cr.R. 503: 1959 All.L.J. 736.

While appraising an extra-judicial confession, the Court must scrutinise the evidence of confession minutely and with great caution to determine whether it was natural for the accused, considering his relationship with the witness, to confide in and confess to the witness; whether the confession was consistent with the facts deposed to by other witnesses and discovered during investigations; whether the witness of confession was otherwise reliable or had any motive in falsely implicating the accused either out of enmity or to divert suspicion away from himself for his own possible connection with the offence. If the Court then found the confession as acceptable and trustworthy, the Court might act upon it; it would not be a 'weak' evidence. [A.I.R. 1955 Madh. Bh. 119 (F.B.), Dissent. from; A.I.R. 1966 S.C. 40, Expl.; A.I.R. 1971 S.C. 1871, Rel. on]: (1972) 74 Bom.L.R. 299: 1972 Mah.L.J. 583.

While a judicial confession is recorded by a Magistrate after completing all the formalities under S. 164 of the Code of Criminal Procedure to ensure that the confession is voluntary and truthful, such formalities and the Magistrate's supporting evidence are not available for extra-judicial confessions; nevertheless, if the latter are shown to be voluntary and truthful, the probative value of the two types of confessions is at par. A voluntary and truthful extra-judicial confession, even if retracted, is no bar to conviction. Such a conviction is upheld where the confession is sufficiently corroborated by other circumstantial evidence on record: (1977) 44 Cut.L.T. 643 (D.B.).

An extra-judicial confession must be judged in the background of attending circumstances and it must be considered if the same is voluntary and true and free from suspicion. There should be cogent evidence on record about

the attending circumstances as well as the exact words used by the accused person to consider whether the extra-judicial confession was not only true but also voluntary. Even accepting the extra-judicial confession which has been retracted, it is a very weak piece of evidence and has to be corroborated by other evidence on record: 1976 Cr.L.J. 262: 42 Cut.L.T. 726.

The evidence of witnesses of extra-judicial confession must not lack plausibility; it must inspire the Court's confidence: 1982 Cr.L.J. 2342 (Ori.).

Confession if oral must be assessed carefully—Voluntary nature of confession must also be considered before it can be acted upon: 1969 Mad.L.W. (Cr.) 231: 1970 Cr.L.J. 1020: A.I.R. 1970 Mad. 298.

An extra-judicial confession of an accused is admissible in evidence against the accused but it should be examined with all the caution prescribed for the scrutiny of such confessions. It is most often a very weak piece of evidence. There may be circumstances in which it may be of more probative value than it usually is. The first disability is that whenever there is an extra-judicial confession by the time it comes to the Court one is not in a position to know in what actual words the accused had spoken. As far as the actual wording goes, the longer and the more complicated the story of the confession the greater such danger and naturally the less the value of the extra-judicial confession. Where the extra-judicial confession is somewhat reliable, there being an independent corroboration, if it is retracted, it cannot be rated too high: 1971 M.P.L.J. 829.

Extra-judicial confessions are those which are made by the party elsewhere than before a Magistrate or in Court. It embraces not only express confession of crime, but also those admissions and acts of the accused from which his guilt may be implied. Extra-judicial confessions, if they are voluntary, are receivable in evidence: (1965) 7 Ori.J.D. 198: 31 Cut.L.T. 804: I.L.R. (1965) Cut. 369.

Extra-judicial confessions if voluntarily made are receivable in evidence on being proved like any other fact. They must be proved in the same way as any other admission or statements by the evidence of the persons to whom they were or who heard them made or by documents, if any, in which they have been recorded. Extra-judicial confessions are not considered of much value, unless the witness reporting can be thoroughly depended upon from all points of view and the acknowledgment of guilt is clear and unequivocal. Evidence of extra-judicial confession is a weak piece of evidence and it would be dangerous to convict a person solely on its basis. It can be taken into consideration only with other evidence: A retracted confession cannot be made solely the basis of conviction unless the same is corroborated. There must be corroboration which connects the accused person with the crime in question. Extra-judicial confessions which are retracted by the accused call for close scrutiny and cannot usually be deemed sufficient to afford the sole basis for conviction: 1966 M.L.J. (Cr.) 698: 1966 Ker. L.T. 649.

Though extra-judicial confessions have to be received with care and caution there is no reasons why they should not be believed when they are clear, consistent and convincing: 12 Mys.L.J. 73; 39 Mys.H.C.R. 320; A.I.R. 1959 Mad. 175.

Thus, where an extra-judicial confession is made to a close relative and a person who was interested in the accused and who is himself a respectable ryot there was no motive for him to falsely implicate the accused and it was in the probable and natural course of conduct that the accused would go and unburden himself to such a person in order to obtain his advice as to his future course of conduct, there could be no hesitation to accept it as true: A.I.R. 1959 Mad. 175.

Extra-judicial confession made under threat and coercion, *held*, is not admissible in evidence: 1992 Cr.L.J. 2190 (Pat.) (D.B.).

So long as the evidence with regard to the extra-judicial confession is not biased or tainted or is not of doubtful character or does not spring from any hostile attitude against the accused, it cannot be discarded: 1994 Cr.L.J. 555 (Ker.) (D.B.). *See* also (1987-1) 35 B.L.J.R. 127: 1986 Pat.L.J.R. 688 (D.B).

Extra-judicial confession must be accepted and acted upon as a whole. It is not permissible for the Court acting upon this evidence to do so only with regard to a part of a confession and to reject some part of it because the accused may not be able to offer further proof: 1960 Cr.L.J. 491: A.I.R. 1960 Mad. 187.

Extra-judicial confessions are frequently made in the presence of persons in authority, and, while that circumstance makes it necessary for the Court to scrutinise the evidence and circumstances carefully in order to ascertain whether the confession was

voluntarily made it is impossible to hold, on the basis of that circumstance alone, that the confession was not freely made. It is true that a Court would exclude a confession if it appears, in such circumstances, that the person in authority used some words which might possibly have induced the accused to make the confession. It is not possible to lay down any hard and fast rule as to what would constitute inducement in the circumstances of a particular case. There must, however, be some basis for the finding that the person in authority used words which might amount to inducement: 1958 B.L.J.R. 6: A.I.R. 1958 Pat. 166: 1958 Cr.L.J. 406.

Once the Court comes to a conclusion that the extra-judicial confession was made under pressure, it cannot refer to it as lending assurance to the other evidence produced in the case: A.I.R. 1955 Sau. 68: 1955 Cr.L.J. 1208. Ordinarily, it is unsafe to base conviction on an extra-judicial confession. Evidence in respect of extra-judicial confession particularly when it is entirely oral, should be strictly scrutinised and no reliance should be placed upon it unless the Court is in a position to pronounce with certainty upon the exact words used by the accused. Apart from this where it appears from the prosecution evidence that the extra-judicial confession was the result of inducement and promise offered to the accused by lambardars of the village, the confession should be ruled out: I.L.R. (1954) Patiala 316: A.I.R 1955 Pepsu 33.

Where the Legislature has specially provided in clear and precise terms how a confession is to be made to a Magistrate and thereby delimiting the powers of the Magistrate, it is not open to the prosecution to resort to some other method, namely, that of extra-judicial confession being made to the Magistrate: A.I.R. 1955 Pat. 425: 1955 Cr.L.J. 1377.

An extra-judicial confession recorded by a Village Munsif after the Police investigation has started, being in contravention of the provisions of R. 72 of the Madras Criminal Rules of Practice, is inadmissible in evidence. The illegality cannot be condoned because of the failure of the accused to raise objection to its admissibility at the proper time.

Where information about death of a suspicious nature is received by a Village Munsif, he should record the statement of the informant and is bound to expedite Police investigation by sending the Yadast immediately to the Police. The delay made by him in sending the Yadast cannot afford him a ground for violating the law: 1961 Ker.L.T. 201.

Where in a capital case, the prosecution demanded conviction of the accused primarily on the basis of his extra-judicial confession, it becomes necessary to examine the evidence of witnesses in that behalf critically, by applying a double test—(*i*) whether the confession was perfectly voluntary, and if so, (*ii*) whether it was true and trustworthy: 1992 Mah.L.J. 402 (D.B.).

Confession made to private person in presence of Police Officer is inadmissible: (1968-69) 73 Cal.W.N. 467: 1970 Cr.L.J. 403.

Where the accused stated regarding some quarrel with deceased, *held*, it cannot be used as extra-judicial confession: 1983 M.P.W.N. 126.

Accused under surveillance of Police constable — Extra-judicial confession — Confession hit by S. 26: 1968 Cr.L.J. 765: A.I.R. 1968 Ori. 97.

Evidentiary value of extra-judicial confession made to a chance witness. *See* 1983 Cr.L.J. 1411 (Raj.).

If an extra-judicial confession by the accused is said to have been made before his arrest within the knowledge of the Police Officer arresting him, yet no mention of such confession is made by the Police Officer in his arrest entry in roznamcha, the authenticity of such confession is of little value: (1983) 2 Crimes 954 (Raj.).

Extra-judicial confession—Evidentiary value. *See* 1984 Cr.L.J. (N.O.C.) 121: (1984) 1 Ori.L.R. 199.

23. Extra-judicial confession—Corroboration.—Usually and as a matter of caution Courts require some material corroboration to an extra-judicial confessional statement which connects the accused person with the crime in question: A.I.R. 1959 S.C. 18.

The confession will have to be proved just like any other fact. Usually and as a matter of caution, Courts require some material corroboration to an extra-judicial confessional statement, corroboration which connects the accused person with the crime in question; oral confession which are not reduced to writing will have to be very carefully assessed before they can be acted upon. [A.I.R. 1959 S.C. 902; A.I.R. 1959 S.C. 18; A.I.R. 1953 S.C. 411; A.I.R. 1970 Mad. 298, Ref. to and Rel. on]: (1971) 1 Cut.W.R. 351.

The extra-judicial confession is a weak type of evidence, especially when it is retracted. Firstly, the evidence to prove extra-judicial

confession has necessarily to be above board, secondly, some corroboration from an independent source is needed to give strength to that evidence: 1979 Cr.L.J. (N.O.C.) 101(Punj.) (D.B.); (1979) 2 An.L.T. 435 (D.B.); 1979 Cr.L.J. (N.O.C.) 179 (Del.) (D.B.).

Extra-judicial confession should be proved in the same way as other admissions or statements by the evidence of persons to whom they are made. They must be proved by evidence of the most reliable character. The infirmity is that in most cases owing to the absence of any writing, the exact words used by the accused cannot be known and the witness may have misunderstood or may not have remembered. For this reason extra-judicial confessions are not considered of much value unless the witness can be depended upon. It is unsafe to convict a person only on such evidence without corroboration. As a rule of caution, Courts usually require some material corroboration to an extra-judicial confession: (1978) 1 Karn.L.J. 30: 1978 Cr.L.J. 462: I.L.R. (1978) Karn. 133.

An extra-judicial confession, if voluntary, can be depended upon by the Court alongwith other evidence in convicting the accused. It is true that the value of the evidence as other confession just like any other evidence rests on the veracity of the witness to whom it is made. It is also true that the Court requires the witness to give the actual words used by the accused as nearly as possible but it is not an invariable rule that the Court should not accept the evidence, if not the actual words but the substance were given: 1970 Raj.L.W. 1.

In the absence of any material on record to establish the offence, *held*, conviction on an extra-judicial confession would be illegal: 1982 Cr.L.J. 929: (1981) 52 Cut.L.T. 32.

Extra-judicial confession is a very weak piece of evidence and is hardly of any consequence; if it is lacking in probability, it can be rejected: A.I.R. 1988 S.C. 1705; A.I.R. 1974 S.C. 1545: 1974 Cr.L.J. 1010: (1974) 4 S.C.C. 747; A.I.R. 1975 S.C. 258: 1975 Cr.L.J. 282: 1975 M.L.J. (Cr.) 446: (1975) 4 S.C.C. 475: (1975) 1 S.C.R. 747.

The evidence in the shape of an extra-judicial confession, by itself, is a weak piece of evidence and the Court would normally expect sufficient and reliable corroboration to such type of evidence: 1993 Cr.L.J. 3364 (Bom.) (D.B.); 1982 M.P.W.N. 537; 1983 Jab.L.J. (Notes) 45.

Excepting in very rare cases the value of an extra-judicial confession is not very high and where there is no other corroborative evidence in support of it, it is very unsafe to rely on such confession: 184 I.C. 390: 1939 All.L.J. 732: A.I.R. 1939 All. 685.

Generally speaking evidence of extra-judicial confession is a very weak kind of evidence. It has to be scrutinised minutely and received with great caution. In dealing with extra-judicial confession it should be borne in mind that a witness may easily fabricate wholly or in part a confessional statement and it is very difficult to expose the falsity: A.I.R. 1955 Madh. Bh. 119: 1955 Cr.L.J. 1073 (F.B.).

The evidence of oral extra-judicial confession is undoubtedly a very weak piece of evidence, and it would be dangerous to convict a person solely on its basis. But it can be taken into consideration alongwith other evidence: A.I.R. 1953 Madh. Bh. 43: 1955 Cr.L.J. 497. *See* also A.I.R. 1953 Vindh. Pra. 38; A.I.R. 1959 Him. Pra. 3; A.I.R. 1959 Madh. Pra. 267 (it must be taken into consideration when it is corroborated by surrounding circumstances and other reliable evidence).

Extra-judicial confession—Material corroboration necessary: 1963 Jab.L.J. 856: 1964 M.P.L.J. 797: (1964) 1 Cr.L.J. 455.

An extra-judicial confession, if satisfactorily proved to have been voluntarily made, may be the basis for a conviction even in the absence of corroboration: (1963) 1 Cr.L.J. 645: I.L.R. (1963) 1 All. 53.

An extra-judicial confession, by its very nature, is a weak piece of evidence and has to be scrutinised with great caution. No doubt an extra-judicial confession, if made voluntarily can be relied upon by the Court alongwith other evidence in convicting the accused. But the confession has to be proved just like any other fact. The value of evidence as to confession just like any other evidence depends upon the veracity of the witnesses to whom it is made. Once the evidence of the witnesses is rejected as not being reliable, the value of the evidence of confession comes practically to nothing. It is also well settled that in case of extra-judicial confessions some material corroboration is required to connect the accused with the crime: I.L.R. (1963) Cut. 511.

True, there is no bar to convicting an accused on his extra-judicial confession but prudence has always insisted on some corroboration from other circumstances; an extra-judicial confession is undoubtedly a weak evidence and it is unsafe to convict solely on

its basis unless its evidence is clinching and fully trustworthy. Thus, where one witness to the extra-judicial confession timed it at noon and the other three to four hours earlier and there were other discrepancies, the confession could not be safely relied upon: 1983 Raj.L.W. 418 (D.B.).

To find the accused guilty on an extra-judicial confession which is retracted, that extra-judicial confession must be corroborated in material particulars: 1956 Pat.L.R. 434.

A retracted extra-judicial confession is at best a weak kind of evidence and cannot in the absence of independent corroboration be made the sole basis of an order of conviction: 1960 M.P. L.J. (Notes) 165.

Extra-judicial confessions which are denied by the accused call for close scrutiny and cannot usually be deemed sufficient to afford the sole basis for conviction. There is, however, no rule that they should not be believed when they are clear, consistent and convincing though they have to be received with care and caution. As in the case of judicial confessions which are retracted, as a rule of prudence and caution independent evidence in corroboration is insisted upon. The mere existence of a slight motive is not a sufficient corroboration: 55 Mys.H.C.R. 134.

Extra-judicial confession though retracted subsequently is undoubtedly admissible— When the subsequent discoveries fully corroborate it, a conviction could be sustained on that alone: I.L.R. (1940) Nag. 679: 1940 Nag.L.J. 623: A.I.R. 1941 Nag. 86.

The evidence of extra-judicial confession made by an accused to a witness cannot be termed to be tainted evidence. If the Court believes the witness before whom the confession is made and it is satisfied that the confession was voluntary, a conviction can safely be founded on such evidence alone: 1980 Raj.L.W. 159: 1980 W.L.N. 452: 1981 Cr.L.J. 852. *See* also (1990) 1 Ker.L.T. 305: (1990) 1 Ker.L.J. 258; (1991) 2 Ker.L.T. 838; (1991) 2 Ker.L.T. 208: (1991) 2 Ker.L.J. 198.

The evidence furnished by the extra-judicial confession made by the accused to witnesses cannot be termed to be a tainted evidence and if corroboration is required it is only by way of abundant caution. If the Court believes the witnesses before whom the confession is made and it is satisfied that the confession was voluntary, then in such a case conviction can be founded on such evidence alone: A.I.R. 1975 S.C. 1320: (1974) 3 S.C.R. 915: 1975 Cr.L.J. 1102: (1975) 4 S.C.C. 234.

It is not open to any Court to start with a presumption that extra-judicial confession is a weak type of evidence; it would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession: A.I.R. 1985 S.C. 1678; (1992) 1 Ker.L.J. (N.O.C.) 6 (D.B.).

Extra-judicial — Confessions made by accused voluntarily can be used alongwith other evidence for convicting him: (1965) 2 Cr.L.J. 765: A.I.R. 1965 Him. Pra. 68.

Law does not require that the evidence of an extra-judicial confession, should in all cases be corroborated: (1993-1) 41 B.L.J.R. 129: (1992) 3 S.C.C. 204: (1992) 1 Ker.L.J. (S.N.) 50: (1992) 3 J.T. 270. Conviction can be based on it, if it is real and voluntary: 1985 Cr.L.J. 1416: (1985) 1 Crimes 859 (Raj.); if it is clear, consistent, true and trustworthy: (1985) 59 Cut.L.T. 488. However, where the extra-judicial confession was proved by an independent witness who was a responsible officer and who bore no animus against the accused, *held*, there was hardly any justification to disbelieve his evidence particularly when the extra-judicial confession was corroborated by the recovery of an empty cartridge from the place of occurrence: A.I.R. 1977 S.C. 2274: (1978) 1 S.C.R. 597.

Extra-judicial confession, which is not obtained by coercion, promise of favour or false hope, etc. and is plenary in character and voluntary in its nature acknowledging his guilt, and made in presence of a body of persons on two occasions inclusive of the family members of the accused and other witnesses, *held*, can be acted upon: (1993-1) 41 B.L.J.R. 129: (1992) 3 S.C.C. 204: (1992) 1 Ker.L.J. (S.N.) 50: (1992) 3 J.T. 270.

Though an extra-judicial confession is treated as a weak piece of evidence, there is neither any rule of law nor of prudence which requires that unless corroborated it cannot be acted upon; if the extra-judicial confession is testified by unbiased witnesses not even remotely inimical to the accused and having no motive to attribute untruth to the accused and the words of the witness, clear, unambiguous and unmistakable, show the accused to be the offender, and the evidence of the witness passes a rigorous test on the touchstone of credibility, *held*, the extra-judicial confession can be accepted and relied upon for convicting the accused; corroboration need not be sought. [(1978) 1 S.C.R. 597: A.I.R. 1977 S.C. 2274, Rel. on]: A.I.R. 1985 S.C. 48; 1993 Cr.L.J. 2834 (All.) (D.B.).

Extra-judicial confession appears to have been treated as a weak piece of evidence. But there is no rule of law nor rule of prudence that it cannot be acted upon unless corroborated. If the evidence about the extra-judicial confession comes from the mouth of witness / witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused; the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it, then after subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, if it passes the test, the extra-judicial confession can be accepted and can be the basis of a conviction. In such a situation to go in search of corroboration itself tends to cast a shadow of doubt over the evidence. If the evidence of extra-judicial confession is reliable, trustworthy and beyond approach the same can be relied upon and a conviction can be founded thereon: (1987-1) 35 B.L.J.R. 896: 1987 B.B.C.J. 653 (D.B.).

When fact of extra-judicial confession of an accused comes through witnesses having no interest to falsely implicate the accused and it is found free from any suspicion as to its voluntary character and bears a ring of truth in it, then its evidentiary value becomes more stronger carrying high probative value and deserves to be acted upon. Where extra-judicial confession came through witnesses who had no reason to falsely implicate the accused and furthermore it was corroborated by circumstantial evidence and the same had been proved, *held*, extra-judicial confession could formulate the basis for conviction: 1992 Cr.L.J. 733 (Gau.) (D.B).

The existence of the dead body and other articles in the field of the accused and recovery of the same on information by and at the instance of the accused, coupled with the circumstances that the deceased had visited the accused at or about the time when he might have been murdered furnish strong corroboration to the extra-judicial confession: I.L.R. (1975) 25 Raj. 892: 1975 Raj.L.W. 286.

Where the extra-judicial confession lacked plausibility having regard to the words used and contradictions in the evidence of the witnesses and it was not voluntary as the accused was surrounded by a crowd of two or three hundred persons, *held*, such an extra-judicial confession could not be made basis for conviction without independent corroboration: 1990 Cr.L.J. (N.O.C.) 168 (Cal.) (D.B.).

Where evidence of extra-judicial confession was fully corroborated by the medical evidence. *See* (1990) 41 Del.L.T. (S.N.) 31 (D.B.).

24. Extra-judicial confession — Actual words used by the accused.—In ordinary circumstances extra-judicial confessions are not entitled to weight because it is impossible to ascertain the exact words used by the accused in such cases. Where not only it is not possible to find out what exact words were used by the accused in the extra-judicial confession but also there is definite conflict between the statements of witnesses proving the extra-judicial confession as regards the perpetrator of the crime, the extra-judicial confession must be altogether discarded. In any case it cannot be described as credible independent evidence which can be deemed sufficient for the purpose of corroborating a retracted confession: 1953 Cr.L.J. 1865: A.I.R. 1954 J.&K. 1; A.I.R. 1955 Manipur 1: 1955 Cr.L.J. 139.

Where an attempt is made to rely upon an extra-judicial confession, every precaution should be taken to ascertain as exactly as possible the very words which were used by the prisoner who is supposed to have confessed: A.I.R. 1934 Sind 119; A.I.R. 1957 All. 459.

An extra-judicial confession, if voluntary, can be relied upon by the Court alongwith other evidence in convicting the accused. The confession will have to be proved just like any other fact. The value of the evidence as to the confession just like any other evidence depends upon the veracity of the witness to whom it is made. It is true that the Court requires the witness to give the actual words used by the accused as nearly as possible, but it is not an invariable rule that the Court should not accept the evidence, if not the actual words but the substance were given. It is for the Court having regard to the credibility of the witness his capacity to understand the language in which the accused made the confession, to accept the evidence or not: 1959 Cr.L.J. 1219: A.I.R. 1959 S.C. 902. If the Court believes the witness and is satisfied that the confession was voluntary, it may found conviction on such evidence: A.I.R. 1991 S.C. 37: 1990 Cr.L.J. 2643: (1990-2) 10 Guj.L.H. 552; (1991-2) 39 B.L.J.R. 953 (D.B.).

The exact words of an extra-judicial confession need not be proved in every case. In

most cases, it would be sufficient if a substance of these words is proved. Ordinarily, layman, before extra-judicial confessions are made, do not note down the words uttered by the accused. They cannot, therefore, accurately prove the exact words used. If the witness gives a substance of the statement made by the accused, the Court can judge whether it amounts to a confession or not. In such a case, there would, ordinarily, be no objection to the Court taking the substance of the statement into consideration: 1958 Cr.L.J. 406: A.I.R. 1958 Pat. 166: 1958 B.L.J.R. 6.

It is not necessary for a witness to whom extra-judicial statement has been made by an accused person, to reproduce the very words used by him if the substance of the confessional statement as made by an accused person, is given by the witness to whom it is made. Such statement could be used against the accused person, if his evidence is not liable to be discarded on the ground of being an interested witness or his evidence being otherwise undependable: 1969 Cr.L.J. 1186 (Punj.).

An extra-judicial confession is not *per se* an inferior kind of confession or admission, and it would all depend upon the facts of the case. But it is usually subject to the infirmity that the actual words are not preserved; except in a very fallible sense, by recollection: 1960 Cr.L.J. 1344: A.I.R. 1960 Mad. 462.

Extra-judicial confession is considered weak evidence and it is settled law that as far as possible, the Court should be told what the accused had said: 1992 Cr.L.J. 13 (Gau.) (D.B.).

Extra-judicial confession to function as a reliable evidence must be a reproduction of exact words stated by the accused. [1982 Cr.L.J. (N.O.C.) 127 (Gau.), Reversed]: A.I.R. 1982 S.C. 1595: 1983 Cr.L.J. 149: (1982) 3 S.C.C. 351; 1991 Cr.L.J. 570 (Ker.) (D.B.).

If the extra-judicial confession is voluntary and true it can constitute the basis of a conviction. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not an invariable rule that the evidence regarding extra-judicial confession is not acceptable unless the actual words used are given. It is always a question of fact to be determined in each case if such evidence is acceptable or not. *Held*, that the extra-judicial confession which was subsequently retracted was made voluntarily and the same was corroborated by the discovery made on the information of the accused himself, and his admission in the statement under S 342, Cr.P.Code, and also by the finding that the co-accused took the deceased child towards the place of incident, and was last seen with the deceased: (1964) 1 Cr.L.J. 422: A.I.R. 1964 Ori. 100.

Even if the witnesses to whom extra-judicial confession was made, gave substance and not actual words of the confession, *held*, it can be accepted by the Court notwithstanding slight departure by witnesses from statement in first information report: 1985 Cr.L.J. 1416: (1985) 1 Crimes 859 (Raj.).

There is no invariable rule that the Court should not accept a testimony which does not give the actual words but only the substance of the confession; the value of the evidence of confession, like any other evidence, depends on the veracity of the witness. Thus, where the witnesses were independent and disinterested and the extra-judicial confession was corroborated by the recovery of the dead body as well as of the deceased's ornaments, *held*, their evidence could not be disbelieved: (1982) 53 Cut.L.T. 130: 1982 Cr.L.J. 938 (D.B.).

Where against an accused, alleged to have made extra-judicial confession to two persons, only one of them, uncle of the deceased, was examined who failed to reproduce the exact words used by the accused and it was also doubtful whether the confession was voluntary, *held*, the evidence of extra-judicial confession was unworthy of belief: 1988 Cr.L.J. 1054 (Raj.) (D.B.).

Accused killed his wife by strangulation as he found her in a compromising position with stranger as she refused to disclose his name and afterwards tied a cloth tightly around his own neck which made him unconscious. Witnesses untied cloth and accused regained consciousness. He confessed to the witnesses his guilt. They proved the confession though they could not produce exact words used by him. It was urged for accused that as witnesses failed to reproduce his exact words, extra-judicial confession could not be relied upon: *Held*, that in extra-judicial confession it was not essential to reproduce and prove exact words used by accused. Proof of substance of words used by accused was enough: 1962 M.P.L.J. (Notes) 315: 1963 Jab.L.J. 24.

25. Extra-judicial confession—To whom may be made.—The value of the evidence as to the extra-judicial confession depends upon the veracity of the witnesses to whom it is made: A.I.R. 1991 S.C. 37: 1990 Cr.L.J. 2643: (1990-2) 10 Guj.L.H. 552.

It is well-known that a person committing a crime would admit his guilt only when he is

repentant for his misdeed and when he has a feeling that by making a confession his mental tension on account of his misdeed would be lightened. This the offender would invariably like to make before such persons with whom he has some sort of relationship and certain amount of confidence, and not before persons with whom he had not even visiting relationship. Making confession before acquaintances and the persons not related in any manner is very seldom acceptable to Courts of law: 1992 Cr.L.J. 3927 (Ori.) (D.B.); 1979 B.L.J. (N.O.C.) 40 (S.C.).

While considering the extra-judicial confession, it has to be seen whether the person before whom such a confession was made is known to the person making confession, that is, the confession is not made before a stranger. Normally a person would not make an implicatory statement before a stranger. If the person before whom the confession is made is a close relative of the person making confession, or has possibility of being in his confidence, the same can be a piece of evidence to be utilised against the accused. Where accused made extra-judicial confession in front of three persons who were co-villagers and not strangers, *held*, same could be acted upon: 1992 Cr.L.J. 3614 (Ori.) (D.B).

Extra-judicial confession made before a respectable person of the town—Admissibility: 1991 Cr.L.J. 2265 (P.&H.) (D.B.).

Village Magistrate to whom extra-judicial confession was made reduced it to writing and sent to the Executive Magistrate as well and corroborated by independent witness of some status, *held*, such extra-judicial confession could be relied upon: 1991 Cr.L.J. 1680 (Mad.) (D.B.).

Extra-judicial confession allegedly made to a witness having casual connection with the accused, *held*, does not inspire confidence: 1994 Cr.L.J. (N.O.C.) 76 (Mad.) (D.B.). Where the witness to whom the alleged confession was made was not on visiting terms with the accused and he knew the accused casually, being a resident of the locality where the accused was living about 14 years earlier, *held*, it was highly improbable that the accused would have made any extra-judicial confession to such witness: A.I.R. 1994 S.C. 2585.

Where the person to whom the alleged extra-judicial confession was made was not known to the accused previously and, thus, there was no reason for the accused to make a clean breast of the murder alleged to have been committed by him and that apart the accused was also stated to have told that person that certain other person had settled his dispute with the deceased and even then simply because the deceased used to remain angry he alongwith one other had murdered him, *held*, no reliance could be placed on such extra-judicial confession: 1990 Cr.L.J. 77 (All.) (D.B.); 1995 Cr.L.J. 3113 (Raj.) (D.B.).

Where the witness to whom the alleged extra-judicial confession was made, was neither related to the accused nor belonged to his village and was never on friendly or visiting terms with him, *held*, extra-judicial confession made to him was to be rejected as unworthy of belief: 1991 Cr.L.J. 742 (Del.) (D.B.). Where there was nothing to show that the accused had good relations with the person to whom the alleged extra-judicial confession was made, *held*, it could not reasonably be inferred that the accused would go and repose confidence in that person so as to blurt out confession of his guilt before him: 1994 Cr.L.J. 3695 (P.&H.) (D.B.). *See* also 1995 Cr.L.J. 3002 (Him. Pra.) (D.B.).

Extra-judicial confession—It has to be proved like any other fact—Its value depends upon veracity of witnesses to whom it is made: 1967 An.W.R. 58: 1967 M.L.J. (Cr.) 115: 1967 Cr.L.J. 1407.

A statement, whether communicated or not, admitting guilt amounts to a confession. Admissions and confessions are exceptions to the hearsay rule. They are placed in the category of relevant evidence by the Act (Ss. 17 to 30), presumably on the ground that, being declarations against the interest of the person making them, they are probably true. Their probative value does not depend upon their communication to another : A.I.R. 1966 S.C. 40. The expression 'confession' is not defined in the Evidence Act. 'Confession' is a statement made by an accused which must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. The dictionary meaning of the word 'statement' is 'act of stating; that which is stated; a formal account, declaration of facts, etc.'. The word 'statement' includes both oral and written statement. Communication to another is not, however, an essential component to constitute a 'statement.' An accused might have been over-heard uttering to himself or saying to his wife or any other person in confidence. He might have also uttered something in soliloquy. He might also keep a note in writing. All the aforesaid nevertheless constitute a statement. If such statement is an admission of guilt, it would amount to a confession whether it is communicated to

another or not. Thus, extra-judicial confession need not be addressed to any particular person: 1995 Cr.L.J. 1207 (Ori.) (D.B.) *contra*. The extra-judicial confession must be addressed to somebody and not the way one goes on shouting in the street that he/she had killed someone: 1993 Cr.L.J. 2701 (Ori.) (D.B.); 1992 Cr.L.J. 762 (Ori.) (D.B.).

Extra-judicial confession made to such witnesses with whom the accused had no occasion to speak—Not relied on: 1980 Jab.L.J. (Notes) 51.

It looks improbable that the accused would contact the near relations of the deceased residing in different village and repose confidence in them of making confession of such a heinous crime like the murder of their relation: (1992) 2 Hindu L.R. 391 (P.&H.) (D.B.).

An extra-judicial confession is generally made to a person in whom the accused confides. Where the witness to whom alleged extra-judicial confession was made was a distant relative of the accused but very near relative of the deceased and it was not shown that the accused could repose utmost confidence in him so as to confess the guilt before him, *held*, such a confession was of no value: 1985 RaJ.L.W. 97 (D.B.). *See* also 1983 Raj.L.W. 38: 1982 W.L.N. (U.C.) 409 (D.B.); 1992 Mah.L.J. 402 (D.B.).

Where the person to whom the alleged extra-judicial confession was made were stranger to the accused and even said confession was tape recorded and medical evidence also did not support the confession, *held*, such a confession was clearly brought out by influence; no reliance could be placed on it: A.I.R. 1994 S.C. 468: 1994 Cr.L.J. 140.

Where an accused was said to have made an extra-judicial confession to a person, to avoid unnecessary harassment from the Police, but there was nothing to indicate that that person was a person having some influence with the Police or a person of some status to protect the accused from harassment, and also there was no other corroborative evidence about the extra-judicial confession, *held*, no reliance could be placed on it: A.I.R. 1988 S.C. 1705.

Extra-judicial confession made before Village Administrative Officer, *held*, is not reliable. *See* 1993 Cr.L.J. 1933 (Mad.) (D.B.).

The value of the evidence as to the confession just like any other evidence, depends upon the veracity of the witnesses to whom it is made. It is true that the Court requires the witness to give the actual words used by the accused as nearly as possible, but it is not an invariable rule. [A.I.R. 1959 S.C. 902, Rel. on]. Where, therefore, the witnesses who speak to the extra-judicial confession are thoroughly disinterested witnesses who have no axe to grind against the accused and they are persons who have no reason to invent a false confession, the Judge is perfectly justified in accepting their testimony: 1960 Ker.L.T. 116: 1960 Ker.L.J. 1375: 1961 M.L.J. (Cr.) 356: (1962) 2 Cr.L.J. 135.

Where it is made voluntarily by the accused immediately after the crime to strangers visiting the accused with every token of truthfulness and repentance even if momentary, the Court would be definitely justified in accepting and acting upon such confessional statement: A.I.R. 1960 Mad. 187.

Extra-judicial confession—Accused narrating incident to her husband—Such confession held was corroborative piece of evidence in the case: 1970 Cr.L.J. 549 (Manipur).

Where a joint confession was alleged to have been made by the accused persons to a person with whom they had no intimacy and it was not disclosed as to who out of the accused disclosed the facts relating to the occurrence because all of them could not state at the same time the same words and no reason was given for the confession and for the person selected for that purpose, *held*, confession to such a person who was not even sure about the place where the accused contacted him was devoid of any credibility. [1993 Cr.L.J. 149 (S.C.), Rel. on]: 1995 Cr.L.J. 248 (P.&H.) (D.B.).

Extra-judicial confession — Evidentiary value —Wife and son accused of murdering father—Wife and son alleged to have gone to a stranger's place and made confession of offence—Witness stated to have been present there—That stranger, however, not made witness—No connection suggested between that stranger, witness and accused—It will be wholly impossible for accused to go to those strangers and make such confession—Such extra-judicial confession not worthy of credence—(Cr.P.Code, 1898, S. 367—'Decision thereon'—Appreciation of evidence): (1969) 71 Punj.L.R. 280.

Where the accused in a murder case had made extra-judicial confession of having hit the deceased with a *sarya* before two witnesses and one of them was declared hostile for not supporting the prosecution and the other was proved by the defence to be a stock Police witness who had appeared as a

prosecution witness in 15 cases, had admitted earlier in the Court of an Additional Sessions Judge as having been cited as a prosecution witness in about 30 Police cases, and was not on visiting terms with, and only casually knew, the accused, *held*, it was highly improbable that the accused would make an extra-judicial confession before the witness; no reliance could be placed on such a confession: A.I.R. 1994 S.C. 2585: 1995 Cr.L.J. 470.

26. Extra-judicial confession—Made by a co-accused/approver.—It is not as if an extra-judicial confession or confession of a co-accused has only to be rejected as of no value. It has to be considered in the facts and circumstances of the case as brought out in the other evidence adduced in the case. A confession can be acted upon even in a case where the only other evidence available is circumstantial evidence. Confession of a co-accused, if sufficiently corroborated in material particulars, can be treated as conclusive against the maker thereof and it can be taken into consideration alongwith other evidence against co-accused as well: (1994) 1 An.L.T. (Cr.) 405: (1994) 1 An.L.T. (N.R.C.) 47 (D.B.).

Merely because a record of extra-judicial confession of an accused, made to some individuals, is handed over to Police will not make it inadmissible in evidence.

Extra-judicial confession cannot be made the sole basis for conviction of co-accused. However, there is no bar in getting an assurance from it if the facts and circumstances brought out on the record by themselves indicate unmistakably that the co-accused has been connected with the crime. Extra-judicial confession can be used for this limited purpose for arriving at a decision regarding the guilt of the co-accused: 1968 Cr.L.J. 1: A.I.R. 1968 All. 8.

Extra-judicial confession — Statement of approver about confession of guilt made to him by accused — Statement not corroborated in material particulars — Conviction cannot be based on such statement: (1965) 2 Cr.L.J. 566 (Mad.).

As extra-judicial confession made in the presence of a person who was subsequently made an approver, cannot be relied upon. The approver is no better than an accomplice and therefore, his testimony on the extra-judicial confessions would need independent corroboration, before it can be acted upon: A.I.R. 1957 Him. Pra. 52: 1957 Cr.L.J. 1254.

27. Extra-judicial confession—Illustrative cases.—Where extra-judicial confessions contained several discrepancies regarding the persons to whom and the occasions when the confession was made and what precisely was said by the accused, *held*, it was not admissible: A.I.R. 1981 S.C. 2007.

Where there were many suspicious features in the evidence of the witness to whom the alleged extra-judicial confession was made, *held*, in view of further fact that such confession was retracted, no reliance could be placed on it: A.I.R. 1994 S.C. 1594: 1994 Cr.L.J. 2189.

Where in the alleged extra-judicial confession the co-accused had passed on the entire blame for committing the offence of murder on the other accused and entirely exonerated himself, *held*, no reliance could be placed on such extra-judicial confession: 1994 Cr.L.J. 3695 (P.&H.) (D.B.).

Where confession was made soon after the incident to four persons, *held*, the confession being spontaneous and there being no contradiction in between, confession was proved: 1979 W.L.N. (U.C.) 437 (Raj.).

Where the accused brought out from the well voluntarily stated in front of witnesses that she had, together with her two children, jumped into the well since her mind was not working properly, *held*, her confession could be relied upon to enter conviction: 1989 Cr.L.J. 415 (Ori.) (D.B.).

Where accused's brother attacked him in the midnight when he was asleep and when both were involved in a scuffle, the accused could lay his hand on a bamboo and aimed a blow at his brother but suddenly their father arrived there and intervened and the blow of bamboo hit him on his head and he succumbed to his injuries next day, *held*, mere omission on the part of the rustic and illiterate accused to mention the word 'accident' while making extra-judicial confession to the villagers, cannot be a ground for denying him whatever protection he is entitled under the law. Further, the statements of the persons to whom the alleged extra-judicial confession was made were substantially at variance with each other and also from their respective statements made to the Police; furthermore, these witnesses could not reproduce the exact words of the extra-judicial confession of the accused; conviction set aside: 1993 Cr.L.J. 3808 (Gau.) (D.B.).

If a father finds that his son has committed a crime and puts pressure on him by using strong language to disclose the truth and the son thereafter makes a statement incriminating himself, it cannot be said that a confession was extorted: (1988) 2 Crimes 290: 1989 Cr.L.J.

271: (1988) 1 Ori.L.R. 448: (1988) 65 Cut.L.T. 714 (D.B.).

Though extra-judicial confession is a weak type of evidence, it can be used for corroboration of other material on record; therefore, where the accused had made an extra-judicial confession that he kidnapped the girl, raped her and then killed her and after his arrest he gave information regarding place of incident and the body of the girl was recovered at his instance, *held*, there being sufficient corroboration to that confession, it could be acted upon: 1993 Cr.L.J. 1616 (Raj.) (D.B.).

Where the accused caught red-handed immediately after the happening of the incident, prayed for apology or begged pardon, *held*, extra-judicial confession, in such circumstance, could be relied on: 1991 Cr.L.J. 1636 (Bom.) (D.B.).

Where the prosecution witness to whom the alleged extra-judicial confession was made on sighting the accused with other witnesses asked about the deceased and persistently pressurised him by putting questions and in order to escape from the clutches of the said persons, the accused made a confession that he killed deceased girl by throttling, *held*, as said confession came into existence under pressure it could not be relied upon: 1994 Cr.L.J. 520(Mad.) (D.B.); 1989 Cr.L.R. 132 (Raj.).

Where it was found that the accused made the alleged extra-judicial confession when he was being beaten by the villagers and they asked him to name his associates, *held*, such a confession was made under threat and thus, was not legally admissible under S. 24: (1992-1) 40 B.L.J.R. 293; (1981) 52 Cut.L.T. 109.

Where, on the assumption that the accused had killed his father, the prosecution witness asked the accused as to why he killed his father and the accused replied that as he used to quarrel, he killed him, *held*, by no stretch of imagination this could be considered to be an extra-judicial confession made by the accused: 1993 Cr.L.J. 3364 (Bom.) (D.B.).

Where in the late hours of night, the deceased left his house and soon thereafter gun shots were heard and when his parents came out of the house to know what had happened, they saw the deceased in pool of blood and the accused, who was a neighbourer, fell in their feet saying that he had committed a mistake and in a provocative moment killed the deceased and in the F.I.R. also, which was registered only some minutes after the death of the deceased, fact of making said extra-judicial confession was mentioned, *held*, as the said confession had been made voluntarily without any duress, undue influence, coercion or any other suspicious circumstances and further as there was nothing to show that there was any animosity between the parents of the deceased and the accused so that they were interested in implicating him in a false case, his confessional statement could be relied upon: 1994 Cr.L.J. 736 (J.&K.) (D.B.).

Where the accused allegedly went to a person's house after covering a distance of 4, 5 Kms. on a rainy night after 11.45 P.M. and confessed the commission of crime and said person did not inform about the same to anyone or Police on meeting them, *held*, the story of making extra-judicial confession was clearly not believable: 1992 Cr.L.J. 3848 (Him. Pra.) (D.B.). *See* also 1982 M.P.W.N. 375.

Where there was nothing on record that the non-judicial confession made (expecting hushing up of the case) to a close relative of the accused and the deceased was extracted by threat, inducement or promise or that it was not voluntary and it also satisfied the rule of caution of being corroborated by evidence and other incriminating circumstances like unearthing of the dead body by the accused from his field, *held*, the confession could safely be relied on: 1975 Raj.L.W. 286 (D.B.).

Extra-judicial confession — Confession made to village Panch—No proof of any threat having been given—Confession admissible in evidence: 1960 B.L.J.R. 268: I.L.R. 39 Pat. 361.

Extra-judicial confession by the accused to the Pradhan of a village appointed under the U.P. Panchayat Raj Act on his promise to get the accused acquitted, is inadmissible in evidence and conviction cannot be based on such confession.

Pradhan being an *ex officio* member of Gaon Panchayat and Gaon Panchayat being entrusted with administration of Criminal and Civil Justice, Pradhan must be deemed to exercise his powers in the administration of Criminal and Civil Justice and hence, confession made on his promise is confession on the promise made by a person in authority and is inadmissible: 1969 All.W.R. (H.C.) 377: 1969 All.Cr. R. 245.

Where the accused made an extra-judicial confession before the Village Administrative Officer before being arrested by the Police, *held*, the said confessional statement in its entirety was admissible and valid. [1975 Cr.L.J. 774 (S.C.) and 1987 Mad.L.W. (Cr.) 375, Foll.]: 1993 Cr.L.J. 3113 (Mad.) (D.B.).

Extra-judicial confession made to quasi-official witness like Lambardar—Confession could not be discarded: 1969 Cr.L.J. 94 (Punj.).

Where the accused, a constable of Border Security Force, prosecuted for his wife's murder, made an extra-judicial confession to his wife's uncle and cousin and also to Inspector and the commandant stating that he had killed his wife, *held*, the extra-judicial confession made to his wife's uncle and cousin did not suffer from any legal infirmity as they were not persons in authority under S. 24: A.I.R. 1975 S.C. 898: (1975) 4 S.C.C. 33.

Where the alleged extra-judicial confession was made after about 20 days of the incident to a person who himself was an accused in another case, *held*, possibility of that witness deposing at the instance of the Police could not be ruled out and, thus, no reliance could be placed on it: A.I.R. 1994 S.C. 470: 1994 Cr.L.J. 142; (1992) 1 An.L.T. 21 (D.B) [Extra-judicial confession to a person of dubious character and not so intimate to the accused].

Where a murder accused, having escaped from judicial custody, was apprehended four years thereafter and produced before the Mukhiya by villagers for committing a theft; he asked the Mukhiya not to hand him over to the Police because he was hiding from the Police; and it was alleged that he stated that he was wanted in connection with a murder case, but of the two witnesses of the extra-judicial confession, one resiled in the Court; *held*, having been made after a long lapse of time, the confession could not be relied upon; it had to be discarded: A.I.R. 1987 S.C. 1507: (1987) 3 S.C.C. 480.

Where the prosecution version was that the Investigating Officer and the village *Pradhan* had apprehended the accused from his village, got him identified by other prosecution witnesses as the person last seen with the deceased, whereafter, the Investigating Officer went away for further investigation, leaving the accused with the *Pradhan* before whom the accused made the confession; and it was then that the accused made an extra-judicial confession to the *Pradhan*, *held*, it is incredible that the Investigating Officer would leave the accused without taking him into custody; obviously, the Investigating Officer had manipulated this artificial scenario to procure the extra-judicial confession; he could have very well taken the accused to a Judicial Magistrate and get the confession recorded under S. 164 of the Code of Criminal Procedure; that would have greater probative value and an unerring assurance of its truth to the Court. The 'extra-judicial' confession was hit by S. 26 as the accused was in Police custody: A.I.R. 1990 S.C. 2140: (1991) 1 S.C.C. 286: 1990 Cr.L.J. 2289; (1992) 2 Crimes 1050 (All.).

Where the Police was present in his village at the time when the accused was alleged to have made an extra-judicial confession before a person in an adjacent village and no reason was shown as to why the accused, instead of surrendering himself before the Police, should go to adjacent village, blurt out a confession before him and ask to produce the accused before the Police, *held*, no reliance could be placed upon it: A.I.R. 1974 S.C. 1545: 1974 Cr.L.J. 1010: (1974) 4 S.C.C. 747.

Where 8 out of 10 witnesses before whom alleged extra-judicial confession was made turned hostile and presence of one of the remaining two witnesses was found doubtful and as regards the remaining witness there were several contradictions, *held*, no reliance could be placed on such confession. [A.I.R. 1974 S.C. 1545: 1974 Cr.L.J. 1010; 1990 Raj. Cr.C. 34 and 1990 Cr.L.R. (Raj.) 111, Rel. on]: 1994 Cr.L.J. (N.O.C.) 143 (Raj.) (D.B).

Where accused's extra-judicial confession that he pushed the deceased, his mother-in-law, into river was corroborated by the evidence that (*i*) he chased the deceased, (*ii*) returned alone in drenched clothes after half an hour of chasing the deceased and (*iii*) he disappeared from the locality when dead body was recovered from the river, *held*, such an extra-judicial confession could certainly be relied on: 1992 Cr.L.J. 1682 (Ker.) (D.B.).

Where the accused was stated to have made extra-judicial confession to his uncle that after giving lathi blows he had locked the deceased and in the F.I.R. lodged on the basis of said confession, such injuries were specifically mentioned and further the nature of injuries stated to have been disclosed in the confession stood corroborated from the medical evidence, *held*, the accused could be convicted on the basis of such extra-judicial confession: A.I.R. 1995 S.C. 1943: 1995 Cr.L.J. 3225.

Where a witness alleged that the accused confessed to him of having killed the deceased, and he ran away just when the witness tried to ring up the Police and the witness did not inform the Police about the confession the same day, *held*, if the accused intended to run away, he would be the last person to confess before a stranger; such evidence of extra-judicial confession could not, thus, be relied upon: 1982 Cr.L.J. 2289 (Him. Pra.) (D.B.).

Where after committing the crime when the accused tried to run away he was apprehended by the people and soon thereafter he made a confession and no Police man had arrived at that time, *held*, that confession before the members of the public was wholly voluntary, not before any person in authority

and without any threat, promise or undue influence. It was rather spontaneous and it will not be hit by S. 24: (1987-1) 35 B.L.J.R. 127: 1986 Pat.L.J.R. 688 (D.B.).

Where a rustic woman, in apprehension of assault and mal-treatment at the village *panchayat* meeting, makes a confession, *held*, it is involuntary and not valid: (1985) 60 Cut.L.T. 346.

Except extra-judicial confession, nothing to connect the accused with the crime—Persons to whom he allegedly confessed were strangers to him and it was not prosecution's case that he sought their help from harassment of Police—*Held*, his conviction was not justified: 1993 Cr.L.J. 1679 (Mad.) (D.B.).

Where accused who was only about 14 or 15 years of age was kept in tied up condition till the Police arrived and in that state he made a confession, *held*, no reliance could be placed on such evidence of extra-judicial confession: 1992 Cr.L.J. 13 (Gau.) (D.B.).

Where there was no cogent evidence of the exact words used by the accused in his extra-judicial confession, there was no other evidence to establish the extra-judicial confession and the evidence disclosed that the accused was tied up with the leg of a cot and was not in mental equilibrium, *held*, the possibility of extracting the extra-judicial confession from his mouth could not be ruled out; no reliance could be placed on the confession: 1989 Cr.L.J. 1495 (Gau.) (D.B.).

Penal Code (1860), S. 302—Extra-judicial confession—Value of—Proof by person who had no reason to state falsity—Corroborated by circumstances proved by independent evidence—Accused, *held*, was rightly convicted under S. 302: 1962 All.L.J. 302: 1962 M.L.J. (Cr.) 429: (1962) 2 S.C.R. (Supp.) 203: A.I.R. 1967 S.C. 152.

Where the extra-judicial confessions that he had killed his wife, *inter alia*, by strangulating her with a leather belt were made by the accused before several witnesses, one confession having been made in the presence of two witnesses, and corroborated by the recovery of the belt at his instance, medical evidence as to the nature and location of injuries on her body and the evidence as to the state of the spot in the field where she was killed, *held*, the evidence was sufficient to enter conviction on the charge of murder: 1995 Cr.L.J. 2129 (Raj.) (D.B.).

Where the accused was said to have made extra-judicial confessional statement to his wife's relations that he had killed her and her daughter when the relations visiting his house had found him asleep with his daughter's dead body by his side, *held*, it is improbable that the accused having tried to cause disappearance of his wife's dead body would keep his daughter's corpse by his side, and when woken from sleep would confess before his wife's relations; the extra-judicial confession excluded from consideration: (1986) 1 Bom.C.R. 343.

An extra-judicial confession by one of the accused to the widow of another accused, whom she had been helping in making spears and other weapons, *held*, cannot be relied upon: A.I.R. 1979 S.C. 1127.

Where a prosecution witness stated that he had seen the accused, not known to the witness, running away and on being questioned, the accused stated that he had committed a mistake and killed his brother due to a quarrel; on cross-examination, the witness admitted not having narrated the story to any one though he had met numerous persons before he was called to the Police Station, *held*, it was difficult to believe that the accused would make a confession to a person not known to him at all; it would be wholly unsafe to accept such an extra-judicial confession: A.I.R. 1979 S.C. 1620.

Two accused, husband and wife—Each implicating himself or herself — Husband telling before villagers that he had killed the deceased—Wife also making statement before Police and Magistrate that she shot the deceased when he was trying to abduct her—No corroborating evidence—If statements of accused are not believed they should be rejected as a whole: 1969 Jab.L.J. 525: 1969 M.P.L.J. 524: 1969 Cr.L.J. 1291.

Where accused had made a statement that she stabbed the deceased, because he outraged her modesty, *held*, considered as a whole the statement did not tantamount to an extra-judicial confession for the reason that she had justified her action of stabbing the deceased in exercise of her right of private defence: 1989 Cr.L.J. 621 (Ori.) (D.B.).

Where prosecution witnesses to the extra-judicial confession had no reason to falsely implicate the accused, and the extra-judicial confession was also mentioned in the F.I.R., *held*, their evidence could be accepted as reliable: 1988 Cr.L.J. 1412 (Gau.) (D.B.).

Extra-judicial confession found to be unreliable: A.I.R. 1993 S.C. 1469: 1993 Cr.L.J. 1801; 1983 Cr.L.R. (Raj.) 52: 1983 Raj.L.W. 86; 1975 Raj.L.W. 279: 1975 W.L.N. 352: I.L.R. (1975) 25 Raj. 833.

Extra-judicial confession—Admissibility of — Statements of suspects recorded by

25. Confession to police officer not to be proved.—No confession made to a police officer[1], shall be proved as against a person accused of any offence.

1. As to statements made to a Police Officer investigating a case, *see* S. 162, Cr.P.Code.

---

person in authority—Circumstances corroborating statements, present—Statements, *held*, were admissible: 1964 M.P.L.J. 750: 1964 Jab.L.J. 724.

Evidence of oral confessions of guilt has to be received with great caution. There was nothing in the cross-examination of the witnesses to show that they had any motive for implicating the accused. The witnesses had not made any different statements previously. They had not been confronted with any and asked to explain variations. They did not state merely their conclusion about the guilt of the accused but also deposed to the actual words uttered by the accused. *Held*, that none of the considerations which tend to impair the value of this kind of evidence was present here and there was, thus, no reason to discard the statements of the witnesses that the accused admitted having killed his sister-in-law in the words deposed to by them: A.I.R. 1955 Madh. Bh. 43: 1955 Cr.L.J. 497.

Where the prosecution had relied on the testimony of a child eye-witness and oral extra-judicial confession of the accused and the circumstances did cast a serious doubt about the child's claim to being an eye-witness, *held*, it also destroyed the veracity of the extra-judicial confession; no case for conviction was made out: A.I.R. 1980 S.C. 1621: (1980) 1 S.C.C. 582.

Where all the witnesses, in whose presence the alleged extra-judicial confession was made, gave inconsistent versions, *held*, the story of making confession was a cooked up story and could not be relied: 1988 Raj.Cr.C. 65.

Extra-judicial confession coupled with discovery of dead body, *held*, such confession is reliable: 1982 M.P.W.N. 96.

Oral extra-judicial confession—Unsafe to deduce therefrom exact state of mind and meaning of confessor, when no adequate corroboration thereof is available—Accused not in full possession of mental faculties when she made confession—Confession that she took one bottle of poison and gave half bottle to her child to die—Only one bottle shown to have been seized—*Held*, discrepancy in corroboration though minor was material and confession being not adequately corroborated, could not be relied—Evidence—Appreciation of major and minor discrepancies—Evidence Act (1872), S. 3—Appreciation of evidence—Major and minor discrepancies: 1966 Mad.L.W. (Cr.) 82.

Where there was evidence of witnesses as to extra-judicial confession of accused that he had committed murder of deceased which was supported by incriminating circumstantial evidence to the effect that after death of deceased he was burried inside a pit in one of the rooms of the accused and also judicial confession made before Magistrate stating that he had mixed poison with liquor and given it to the deceased, *held*, the prosecution had proved its case against the accused: 1990 Cr.L.J. (N.O.C) 109 (Ori.) (D.B.).

Section 25—Synopsis.

1. Statement not amounting to confession.
2. Scope and applicability.
3. First information report by accused containing confessional statement.
4. "Police Officer" [*See* also S. 26, Note 4, *infra*].
5. Confession leading to discovery of fact.
6. "Accused of any offence" [*See* also S. 24, Note 4, *supra*; S. 27, Note 8, *infra*].
7. Miscellaneous.

---

1. Statement not amounting to confession.—The test to decide whether a statement is confession or not is to see whether the accused states that he has done something which amounts to an offence thereby accusing himself of committing of an offence: I.L.R. 17 Pat. 15: 19 Pat.L.T. 452.

A statement made by an accused to a Police Officer if it does not amount to a confession may nevertheless be used against him and more particularly if the statement made turns out to be false in the light of the other evidence in the case: 23 Cr.L.J. 193: A.I.R. 1922 All. 24. *See* also A.I.R. 1941 Lah. 82; I.L.R. (1959) Bom. 1244: (1959) 61 Bom.L.R. 715: A.I.R. 1959 Bom. 534.

Under S. 25 only confessions are excluded and not admissions not amounting to a confession. The accused, a Police Officer, made confession to his subordinate that he had heard a rumour about the murder and that certain persons had approached him to get the matter hushed up and had forced upon him a certain amount. *Held*, that statement as to acceptance of bribe being confession was inadmissible under S. 25 but the statement as to a rumour and approach of people to the accused to get the matter hushed up being admission was admissible: 193 I.C. 878: A.I.R. 1941 Lah. 82.

Self-exculpatory statements cannot be excluded from consideration: A.I.R 1959 All. 483. No statement that contains self-exculpatory matter can amount to a confession if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed. A confession cannot be construed as a statement by an accused "suggesting the inference that he committed" the offence: 66 I.A. 66: (1938-39) 43 Cal.W.N. 473: (1939) 1 M.L.J. 756: A.I.R. 1939 P.C. 47 (P.C.); A.I.R. 1941 Oudh 359; A.I.R. 1942 Lah. 37: I.L.R. (1943) Lah. 77.

All confessions are inculpatory admissions on the part of the maker thereof. To be a confession, admission should contain an acknowledgment of the guilt. Therefore, all confessions are admissions, but every admission may not be a confession: 1979 Bom.C.R. 680 (D.B.).

A statement made by the accused to the Police containing an admission of a gravely incriminating fact or even a conclusively incriminating fact, is not itself a confession. And not being a confession, it cannot be excluded by S. 25, Evidence Act. And if the statement happens to be made to the Police prior to the investigation in the case, then it is also not hit by S. 162, Cr. P. Code. Thus, it becomes admissible in evidence: A.I.R. 1956 Cal. 82: 1956 Cr.L.J. 509. *See* also A.I.R. 1958 Mad. 368. But *see* 36 I.C. 480: 17 Cr.L.J. 512 (Admission made by accused to Police is inadmissible against him under S. 25).

Every statement made to the Police by an accused person is not a confession and statements which are of an incriminating nature are admissible: 151 I.C. 437: A.I.R. 1934 Sind 100. Statement of an accused made at the Police Station against the co-accused is inadmissible and cannot be used as evidence against the co-accused: (1932) 34 Punj.L.R. 259: A.I.R. 1933 Lah. 167.

Confession by co-accused—Confession wholly self-exculpatory—Cannot be used against the other co-accused: 1965 Raj.L.W. 418: I.L.R. (1965) 15 Raj. 989: 1966 Cr.L.J. 441: A.I.R. 1966 Raj. 74.

A confession by an accomplice to an Excise Officer is inadmissible as a piece of substantive evidence as against the other accused, even if the latter had been tried alongwith the maker and a *fortiori* it is inadmissible in a separate proceeding against the other accused. But where the maker is examined as a witness on behalf of the other accused it is admissible for the purpose of impeaching his credit in respect of the later statement made by him in the evidence in Court, under the provisions of S. 155: I.L.R. 61 Cal. 967: (1933-34) 38 Cal.W.N. 1005: A.I.R. 1934 Cal. 616.

Where the accused was neither named in the F.I.R. nor named by any witness nor any property was recovered from his possession, *held*, he could not be proceeded against merely on the basis of statement of co-accused made to Police; that being a confession made to Police will not be admissible under Ss. 25 and 26: 1993 Cr.L.J. 1499 (Madh. Pra.).

2. Scope and applicability.—The prohibition enjoined by section is directed against proof of confessions made to a Police Officer. That section does not prohibit the proof of any other matter unconnected with the confession of the crime: I.L.R. (1956) Mys. 244: A.I.R. 1957 Mys. 50.

Confession made to the Police Officer is admissible to prove the ownership of property regarding which he is charged: 56 I.C. 62: 21 Cr.L.J. 414 (N.).

S. 25 applies to confession to any Police Officer though he may not be acting as such. The policy behind S. 25 is to make it substantive rule of law that confessions whenever and wherever made to the Police, or while in the custody of the Police to any person whomsoever unless made in the immediate presence of a Magistrate, shall be presumed to have been obtained under the circumstances mentioned in S. 24 and, therefore, inadmissible, except so far as is provided by S. 27 of the Act: 1993 Cr.L.J. 2374 (Ori.) (D.B.).

Section applies to every Police Officer and is not restricted to a regular Police Force:

I.L.R. 26 Cal. 569. S. 25 is very broad in its terms and would exclude any confession if made to a Police Officer, whether he is then acting as such or not: 1956 Cr.L.J. 217: A.I.R. 1956 Kutch 1.

Writer constable in a Police Station—Incriminating statement made to him not admissible evidence: 35 Cut.L.T. 94: 1969 Cr.L.J. 1172.

There is no bar to the admissibility of a confessional statement of an accused, unless it is shown that the same has been made to a Police Officer. The material words used in S. 25, Evidence Act and S. 162, Cr.P.Code, are the same and the intention in enacting the former is the same as in the case of the latter: I.L.R. (1964) Guj. 804: (1964) 5 Guj.L.R. 897: (1965) 2 Cr.L.J. 753: A.I.R. 1965 Guj. 302. *See* also 1966 Cr.L.J. 1275: A.I.R. 1966 Mad. 392.

For assessing acceptability of confession before any person except a Police Officer, the test is whether it is voluntary: 1993 Cr.L.J. 2374 (Ori.) (D.B.).

Nature of proceedings under—Confessional statement of accused is admissible: (1962) 1 Cr.L.J. 654 (Ker.).

Statement made by accused to Police during investigation—Where such statement is confession it is hit by section: 1969 Cr.L.J. 739: A.I.R. 1969 Goa 68.

A confession made by the accused during the course of investigation is inadmissible: 1994 Cr.L.J. (N.O.C.) 423 (Mad.).

Applicability—Conspiracy cases—Statements made by accused before investigation—S. 162, Cr.P.Code—Effect of: A.I.R. 1958 Mad. 368: 1958 Cr.L.J. 906.

Statements made during the investigation whether inculpatory or exculpatory, whether in the nature of confession or not, cannot be excluded from consideration by the Investigating Agency, while submitting a charge sheet. The bar of Ss. 25 and 27 applies to a stage when the case is being tried by a Court before whom the evidence is recorded: 1983 All.W.C. 289: 1983 All.Cr.R. 154: 1983 All.L.J. 309.

S. 27 apparently provides an exception to Ss. 25 and 26 but a careful reading shows that it is not really an exception to S. 25 at all but only an exception to S. 26, because S. 27 contains the phrase 'in the custody of a Police Officer,' which is found only in S. 26 and not in S. 25: I.L.R. (1961) 1 Punj. 33: (1962) 1 Cr.L.J. 186: A.I.R. 1962 Punj. 70.

In a trial for murder the prosecution proved the panchanama prepared by the Police the day the murder was committed and signed not only by the panchas but purporting to have been signed also by the accused persons. That document was a record which was a complete confession of the crime from the beginning to the end, by all the accused persons. *Held*, that this was highly irregular as the provisions of the Evidence Act and of the Cr.P.Code had not been observed: A.I.R. 1957 S.C. 737.

A confession made by an accused to the Police is inadmissible; and a conviction based on such a confession is illegal and liable to be set aside: 1981 Cr.L.J. 1235 (P.&H.); 1978 Mah.L.J. 244; 1982 Jab.L.J. 300.

Ss. 25 *and* 31—Conviction based on admissible portion of confession by accused—Conviction of accused not based merely on his statement under S. 342, Cr.P.Code, but also other evidence including admissible portion of confession, as a whole—Procedure adopted by Court is not open to legal objection: (1963) 76 Mad.L.W. 722.

Confession—Contained in a letter addressed by an accused person to a Police Officer—S. 25 not attracted—Letter is not admissible in evidence: (1974) 2 Chand.L.R. 107 (S.C.).

Where, though the accused was alleged to have made a confessional statement to a Police Officer and also to an Executive Magistrate under S. 176, Cr.P.Code but the latter was not tendered in evidence and thus, what was ultimately left was the confessional statement made to the Police Officer, *held*, the same was hit by S. 25; therefore, the accused could not be convicted on the basis of information given by him to a Police Officer: 1993 Cr.L.J. 388: (1993) 1 An.L.T. (Cr.) 174: (1992) 3 Karn.L.J. 763 (D.B.).

Where a confession was made to the villagers at large, the mere fact that a Policeman happened to be present in the crowd would not make the confession inadmissible in evidence: 1934 All.L.J. 143: A.I.R. 1934 All. 132; 1978 Jab.L.J. 488: 1978 M.P.L.J. 599 (D.B.); 1983 Cr.L.J. 1559: (1982-83) 87 Cal.W.N. 723: (1983) 2 Cal.H.N. 26: (1983) 2 Crimes 499; 1987 Cr.L.J. 1172: (1987) 2 Crimes 870: (1987) 1 Bom.C.R. 709: 1986 Mah.L.J. 1055.

Confession made to a private individual in presence of Chaukidar—Admissibility of: A.I.R. 1934 Oudh 222.

Where a confession is made by the accused to some villagers, the fact the chowkidar was also present there would not

render the confession inadmissible on that ground. The accused could not be said to be in the custody of chowkidar: 1947 All.L.J. 265: A.I.R. 1948 All. 7.

S. 25 refers to confessions made to a Police Officer and not to confessions made in the hearing of Police Officer. If a confession is made to a person who is not a Police Officer, S. 25 would not apply to it even though a Police Officer may have overheard it. Of course, if it is made to a person who is not a Police Officer but while an accused is in custody of the Police, S. 26 may apply to it unless it is made in the immediate presence of a Magistrate.

Held, that the confession made to a member of C.R. Police at a time when he was taking the accused to the quarter-guard under order of Havildar is excluded by both Ss. 25 and 26 of the Evidence Act as it was made to a member of the C.R.P. Force while the accused was in his custody: A.I.R. 1956 Kutch 1: 1956 Cr.L.J. 217.

The prohibition contained in S. 25 applies only to confessions which are to be proved against the accused, that is, in support of the prosecution case, and does not apply to statements on which the accused himself wishes to rely in connection either with his conviction or his sentence: (1941) 43 Punj.L.R. 672: A.I.R. 1942 Lah. 37.

S. 25 only lays down that a confession made by the accused to a Police Officer cannot be used against the accused; it does not, thus, bar the use of such confession in favour of the accused; it is a well settled proposition of law. Thus, where the accused had immediately after murdering his wife was first to report at the Police Station and *inter alia* stated that his wife and her mother were selling their flesh for money, *held*, this statement could be used in the accused's favour: 1975 Raj.L.W. 370: I.L.R. (1975) 25 Raj. 929: 1975 W.L.N. 508 (D.B.).

The prohibition contained in S. 25 is of a general nature. It forbids the proof at a trial of a criminal offence of any admission of any offence made by the accused to a Police Officer, and it makes no difference whether the offence is one of which the accused can be convicted at the trial at which it is sought to prove the confession made to a Police Officer. The admissibility of a confession does not depend upon the offence charged. A confession made by an accused to the Police of an offence of culpable homicide not amounting to murder is not admissible in a trial of murder on the same fact: A.I.R. 1941 Sind 134: I.L.R. (1941) Kar. 292.

The prohibition under S. 25 is of a general nature; it is not confined to the confession for the offence the accused is charged with; thus, where the accused is charged with murder, a confession for a lesser offence is also inadmissible. [(1964) 2 Cr.L.J. 744 (S.C.), Rel. on]: 1982 Cr.L.J. 534: 53 Cut.L.T. 305 (D.B.).

A confession made to the Police in the course of the investigation of a crime is inadmissible in evidence, though the confession relates to another crime. The whole spirit of S. 25 is to exclude confessions to the Police, and the moment a statement is found to amount to a confession, it does not matter at all of what crime it is a confession: A.I.R. 1937 Mad. 209: (1937) 1 M.L.J. 154. *See* also I.L.R. (1942) Mad. 77: (1941) 2 M.L.J. 209.

S. 25 merely forbids the use of a confession made to a Police Officer in a trial of the accused person for having committed an offence. The statement would be admissible in a civil case brought against the accused for recovery of the article or for damages for trespass and the like. Proceedings under S. 517, though they occur in the Code of Criminal Procedure are really in the nature of proceedings analogous to civil proceedings in which the question to be determined is to whom the possession of certain articles should be given. These proceedings are proceedings, in which the guilt of the accused person is not to be determined but are proceedings which take place after the main proceedings are over. In that proceedings the Magistrate is perfectly right in taking into consideration the statements of the accused which led to the recovery of the property in determining the question as to who was entitled to the possession of that property: 1954 Cr.L.J. 155: A.I.R. 1954 Punj. 27.

The guidelines for recording confessions in pre-indictment interrogation under S. 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 to ensure that they are not tainted with vice but strictly conform to well recognised principles and fundamental fairness are: (*1*) they should be recorded in a free atmosphere and as narrated by the accused in the language he spoke; (2) the accused should be produced, alongwith the original confession, in the concerned Court without unreasonable delay; (3) the concerned Court should scrupulously record the accused's statement, if made, get it signed by him and if he complains of torture, he should

be directed to be produced for medical examination before a medical officer not lower in rank than of an Assistant Civil Surgeon; (4) the Police Officer seeking custody of an accused for pre-trial interrogation from judicial custody must file his affidavit explaining not only the reason for seeking such custody but also for the delay, if any, in moving the Court; and (5) if the accused on administration of the statutory warning asserts his right not to make any statement, the Police Officer must respect his right and not compel him to make any statement. The guidelines recommended for incorporation in the Act or the Rules framed thereunder: 1994 Cr.L.J. 3139 (S.C.).

As per S. 15(1) of the Terrorist and Disruptive Activities (Prevention) Act, 1987, a confession can be reduced into writing or recorded on any mechanical device like cassettes, tapes or sound tracks from which sounds or images can be reproduced; since they can be tampered, tailored, linkered, edited and erased, there must be some severe safeguards to be scrupulously observed while recording such confessions to prevent, to some appreciable extent, the possibility of extorting a false confession; S. 15(2) enjoins upon the Police Officer recording such confessions to explain to the confessor that he was not bound to confess and give to him a statutory warning that his confession might be used as evidence against him: 1994 Cr.L.J. 3139 (S.C.).

A statement by an accused, arrested on a charge of unlawful possession of opium to Excise Officers, the Police servants remaining in a room in another part of the house, is still a statement made while in Police custody and therefore, inadmissible: 39 I.C. 977: (1916-17) 21 Cal.W.N. 694.

Statement by accused on being halted, to Police Officer—It is not admissible as confession being hit by S. 25—Such statement is not admissible under S. 26, being made in immediate presence of Magistrate, where it was not recorded in the manner laid down by S. 164, Cr.P.Code: 1954 Cr.L.J. 230: A.I.R. 1954 S.C. 15.

Interpretation of Statutes — Maxim *contemporanea expositio* — Its applicability to comparatively modern statute — It cannot be applied to S. 25, Evidence Act. Per *Subba Rao* and *Mudholkar, JJ.*—The maxim *contemporanea expositio* as laid down by Coke is applied in construing ancient statutes but not in interpreting Acts which are comparatively modern. The rule of construction which ought to be applied to a statute either ancient or modern is the same and that is to ascertain the intention of the Legislature. However, it would be inappropriate to attach wide meaning to the words used by the Legislature in a law made in remote ages when society was static. The position would be different with respect to words used in a law made in a modern progressive society in which the frontiers of knowledge are fast expanding. The maxim laid down by Coke, cannot therefore, properly be applied for construing the language used by the Legislature in S. 25 of the Evidence Act: (1964) 2 S.C.R. 752: A.I.R. 1964 S.C. 828.

S. 25—*Ss.* 24 *to* 30—Confession—What is—Law relating to—Confession or admission admissible against maker unless excluded by some provision of law—Confession to Police whether in course of investigation or otherwise and confession made while in Police custody—How far protected: 1966 Cr.L.J. 100: A.I.R. 1966 S.C. 119.

Confession to Police Officer, *held*, cannot be used even for proving motive of accused. [A.I.R. 1966 S.C. 119, Foll.]: 1982 Cr.L.J. 534: 53 Cut.L.T. 305 (D.B.).

Police Officer forming raiding party on receipt of information and seizing opium bags—Admission by accused of ownership of goods—Admissibility. *See* (1972) 2 Sim.L.J. 152.

Where in a prosecution for violation of the Motor Spirits and High Speed Diesel Oil (Maintenance and Regulation of Supplies) Order, 1979, there was no oral or documentary evidence even remotely suggesting the involvement of the accused in the offence but much reliance was placed on an alleged confession made to a Police Officer, *held*, the same was violative of S. 25 and could not be accepted as substantive evidence: 1990 Cr.L.J. 100 (Ker.).

The phraseology employed by S. 25 and S. 26 contains negative and positive injunctions with regard to the confessions by accused person and is indicative as to when and against whom such evidence is admissible or is not admissible: 1979 Bom.C.R. 680 (D.B.).

Admission of a confession in evidence does not complete the judicial process; it is not a plea of guilt but only a light weight evidentiary document: (1992) 58 E.L.T. 192 (Cal.).

An unambiguous, extra-judicial confession, has a high probative value; if free from suspicion and suggestion of falsity, it is

admissible. But the Court has to be satisfied that the confession is voluntary, is not obtained by inducement, threat or promises envisaged in S. 24 and there are no suspicious circumstances to attract the bar under Ss. 25 and 26. The Court has also to ascertain that the confession is not inspired by improper or collateral consideration, motive or desire to circumvent the law; it must also scrutinise all relevant facts like the person to whom it is made and the time, place and other circumstances and finally the actual words used by the accused: A.I.R. 1990 S.C. 2140: 1990 Cr.L.J. 2289: (1991) 1 S.C.C. 286. *See* also 1973 Sim.L.J. 103.

An admission of a fact however incriminating, but not by itself establishing the guilt of the maker of such admission, would not amount to confession within the meaning of Ss. 24 to 26. Thus, statement made by the accused to the doctor where he was taken by the Police after arrest that it was the deceased who had caused the injury to him, *held*, it was an admission of a fact, no doubt of an incriminating fact, and which established the accused's presence in the deceased's room but which clearly was not barred under S. 26. [(1970) 2 M.L.J. 371, Affirmed]: A.I.R. 1972 S.C. 66: 1972 Cr.L.J. 11: (1972) 1 S.C.R. 450; 1984 M.L.J. (Cr.) 202: 1984 Mad.L.W. (Cr.) 23: 1984 Cr.L.J. (N.O.C.) 193; 1986 Cr.L.J. 1865: (1987) 1 Ker.L.T. 391 (D.B.); A.I.R. 1988 Ker. 1 (F.B.); (1993) 2 Ker.L.J. 11: 1994 Cr.L.J. 322 (D.B.). *See* also 1982 Cr.L.J. 2102 (Ker.); 1983 Cr.L.J. 1578 (Gau.); 1991 Cr.L.J. 1793 (Karn.) (D.B.).

Any incriminating statement which may even go to establish the presence of accused at the time of the incident will amount to a confession and, hence, hit by S. 25. [20 Guj.L.R. 847 and A.I.R. 1966 S.C. 119, Rel. on]: (1985) 26 Guj.L.R. 136.

Where the accused stated before the Police that while sleeping with his deceased wife at night, he quarrelled with her and killed her, *held*, the prosecution could not rely on the information about the accused sleeping with his wife that night; ultimately it would be the vital link in the chain of circumstances to establish that there was then none else other than the accused, his wife and their child in the house and none else could commit the murder; this part of information would certainly be hit by the bar under S. 25. [1981 Cr.L.J. 1235 (P.&H.), Foll.]: 1993 Cr.L.J. 388: (1993) 1 An.L.T. (Cr.) 174: (1992) 3 Karn.L.J. 763 (D.B.).

3. First information report by accused containing confessional statement.—*See* also S. 17, Note 8; S. 21, Note 6; S. 24, Note 3, *supra* and S. 27, Note 8, *infra*. If the first information of an offence is given by the accused to a Police Officer, and that information admits his own guilt, it is a 'confession', which cannot be proved under S. 25: (1934) 36 Bom.L.R. 1117: I.L.R. 59 Bom. 120: A.I.R. 1935 Bom. 26. *See* also (1932) 34 Punj.L.R. 1000: A.I.R. 1933 Lah. 899. As S. 25 stands at present confessions made in a first information report must be excluded from its operation. However, the statement made in the course of such an inadmissible confession are not excluded for the purposes of S. 27: I.L.R. (1940) Nag. 679: A.I.R. 1941 Nag. 86.

First information report by accused amounting to a confession should be excluded from consideration: 1967 Jab. L.J. 504.

Confessional statement made to Police Officer which formed the basis of the first information report is not admissible in evidence, being hit by S. 25: A.I.R. 1972 S.C. 922; I.L.R. (1971) 21 Raj. 1274: 1971 Raj.L.W. 589; (1990) 2 Karn.L.J. 242.

The inculpative statement made by an accused even though it forms part of the first information report in the case is inadmissible in evidence. [A.I.R. 1966 S.C. 119, Foll.]: 1995 Cr.L.J. 61: (1994) 1 Ker.L.J. 696 (D.B.).

A non-confessional report lodged by an accused may, in the case in which he figures as a complainant, attract only the provisions of the law of evidence as to corroboration or contradiction and may be no more admissible than former statement of a witness, yet in the case in which he figures as an accused, it is admissible against him as his admission under S. 21. The bar under S. 162, Cr.P.Code or S. 25 of the Evidence Act would not apply to it: 1994 M.P.L.J. 306 (D.B.).

The contents of the first information report given by the accused, which has not been denied by him, *held*, is not admissible in evidence in view of S. 25: (1985) 59 Cut.L.T. 93.

Where a first information report made by the accused contains confessional statements, the whole of the first information report need not be excluded from admission. The confessional part of the first information report alone should be excluded: A.I.R. 1950 Ajmer 75, following A.I.R. 1941 Nag. 86.

Where the first information report is made by the accused himself so much of it which amounts to a confession by him is not admissible in evidence against him in view of the provisions of S. 25 of the Evidence Act. But those portions of the report which do not relate to the commission of the crime itself, as

for instance which are introductory or narrate the motive and the opportunity for the offence, the presence of certain witnesses, or give information about facts which are admissible under S. 27 of the Evidence Act would be relevant evidence in the case: A.I.R. 1952 Pepsu 98: I.L.R. (1952) Pepsu 186.

If the first information report made by an accused person contains facts relating to motive, preparation and opportunity to commit the crime, with which he is charged, and the facts recited therein are self-inculpatory in the sense that the narrative describing the relations between the accused and the deceased gives the motive for the crime with which the accused is charged, the whole statement must be treated as a confession made to a Police Officer and would be hit by S. 25 of Evidence Act. A narrative disclosing strained relations between the accused and the deceased and referring to an event that occurred several days before the occurrence in the first information report given by the accused, being a statement disclosing motive for the crime is inadmissible under S. 25 of the Evidence Act: 1964 All.L.J. 285: (1964) 2 Cr.L.J. 372: 1965 All.W.R. (H.C.) 9: 1965 All.Cr. R. 42: A.I.R. 1964 All. 447.

A first information report lodged by a person who subsequently becomes the accused is admissible against its maker; but if it contains a confession, the entire report is rendered inadmissible. [A.I.R. 1917 P.C. 25; A.I.R. 1964 S.C. 1850 and 1966 Mah.L.J. 244, Rel. on]: 1978 Cr.L.J. 891: 1978 Mah.L.J. 244; 1979 W.L.N. (U.C.) 252 (Raj.) (D.B.).

If an investigation starts on the basis of the complaint given by a person who later becomes the accused in the case, that information cannot be used for any purpose. But this rule has no application, where the statement made by the accused before the actual F.I.R. was even prepared, did not lay down any complaint in connection with the occurrence in which the deceased was killed and in fact did not refer to the deceased being injured, but related to the injuries sustained by the accused in an incident of the previous day, when he was assaulted and the statement is neither a confession nor one made to Police Officer in the course of the investigation of the occurrence, S. 25, Evidence Act and S. 162, Cr.P.Code do not bar its admissibility. The report is an admission by the accused of certain facts which have a bearing on the questions to be determined by the Court, namely, whether the earlier incident as spoken to by an eye-witness had, in fact, taken place and whether the other accused or others had sustained injuries as a result of the incident. It will also help in showing whether the statement of the accused denying altogether the earlier incident is true or not. Admissions of this nature are admissible in evidence under S. 21 of the Evidence Act and are proveable against them: 1965 Ker.L.T. 292: 1965 Ker. L.J. 412: I.L.R. (1965) 2 Ker. 33: (1965) 1 Ker.L.R. 306: (1965) 2 Cr.L.J. 647: A.I.R. 1965 Ker. 248.

Where the first information report is given by an accused himself to a Police Officer and amounts to a confessional statement, proof of the confession is prohibited by S. 25. No part of the confessional statement can be proved or received in evidence, except to the extent it is permitted by S. 27 of the Evidence Act. The first information report recorded under S. 154, Cr.P.Code is not a substantive piece of evidence. It may be used to corroborate the informant under S. 157 of the Evidence Act or to contradict him under S. 145 of the Evidence Act in case the informant appears as a witness at the trial. Where the accused himself lodges the first information report, the fact of his giving the information to the Police is admissible against him as evidence of his conduct under S. 8 of the Evidence Act and to the extent it is non-confessional in nature, it would also be relevant under S. 21 of the Evidence Act but the confessional part of the first information report by the accused to the Police Officer cannot be used at all against him in view of the ban of S. 25: (1994) 1 An.L.T. (Cr.) 695 (S.C.).

The entire first information report is not inadmissible in evidence merely because it has been made by an accused person. Parts of it which can be properly separated from the confessional part can and should be admitted in evidence as first information: 1952 Raj.L.W. 269: I.L.R. (1952) 2 Raj. 93.

F.I.R. by accused—Not admissible against makers: 1968 Cr.L.J. 15: A.I.R. 1968 All. 37.

First information report—Value and use of—First information by accused containing confession—How far admissible in evidence: 1966 Cr.L.J. 100: A.I.R. 1966 S.C. 119.

A statement of an accused amounting to a confession made at a Police Station and taken down as first information report in the case, is inadmissible against him as it amounts to a confession to a Police Officer. There is, however, no legal bar to such a confession being used in his favour: 48 Cr.L.J. 977: A.I.R. 1948

Lah. 43, followed in I.L.R. (1956) Mys. 244: A.I.R. 1957 Mys. 50.

A confession made by an accused to a Police Officer cannot be used against an accused but may be used in favour of the accused. Where the accused was found guilty of murder and the only extenuating circumstances are found in a confession made by him to the Police which was also the first information in the case, the motive and extenuating circumstances appearing in the confession, the Court is entitled to use the confession in favour of the accused: (1951) 2 M.L.J. 605: A.I.R. 1952 Mad. 586.

Statement to Officer recording F.I.R.—Accused charged with rash and negligent driving and causing death—First information lodged by himself in the Police Station—Statement made by him to the officer recording the information, that he had driven the lorry, would be a confession made to a Police Officer and would be inadmissible in evidence: (1963) 76 Mad.L.W. 724: 1963 M.L.J. (Cr.) 558: (1963) 2 M.L.J. 473: (1964) 1 Cr.L.J. 241.

Where the truck driver, after the accident, went to the Police Station and stated that while he was driving the truck, a cyclist was injured and people had collected and he had rushed to the Police Station, *held*, though the confessional part of his statement could not be considered admissible evidence because of S. 25, the fact of the driver having gone to and given information about the accident at the Police Station, was admissible under S. 8 as his conduct: (1990-2) 31 Guj.L.R. 785: 1990 Cr.L.J. 2500. *See* also (1993) 1 An.W.R. (N.R.C.) 27.

Where the accused lodged a report at the Thana that he committed the murder of his wife, *held*, such a statement being a confessional statement, is hit by S. 25. [A.I.R. 1964 S.C. 1850, Disting.]: 1973 All.W.R. 142: 1973 All.L.J. 251: 1973 Cr.L.J. 1478. *See* also 1979 W.L.N. (U.C.) 252 (Raj.) (D.B.).

An F.I.R. lodged by the accused himself that he had murdered his wife because of her bad character and that her dead body and the *khurpi* with which he killed her were lying in his field which were later on recovered, *held*, the F.I.R., being a confession made by the accused to the Police, was inadmissible under S. 25; it could not be used to prove the accused's motive; however, the part which led to recovery of the dead body and the *khurpi* was admissible under S. 27: 1977 Cr.L.J. 358: 1977 All.Cr.R. 29 (D.B.).

4. "Police Officer".—(*See* also S. 26, Note 4, *infra*). The expression 'Police Officer' in S. 25 is used in its usual and more comprehensive meaning, and includes Police Officers of the Native States as those of British India: 43 I.C. 111: 14 Nag.L.R. 192. The term 'Police Officer' in this respect must be construed not in any strict technical sense but according to its most comprehensive and popular meaning: 71 I.C. 360: 24 Cr.L.J. 136 (Pesh.). Hence, in common parlance and among the generality of people, a Sub-Divisional Magistrate cannot be taken to be a Police Officer. He is a member not of the Police service but of the Provincial Civil Service and much of his work is judicial: 150 I.C. 991: A.I.R. 1934 Pat. 256.

A confession made under S. 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 can be recorded either by a Police Officer not lower in rank than of a Superintendent of Police under that section or by a (Metropolitan, Judicial, Executive or Special) Magistrate under S. 164(1) of the Cr.P.Code, 1974 read with S. 20(3) of the former Act: 1994 Cr.L.J. 3139 (S.C.).

'Police Officer'—Interpretation of—Test to be applied in determining meaning—Bihar and Orissa Excise Act (II of 1915), Ss. 77(2) and 78—Notification No. 470-F, dated 15th January, 1919 — Inspector or Sub-Inspector of Excise empowered to investigate any offence punishable under Bihar Act—Confession recorded by such Inspector of Excise—(Per *Subba Rao* and *Mudholkar, JJ.*). It is confession to Police Officer and hence not admissible in evidence — It is also inadmissible under S. 162, Cr.P.Code.

Per *Subba Rao* and *Mudholkar, JJ.*—The words 'Police Officer' to be found in S. 25, of the Evidence Act are not to be construed in a narrow way but have to be construed in a wide and popular sense. Those are, however, not to be construed in so wide a sense as to include persons on whom only some of the powers exercised by the Police are conferred. What is pertinent to bear in mind for the purpose of determining as to who can be regarded a 'Police Officer' for the purpose of S. 25, Evidence Act, 1872, is not totality of the powers which an officer enjoys but the kind of powers which the law enables him to exercise. The test for determining whether such a person is a 'Police Officer' for the purpose of S. 25 of the Evidence Act would be whether the powers of a Police Officer which are conferred on him or which are exercisable by him because he is deemed to be an Officer-in-

Charge of Police Station establish a direct or substantial relationship with the prohibition enacted by S. 25, that is, the recording of a confession. In other words, the test would be whether the powers are such as would tend to facilitate the obtaining by him of a confession from a suspect or a delinquent. If they do, then it is unnecessary to consider the dominant purpose for which he is appointed or the question as to what other powers he enjoys.

Unlike the Customs Officer, on whom are conferred by the Sea Customs Act, 1878, powers of a limited character which are analogous to those conferred upon Police Officers, the powers of investigation into offences which a Police Officer enjoys are conferred upon Inspectors or Sub-Inspectors of Excise by the Bihar and Orissa Excise Act. It is the possession of those powers which enables Police Officers and those who are deemed to be Police Officers to exercise a kind of authority over the persons arrested which facilitate the obtaining from them statements which may be incriminating the persons making them. The law allows the Police Officer to obtain such statements with a view to facilitate the investigation of the offences. But it renders them inadmissible in evidence for the obvious reason that a suspicion about voluntariness would attach to them. It is the power of investigation which establishes a direct relationship with the prohibition enacted in S. 25. Therefore, where such a power is conferred upon an officer, the mere fact that he possesses some other powers under another law would not make him anytheless a Police Officer for the purpose of S. 25. Hence, a confession made by a person accused of an offence under the Bihar and Orissa Excise Act (II of 1915) and recorded by an Excise Inspector, who is empowered under Notification No. 470-F, dated 15th January, 1919, to investigate any offence under the Act, is inadmissible by reason of the provisions of S. 25, Evidence Act, 1872. For another reason also the confession made to an Excise Sub-Inspector has to be excluded from the evidence because it is a statement made during the course of Investigation to a person who exercises the powers of an Officer-in-charge of a Police Station. Such statement is excluded from evidence by S. 162, of the Cr.P.Code except for the purpose of contradiction.

Per *Raghubar Dayal, J.* (*Contra*).—The Excise Inspector and Sub-Inspector empowered by the State Government under S. 77(2) of the Bihar Act are not Police Officers within the meaning of S. 25 of the Evidence Act. Further, the aforesaid officers cannot be treated to be Police Officers for the purposes of S. 162 of the Cr.P.Code. S. 162, does not confer any power on a Police Officer. It deals with the use which can be made of the statements recorded by a Police Officer carrying out investigation under Chap. XVI of the Code. The investigation which the aforesaid Excise Officer conducts is not under Chap. XVI of the Code, but under the provisions, of the Bihar and Orissa Excise Act and therefore, this is a further reason for the non-applicability of S. 162, Cr.P.Code to any statement made by a person to an Excise Officer during the course of his investigation an offence under the Act: (1964) 2 S.C.R. 752: A.I.R. 1964 S.C. 828.

The ratio of (1966) 3 S.C.R. 698 is that even if an Officer under a Special Act is invested with most of the powers of an Officer-in-charge of a Police Station investigating a cognizable offence, he does not thereby become a 'Police Officer' within the meaning of S. 25 unless he is further empowered to file charge-sheets under S. 173 of the Code of Criminal Procedure; statements made before him by a person arrested or against whom an enquiry is pending are not hit by S. 25: A.I.R. 1970 S.C. 1065: 1970 Cr.L.J. 898: (1983) 13 E.L.T. 1427; (1984) 15 E.L.T. 289: 1984 Cr.L.J. 134: 1983 Mad.L.W. (Cr.) 289 (F.B.).

The definition of 'Police Officer' occurring in the Indian Police Act V of 1861 is not exhaustive and in the absence of a statutory definition and apart from all authority, one would be tempted to say that a Police Offier is a person whom any statute or other provision of law calls such, or, on whom it confers all or substantially all the powers and imposes on him the duties of Police Officer. If he is expressely called a Police Officer there is no difficulty whatsoever. If he is not so called, then the next step to ask is—What does the law require him to do? What are the duties imposed on him and what are the powers conferred on him?: (1976) 42 Cut.L.T. 80.

In order to ascertain whether officers empowered to inquire into offences are 'Police Officers' within meaning of S. 25, the Court should examine closely and thoroughly the powers, disabilities, functions and duties of the officers under the relevant Act, even though they may not have been described as 'Police Officers': (1975) 77 Bom.L.R. 295: 1975 Cr.L.J. 1891 (D.B.), affirmed in A.I.R. 1981 S.C. 379: (1980) 4 S.C.C. 600.

Police Officer includes person invested with Police powers: I.L.R. 8 Rang. 52: A.I.R. 1930 Rang. 227 (Assistant Superintendent of Pakokku Hill Tracts exercising the powers of Additional District Magistrate); A.I.R. 1946 Mad. 430: (1946) 1 M.L.J. 368. (Special Officer of Commercial-tax Department empowered under Hoarding and Profiteering Prevention Ordinance). Food grains inspector under the U.P. Food Grains Control Order is not a 'Police Officer' within the meaning of S. 25 and, hence, confessions made to him cannot be said to be inadmissible: 1947 All.W.R. (C.C.) 126: A.I.R. 1948 Oudh 81.

As a Home Guard under Ss. 4 and 5 of the Orissa Home Guards Act, 1961 and R. 17 framed under that Act essentially performs Police duties, an extra-judicial confession made before him while he is performing his duties, *held*, is hit by S. 25; his evidence of confession is inadmissible: 1989 Cr.L.J. 1566 (Ori.) (D.B.).

Confession made to a Police Officer in Nizam's Dominions is not admissible in evidence: 19 Cr.L.J. 79; 43 I.C. 111: 19 Nag.L.R. 192.

There must be some communication to a Police Officer for the purpose of showing that the statement was made to a Police Officer. It is such communication which makes it tainted evidence. Therefore, in each case the question must be examined whether the statement was in fact made to a Police Officer or not: I.L.R. (1964) Guj. 954: (1965) 1 Cr.L.J. 30: (1965) 6 Guj.L.R. 129: A.I.R. 1965 Guj. 5.

Ss. 25 *to* 27.—The words 'Police Officer' are used in Ss. 25 and 26 and also in the proviso to S. 27 and they must have the same wide meaning in all those sections. They must cover a person who is authorised to exercise the powers of a Police Officer and would not necessarily mean a person who is in charge of the Police Station or who is empowered to make an investigation. If the statement to any such Police Officer is hit under S. 25 or S. 26 as tainted evidence the principle underlying S. 27, *viz.*, that the evidence relating to confessional or other statements made by a person while a person is in the custody of the Police is tainted and, therefore, inadmissible but if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted must apply to all such statements. This would on the one hand shut out all evidence of a tainted nature while on the other hand permit the proof of so much of the information, whether it amounts to a confession or not which distinctly leads to the discovery of a fact on the ground that its truth is assured: I.L.R. (1964) Guj. 954: (1965) 1 Cr.L.J. 30: (1965) 6 Guj. L.R. 129: A.I.R. 1965 Guj. 5.

According to the provisions of the Karnataka Village Defence Parties Act and the rules framed thereunder, a Dalapathi under the Act has virtually to discharge the duties of a Police Officer and, therefore, the confessional statement made before him is inadmissible in evidence under S. 25. However, the fact of the accused approaching Dalapathi with blood-stained axe and blood-stained clothes is clearly admissible as evidence of his conduct under S. 8: (1990) 2 Karn.L.J. 242: 1991 Cr.L.J. 458 (D.B.). *See* however 1988 Cr.L.J. (N.O.C.) 53 (Gau.); 1988 Cr.L.J. 573 (Gau.) (D.B.) [Members of the Village Defence Organisation are not Police personnel; extra-judicial confession made to them is not hit by S. 25].

Ss. 25 *and* 26—Excise offence—Midnight raid in village—Witnesses from place away from village called—S. 103 does not strictly apply—Non-compliance with its strict provision does not nullify or vitiate proceedings—Police witnesses as a class not discreditable under Ss. 25 and 26, Evidence Act: (1964) 66 Punj.L.R. 81.

Mere power to investigate into offences committed by subordinate does not attract bar as to admissibility of confessions, enacted under S. 25—Confession made by accused, a postal employee, to officer authorised to investigate into departmental offences and irregularities committed by subordinates in Postal Department—*Held*, Officer was not exercising same powers as Police Officer-in-charge of detection in context of provisions of Cr.P.Code and admissibility of statement in evidence was not barred under S. 25: (1968) 1 Mys.L.J. 457: 1968 M.L.J. (Cr.) 226.

The powers conferred upon a Regional Inspector under the Mines Act are similar to those of Customs Officer under the Sea Customs Act which are merely analogous to those of Police Officer under Cr.P.Code, and not identical. Hence, a Regional Inspector under the Mines Act is not a Police Officer for the purposes of S. 25, Evidence Act: 1967 Cr.L.J. 1684: A.I.R. 1967 Pat. 441.

The test for determining whether an Officer is to be deemed a Police Officer, as laid

down by the Supreme Court is, whether he is invested with all the powers of a Police Officer *qua* investigation of an offence including the power to submit a report under S. 173, Cr.P.Code. An Inspector of Mines not having the power to arrest any person or to submit a report under S. 173, Cr.P.Code, cannot be considered to be a Police Officer within S. 25 although under S. 7 of the Mines Act, 1952, he has power of examination, enquiry, search and seizure and he can also make a complaint for an offence under that Act.

A statement made to Inspector of Mines during an enquiry into an accident in the mine out of which the complaint arose is not inadmissible in evidence, since the Inspector is not a Police Officer. [A.I.R. 1970 S.C. 940; A.I.R. 1970 S.C. 1065, Appl.; 1973 Cr.L.J. 290 (Madh. Pra.); A.I.R. 1967 Pat. 441, Foll.]: 1974 Lab.I.C. 934 (Madh. Pra.).

Statements made to a Forest Officer stand on a different footing from those made to Police Officers. As Forest Officers are not vested with powers of an Officer-in-charge of a Police Station they cannot by any means be considered Police Officers under the Cr.P.Code and S. 25 of the Evidence Act cannot apply to them. Therefore, statement made by the accused to the Forest Range Officer, is admissible in evidence: 1958 Cr.L.J. 52: (1957) 2 M.L.J. 624: A.I.R. 1958 Mad. 31. *See* also 1959 Ker.L.J. 593: I.L.R. (1959) Ker. 660: 1959 Ker.L.R. 599: 1959 M.L.J. (Cr.) 808; 1989 Cr.L.J. 2038 (Ker.), cited under S. 24, Note 12, *supra*.

The expression 'Police Officer' in S. 25 of the Evidence Act is not confined only to such officers who are appointed under the Indian Police Act, but includes also other officers who exercise the same powers as that of a Police Officer of a Police Station in respect of investigation of certain offences. The confessions recorded by them in exercise of that power of investigation into the offences would be inadmissible in evidence under S. 25 of the Evidence Act. The mere fact that they are also enjoined with duties other than investigating certain offences would not be a good reason for holding that they are not Police Officers provided the powers of investigation exercised by them are the powers of investigation under the Cr.P.Code, which are exercisable by a Police Officer-in-charge of the Police Station. A Customs Officer under the Customs Act is not a Police Officer within the meaning of S. 25, Evidence Act.

S. 21 of the Central Excise and Salt Act does not make an officer of the Central Excise a Police Officer for all purposes. His powers of arrest or summoning persons for examining them as witnesses or searches are only, in respect of offences under the Central Excise Act. After the arrest of the person he is to be forwarded to a Central Excise Officer empowered to send the person to a Magistrate, and it is only this officer who is empowered to inquire into the charge against the person who is reasonably believed to be liable to punishment under the Excise Act, and it is only for this limited purpose that the powers of investigation of a Police Officer-in-charge of a Police Station are conferred on him and he is empowered to exercise those powers under the Cr.P.Code. The Central Excise Officers who are not by appointment Police Officers are empowered to exercise the same powers as are exercisable by an Officer-in-charge of Police Station only in respect of investigation of offences under the Central Excise Act. It, therefore, follows that it cannot be said that he is a Police Officer while discharging his duties under the Customs Act. Consequently, confessions recorded by Superintendent and Deputy Superintendents of Central Excise, in their capacity as Customs Officers and not in their capacity as officers of Central Excise, are not hit by the provisions of S. 25, Evidence Act: (1965) 67 Bom.L.R. 317: I.L.R. (1965) Bom. 648: (1965) 2 Cr.L.J. 616: 1965 Mah.L.J. 705: A.I.R. 1965 Bom. 195.

Authorised Officers of Customs, Excise and other Departments are not Police Officers; statements made before them are, thus, not inadmissible: 1989 Cr.L.J. 460 (Guj.).

Statements made by accused to Customs Officers—Admissibility: (1965) 1 Cr.L.J. 490: A.I.R. 1965 S.C. 481.

Central Excise and Salt Act, 1944, S. 21—Statement made by an accused to the Deputy Superintendent of Customs and Excise would not be hit by S. 25 of the Evidence Act and would be admissible in evidence—Deputy Superintendent of Customs and Excise is not a Police Officer within the meaning of S. 25 of the Evidence Act: 1966 Cr.L.J. 1353: A.I.R. 1966 S.C. 1746; A.I.R. 1969 Andh. Pra. 278: 1969 Cr.L.J. 1022.

The confession made before the Superintendent, Customs and Excise is not hit by S. 25. That officer may be given the powers of a Police Officer for the purpose of investigation, but he cannot be deemed to be 'Police Officer' for the purpose of S. 25. [A.I.R. 1966 S.C. 1746, Rel. on]: 1980 All.Cr.R. 58.

Authorities under the Foreign Exchange Regulation Act and Customs Act cannot be equated with Police Officers; S. 25 cannot apply to statements recorded by them: 1989 Cr.L.J. 2138 (Mad.) (D.B.).

Confessional statements made to a Customs Officer do not come within the inhibition of Ss. 24 and 25: A.I.R. 1973 S.C. 62: (1973) 3 S.C.C. 401; (1984) 58 Cut.L.T. 127; 1976 Cr.L.J. 165.

Though the Customs personnel are endowed with powers of search, seizure and arrest, akin to those of Police personnel, yet, they are, for all practical purposes, not to be construed as 'Police personnel' under S. 25 on the salutary principle that they are not having the powers of filing of final report as adumbrated under S. 173 (2) of the Cr.P.Code: 1993 Cr.L.J. 956 (Mad.); 1994 Cr.L.J. (N.O.C.) 276 (P.&H.) (D.B.).

A Customs Officer is not a member of the Police force. He is not entrusted with the duty to maintain law and order. He is entrusted with power which specifically relates to the collection of customs duties and prevention of smuggling. The test for determining whether an officer of customs is to be deemed a Police Officer is, whether he is invested with all the powers of a Police Officer *qua* investigation of an offence, including the power to submit a report under S. 173 of the Code of Criminal Procedure. A Customs Officer exercising power to make an enquiry cannot submit a report under S. 173 of the Code of Criminal Procedure: (1969) 2 Um.N.P. 401: (1969) 2 S.C.R. 461: A.I.R. 1970 S.C. 940; A.I.R. 1972 S.C. 1224: 1972 Cr.L.J. 759; I.L.R. (1974) 2 Del. 706; (1990) 45 E.L.T. 51 (Mad.).

The Customs Authorities are not Police Officers as they are not invested with powers of an Officer-in-charge of a Police Station and powers of investigation and the statement made to Customs Authorities by a person, who may later on be accused of an offence under the Foreign Exchange Regulation Act, is not hit by S. 25 of the Evidence Act and is admissible in evidence: 1961 M.L.J. (Cr.) 163: (1961) 1 Cr.L.J. 106: A.I.R. 1961 Mys. 7.

Customs Officer not a Police Officer within meaning of S. 25: 1969 Cr.L.J. 1245: A.I.R. 1969 Del. 301.

The Customs Officer is not primarily concerned with the detection and punishment of crime committed by a person, but is mainly interested in the detection and prevention of smuggling of goods and safeguarding the recovery of customs duties. He is more concerned with the goods and customs duty, than with the offender. Merely because similar powers in regard to detention of infractions of Customs laws have been conferred on Officers of the Customs Department as are conferred on Officers of the Police is not a sufficient ground for holding them to be Police Officers within the meaning of S. 25 of the Evidence Act. The Customs Officers, when they act under the Sea Customs Act to prevent the smuggling of goods by imposing confiscation and penalties act judicially. A Police Officer never acts judicially. Hence, a Customs Officer either under the Land Customs Act, 1924, or under the Sea Customs Act, 1878, is not a Police Officer for the purpose of S. 25, Evidence Act: (1962) 3 S.C.R. 338: (1962) 2 S.C.A. 321: (1962) 1 Cr.L.J. 217: A.I.R. 1962 S.C. 276.

The Customs Officer under S. 104(3) is, it is true, invested with the powers of an Officer-in-charge of a Police Station for the purpose of releasing any person on bail or otherwise. The expression 'or otherwise', however, does not confer upon him the power to lodge a report before a Magistrate under S. 173 of the Code of Criminal Procedure. Power to grant bail, power to collect evidence, and power to search premises or conveyances without recourse to a Magistrate do not make him an Officer-in-charge of a Police Station. Powers are conferred upon him primarily for collection of duty and prevention of smuggling. He is for all purposes an Officer of the revenue. Thus, a Custom Officer is, under the Act of 1962, not a Police Officer within the meaning of S. 25 of the Evidence Act and the statements made before him by a person who is arrested or against whom an inquiry is made are not covered by S. 25 of the Evidence Act: (1969) 2 Um.N.P. 401: (1969) 2 S.C.R. 461: A.I.R. 1970 S.C. 940.

The Customs Officers are not equated with Police Officers acting under the Criminal Procedure Code, 1898 and hence, statement recorded by them under S. 108 of Customs Act, 1962, cannot be hit by S. 25 of the Evidence Act.

The whole purpose of the Act of 1962, is to safeguard the revenues of the country and its economy. It is intended to prevent evasion of duty and in order that the duty might not be evaded, the evasion is made an offence and it is a limited extent and for that limited purpose that powers of searches, seizure and

investigation are given to the Customs Officers.

S. 104(3) of the Act of 1962, read in its context does not give any ascendancy whatsoever to the officer over a citizen merely because the power of granting bail has been given to him. Neither the Sea Customs Act, 1878, nor the Act of 1962, provides the Customs Officers with a lock-up under their control. Their actions are open to view as those of any other officer in his office and they cannot, therefore, extract any confession from the person whom they are questioning: (1968) 70 Bom.L.R. 231: 1968 Cr.L.J. 1617: A.I.R. 1968 Bom. 433.

The confessional statements of the accused made before the Customs Officer are hit by the provisions of S. 25, Evidence Act and cannot be taken into consideration for determining the guilt of the accused. Customs Officers have powers analogous to Police Officer's powers relating to prevention or detection of crimes even though those powers fall short of powers of investigation. The power of investigation is not the real governing test for the application of S. 25 of the Evidence Act: (1958) 60 Punj.L.R. 643: A.I.R. 1959 Punj. 113; (1959) 61 Punj.L.R. 235: A.I.R. 1959 Punj. 287. But *see infra*. The Assistant Inspector of Customs is not a Police Officer within the meaning of S. 25 of the Evidence Act as the section should not be extended to other classes of officers merely on the ground of similarity of function. So, where statements are made by the accused to the Assistant Inspector of Customs, such statements are not hit by S. 25 of the Evidence Act and are hence admissible in evidence: A.I.R. 1947 Mad. 308: (1946) 59 Mad.L.W. 751: 1946 Mad.W.N. 776: (1946) 2 M.L.J. 480: I.L.R. (1947) Mad. 788.

Even though under the new Customs Act of 1962, a Customs Officer has been invested with many powers which were not to be found in the provisions of the old Sea Customs Act of 1878, he cannot be regarded as a 'Police Officer' within the meaning of S. 25 of the Evidence Act and the statements made before him by a person who is arrested or against whom an inquiry is made are not covered by S. 25 of the Evidence Act: (1969) 2 S.C.R. 613: 1970 Cr.L.J. 998: A.I.R. 1970 S.C. 1065.

S. 25 rests upon the principle that it is dangerous to depend upon a confession made to a Police Officer which cannot extricate itself from the suspicion that it might have been procured by the exercise of coercion or by enticement. A confession may fall outside the orbit of S. 25 notwithstanding the presence of a Police Officer at the time when the confession was made if it is established that the confession was not made to him but to someone else who was not a Police Officer, but if on the other hand, it is clear that although there were persons who were not Police Officers present when the confession was made, the confession was made to a Police Officer who was also present, the confession would be inadmissible. Since the evidence of the Police constable demonstrated beyond doubt that the accused came out with her confession on being interrogated by him to speak the truth, the mere fact that other persons who were not Police Officers were also present when the confession was made would not take the confession out of the prohibition which the section incorporates: 1966 M.L.J. (Cr.) 313: 1966 Cr.L.J. 921: A.I.R. 1966 Mys. 199.

A statement made by an accused before the Customs Authorities is not hit by S. 25 and hence the statements made by the accused before the Customs Authorities are relevant unless it appears that they have been caused by any inducement, threat or promise: I.L.R. (1968) 18 Raj. 962: 1969 Cr.L.J. 311: A.I.R. 1969 Raj. 48. *See* also S. 24, Note 12, *supra*.

Enquiry by Customs Department Officers under S. 107 or S. 108 of Customs Act—Not same as an investigation of an offence under Chap. 14, Cr.P. Code: 1967 Cr.L.J. 1007: A.I.R. 1967 Mad. 263 (F.B.).

A Customs Officer while holding an enquiry and recording statements under S. 108 of the Customs Act is not a Police Officer; he is only a Revenue Officer. The person against whom the enquiry is held does not become an accused till the Customs Officer lodges complaint before the Magistrate; thus, a confession made by such a person during the enquiry is not an accused's confession before a Police Officer; it is not hit by S. 162 of the Code of Criminal Procedure or by Art. 20(3) of the Constitution: 1985 M.L.J. (Cr.) 335; A.I.R. 1971 S.C. 1087; (1988) 35 E.L.T. 458 (Bom.); 1991 Cr.L.J. 2359 (Bom.) (D.B.). But if such confession is shown to have been obtained by

inducement, threat, coercion or duress or extracted during his illegal and prolonged custody or obtained by using third degree methods, *held*, such confession being involuntary cannot be accepted or relied upon: (1984) 15 E.L.T. 289 (Mad.) (F.B.); (1992) 3 S.C.C. 178.

The Customs Officers who are empowered under S. 53 of the Narcotic Drugs and Psychotropic Substances Act, 1985 to be Police Station Officers are not Police Officers and any confessions made before them are admissible in evidence under S. 17 and the same is not hit by S. 25 or S. 26: 1993 Cr.L.J. 1310 (Pat.); (1989) 1 Bom.C.R. 503: 1990 Cr.L.J. 144; (1988-2) 8 Guj.L.H. 531: 1989 Cr.L.J. 460; 1988 All.L.J. 411; A.I.R. 1991 S.C. 45: 1991 Cr.L.J. 97: (1990) 2 S.C.C. 409: (1990) 41 Del.L.T. 49: (1990) 2 Crimes 435 affirming (1989) 37 Del.L.T. 362: 1989 Cr.L.J. (N.O.C.) 199: (1989) 3 Crimes 146.

An Intelligence Officer of the Narcotic Control Bureau, vested with powers of an Officer-in-charge of a Police Station for investigation of offences in accordance with S. 53 of the Narcotic Drugs and Psychotropic Substances Act, 1985, *held*, is not a Police Officer; a confessional statement made to him is admissible: 1989 Cr.L.J. 2007 (Cal.); (1990) 2 Ker.L.T. 405: (1990) 2 Ker.L.J. 307; 1991 C.Cr.L.R. (Cal.) 143; 1995 Cr.L.J. 665 (Del.).

Where a custom enquiry was held pursuant to a Magistrate's order, *held*, the Customs Authorities are not Police Officers; a confession made before them in such enquiries is not hit by S. 24; it is admissible: (1982) 3 S.C.C. 512: 1983 S.C.C. (Cr.) 109.

Onus lies on the prosecution to establish that the confession was made voluntarily and not under pressure; for that purpose, it will have to establish before the quasi-judicial authority that the accused had signed the confession without undue lapse of time and despite having the choice, he did not leave the Customs House till he had of his own accord signed the confession: (1992) 58 E.L.T. 192 (Cal.).

Where the accused, for long in the Customs Officer's custody, had retracted their confessional statements only during the trial and not when they were originally produced before the Magistrate, *held*, it did not necessarily mean that their confessions were involuntary and, therefore, unlawful: (1991) 51 E.L.T. 43 (Bom.).

Confession before Administrator in Portuguese territory not admissible. *See* (1924) 26 Bom.L.R. 706: A.I.R. 1924 Bom. 480. It would be difficult to hold that a member of the civic guard should be treated as anything else than a Police Officer when called out on duty, even though he may not have the powers of investigation. There may also be cases in which a confession made to a civic guard would have to be regarded as being a confession made to a Police Officer, though he had not been technically called out on duty; but this would rather be a result of the ordinary rule of prudence which often makes it necessary to exclude confessions made to Village Lambardars or other notables who are assisting the Police in the course of investigation: (1944) 46 Punj.L.R. 15: A.I.R. 1944 Lah. 57.

As S. 25 refers only to a Police Officer, a Court should not extend it to other classes of officers merely on grounds of similarity of function. The restrictive provisions of S. 25 should not be applied to Excise Officers: 39 Cr.L.J. 338: A.I.R. 1938 Mad. 460: (1938) 1 M.L.J. 238. But *see* also A.I.R. 1938 Sind 1: 32 Sind L.R. 185.

Police Officer — Excise Officer under Bihar and Orissa Excise Act is not Police Officer: 1962 B.L.J.R. 344.

An officer who performs 'Police' functions of investigation and arrest would be a Police Officer within the meaning of S. 25 of the Evidence Act, S. 21(2) of the Central Excise and Salt Act confers these functions upon the Excise Officers. A confession of the accused made at the time of his arrest to the Superintendent of Central Excise, therefore, has to be excluded from evidence under S. 25 of the Evidence Act: 1966 All.Cr. R. 85: 1966 All.W.R. (H.C.) 149: 1966 Cr.L.J. 4: A.I.R. 1966 All. 42.

It is well settled that the statement of the accused made to an Officer of Central Excise is not hit by S. 25 of the Evidence Act: (1974) 40 Cut.L.T. 806; (1986) 6 Guj.L.H. 754: (1986) 2 Guj.L.R. 1124 (D.B.).

An Excise Officer invested with the powers of an Officer-in-charge of a Police Station for investigation of offences under S. 20-A of the Opium Act is a 'Police Officer' coming within the purview of S. 25 of the Evidence Act and S. 162 of the Code of Criminal of

Procedure and any confession made to him in the course of investigation is inadmissible under S. 25 of the Evidence Act and the statements made to such an officer under S. 162, Cr.P.Code, can be used only in the manner enacted therein: (1953) 2 M.L.J. 189: A.I.R. 1953 Mad. 917: I.L.R. (1954) Mad. 57.

Also admission of the accused to the Excise Sub-Inspector: 150 I.C. 1144: A.I.R. 1934 Nag. 136; (1944) 46 Punj.L.R. 329: A.I.R. 1945 Lah. 10.

An Excise Officer is a Police Officer: I.L.R. 61 Cal. 607: (1933-34) 38 Cal.W.N. 930: A.I.R. 1934 Cal. 580 (F.B.); A.I.R. 1935 Nag. 13; 46 Cr.L.J. 213: A.I.R. 1945 Lah. 10.

Whether Excise Officers who have large powers of search, arrest and detection are to be regarded as Police Officers within the meaning of S. 24. *See* (1916-17) 21 Cal.W.N. 694; (1926) 28 Bom.L.R. 1196: A.I.R. 1927 Bom. 4 (F.B.). *See* also 28 I.C. 151: I.L.R. 46 Cal. 411; (1926) 28 Bom.L.R. 674.

Confession made to excise peon is inadmissible under S. 25: (1929) 31 Bom.L.R. 49: A.I.R. 1929 Bom. 70. *See* also I.L.R. 7 Rang. 771: A.I.R. 1930 Rang. 49.

Proceedings before Director of Enforcement—Confession made before authority having no Police powers at that time—S. 25 is inapplicable: 1969 Ker. L.J. 450.

Enforcement Officers under the Foreign Exchange Regulation Act, 1947, are not Police Officers and, thus, statements made to them can be acted upon, if it is voluntary: (1986) 99 Mad.L.W. 754: (1986) 2 M.L.J. 433 (D.B.); A.I.R. 1981 Ker. 81: 1981 Ker.L.T. 833 (D.B.); 1990 Cr.L.J. 1068 (Del.).

Confessions made to an Enforcement Officer whose powers are similar to those of a Customs Officer are admissible in evidence; a Customs Officer is not a Police Officer. True, an Enforcement Officer is not empowered to summon persons and to record their statements but there is no bar to his questioning a person apprehended or whose premises are searched; confessional statements made in answer to such questioning constitute extra-judicial confessions: 1982 Cr.L.J. 461 (Goa).

Applicability—Statement made to officer appointed under S. 38 (1), Bombay Sales Tax Act—Admissibility in trial for offence under S. 36 (1)(*b*): (1958) 9 S.T.C. 681 (Bom.).

Where an accused charged with the offence of possessing medicines for sale without a licence under Ss. 18(*c*) and 27 of the Drugs and Cosmetics Act told the Police Constable of his intention to sell them, *held*, it amounted to a confession made to a Police Officer, it was inadmissible: 1984 Cr.L.J. 931 (Cal.) (D.B.).

Whereas S. 25 renders inadmissible a confession made by an accused to the Police S. 26 goes further and enacts that a confession made by a person, while he is in the custody of the Police even to a third person, who may not be a Police Officer, is inadmissible unless it is made in the immediate presence of a Magistrate. The reason underlying these two sections is obvious, namely, that the influence of the Police is presumed to affect the voluntary nature of the confession and, therefore, its reliability. The law is imperative in excluding what comes from an accused person in the custody of the Police if it incriminates him. Courts in this country have been so jealous of the voluntary nature of the confession that they have construed the word 'custody' not necessarily to mean custody after formal arrest, but it has been held to extend to a state of affairs in which the accused can be said to have come into the influence of a Police Officer or has been even under some form of Police surveillance or restrictions on his movements by the Police.

A conviction for acquisition of gold in excess of permissible limit based solely on confession of accused made to Excise Authority in presence of Police Officer is illegal as such confession is inadmissible: 1970 Cr.L.J. 635 (Del.).

A Police Patel under the Mysore Police Act, 1963, is a Police Officer and, therefore, a confession made to him is hit by S. 25: 1972 M.L.J. (Cr.) 374: (1972) 1 Mys.L.J. 499 (D.B.).

A Police Patel under the Bombay Village Police Act, 1867, is a Police Officer within the meaning of S. 25: (1985) 5 Guj.L.H. 882. Confession made to him is inadmissible even if he was father-in-law of the accused: 1980 Cr.L.R. 154 (Guj.).

A confession contained in an information given by the accused to a Police Patel is not admissible; however, its other parts which do not amount to confessions are admissible. [(1972) 1 Mys.L.J. 499: 1972 M.L.J. (Cr.) 374 (D.B.), Rel. on]: (1972) 2 Mys.L.J. 6.

The words 'a Police Officer' in S. 25 should not be read in any strict technical sense, but according to its more comprehensive and popular meaning. Nor is the term confined to the person actually in charge of the investigation of an offence under the Criminal Procedure Code. A confession made to him need not have been made when he was actually discharging any Police duty. A confession made to any member of the Police of whatever rank and at whatever time is inadmissible in evidence under S. 25. S. 6 of the Maharashtra Village Police Act, particularly Cl. (*vii*) thereof, clearly stamps the Village Police Patel with the character of a Police Officer. A Police Patel is, therefore, a Police Officer within the meaning of S. 25. A confession made to him is hence not admissible. [I.L.R. 17 Bom. 485; A.I.R. 1962 S.C. 276; (1972) 1 Mys.L.J. 499 and (1972) 2 Mys.L.J. 6, Rel. on]: 1978 Mah.L.J. 244: 1978 Cr.L.J. 891.

See however 1979 Mah.L.J. 603 [A Village Kotwal is not a Police Officer and an extra-judicial confession made to him is admissible in evidence and does not come within the mischief of S. 25. The position and status of a Village Kotwal, who has no powers to exercise but has merely duties to perform, cannot be equated with that of a Police Officer. A Village Kotwal has no power to exercise, much less to misuse.

The scheme of Ss. 5 to 7 in Ch. II of the Maharashtra Land Revenue Code (1956) and in particular phraseology of sub-S. (4) of S. 7, *viz.*, 'one or more Kotwals or village servants', bring to the forefront that a village Kotwal is not an 'Officer' much less a 'Police Officer', and that he is no more than a village servant connected with the Revenue Department].

Extra-judicial confession made to the members of the Village Defence Organisation is not hit by the provisions of S. 25 as they are not Police personnel: (1988) 1 Crimes 254 (Gau.).

The village chowkidar who is deemed to be a kotwar under S. 230 (2) of the M.P. Land Revenue Code is not a Police Officer within the meaning of S. 25, though he may be performing certain functions which are performed by the Police. A village chowkidar could not, therefore, be termed as a Police Officer and an extra-judicial confession made to him is not inadmissible. [1978 M.P.L.J. 599: 1978 Cr.L.J. 1149 (D.B.); 1978 M.P.L.J. 802 and 1986 M.P.L.J. 490 (D.B.), Affirmed]: 1987 M.P.L.J. 195 (F.B.); (1993) 1 Crimes 732 (Madh. Pra.).

The extra-judicial confession by accused made to several witnesses including a village chaukidar, was admissible in evidence as the same was made when the accused was neither in the custody of the chaukidar nor was it made to the chaukidar; it was not also made under the influence of the chaukidar. [A.I.R. 1934 Oudh 222; A.I.R. 1948 All. 7, Foll.]: 1974 Cr.L.J. 126: 1973 All.W.R. 668.

Village Chawkidars are Police Officers: 16 Cr.L.J. 62: 26 I.C. 654: I.L.R. (1937) All. 85: 1936 All.L.J. 999: A.I.R. 1936 All. 753 (F.B.); I.L.R. 25 Pat. 356: A.I.R. 1947 Pat. 146; I.L.R. 17 Pat. 369: A.I.R. 1938 Pat. 308. But *see contra*: 1934 All.L.J. 143: A.I.R. 1934 All. 132. Kotwar in C.P. is not a Police Officer: 76 I.C. 291: A.I.R. 1924 Nag. 29: 57 I.C. 888: 21 Cr.L.J. 568. (N) Village Munsif is not a Police Officer: I.L.R. 7 Mad. 287. A political Muharriar Oghi is a Police Officer: 144 I.C. 160: 34 Cr.L.J. 804: A.I.R. 1933 Pesh. 38.

A Grama Rakshi is not a Police Officer and, therefore, confession before him does not attract operation of S. 25. [1977 Cr.L.J. (N.O.C.) 132: (1977) 43 Cut.L.T. 512, *held* no longer good law in view of 1991 Cr.L.J. 97 (S.C.)]: 1993 Cr.L.J. 2374 (Ori.) (D.B.). *See contra* (1981) 52 Cut.L.T. 126: 1981 Cr.L.J. 1452 (D.B.); (1978) 46 Cut.L.T. 260; 1992 Cr.L.J. 762 (Ori.) (D.B.).

The words "Police Officer" used in S. 25 is not to be considered in a strict sense but is to be given its more comprehensive and popular meaning. S. 7(1) of the C.R. Police Act, 1949, clearly shows that the members of the C.R.P. Force have a duty to detect and bring offenders to justice and therefore, they are "Police Officers" within the meaning of S. 25 of the Indian Evidence Act. Merely because some special powers or duties of Police Officers are not conferred or imposed on the members of the C.R.P. Force under S. 16 of the C.R.P. Act, it would not mean that they are not "Police Officers" within the meaning of S. 25. The definitions given in S. 3 of the Bombay District Police Act are meant for the purpose of that Act alone. A member of the C.R.P. Force may not be a Police Officer within the meaning of the Bombay District Police Act; but it does not mean that he would not be a Police Officer within the meaning of S. 25 of the Indian Evidence Act: A.I.R. 1956 Kutch 1: 1956 Cr.L.J. 217.

An officer of the Railway Protection Force making an inquiry under S. 8(1) of the Railway Property (Unlawful Possession) Act, 1966, *held*, cannot be deemed to be a 'Police Officer' under S. 25. Therefore, any confessional or incriminating statement recorded by him in the course of an inquiry under S. 8(1) of the 1966 Act, cannot be excluded from evidence under the said section. [1975 Cr.L.J. 1891: (1975) 77 Bom.L.R. 295 (Bom.) (D.B.), Affirmed]: A.I.R. 1981 S.C. 379: (1980) 4 S.C.C. 600: (1980) 2 Kam.L.J. (S.N.) 92; 1972 Mah.L.J. 191: (1971) 73 Bom.L.R. 891; 1973 M.P.L.J. 663 (D.B.); 1983 Cr.L.J. (N.O.C.) 188 (Ori.); 1983 Mad.L.W. (Cr.) 219; (1988) 1 Ker.L.J. 235: 1989 Cr.L.J. (N.O.C.) 110.

Statements by accused to C.I.D. Officer—Admissibility: 1938 Mad.W.N. 825: A.I.R. 1938 Mad. 893. The expression 'Police Officer' is not to be read in a technical sense but in its more comprehensive and popular meaning. Whatever reasons existed for inducing the Legislature to make a departure from the English Law and exclude a confession made to Police Officer apply with equal if not greater force to an officer who is clothed with powers of a Police Officer and is actually engaged in the investigation of a crime in respect of which the confession is made to him. Hence, an Abkari Officer investigating an offence against the Bombay Abkari Act in exercise of the powers conferred upon him in Ch. 9 of the Act is a Police Officer within the scope of S. 25: 32 Sind L.R. 185: A.I.R. 1938 Sind 1, overruling A.I.R. 1925 Sind 70 and A.I.R. 1927 Sind 112.

The expression "Police Officer" in S. 25 of the Evidence Act is not used in a technical and restricted sense and includes a Ward Rationing Officer whose position is analogous to that of an Excise Officer: A.I.R. 1951 Punj. 387: (1951) 53 Punj.L.R. 157.

A Prohibition Sub-Inspector under the Madras Prohibition Act cannot be deemed to be a "Police Officer" within the meaning of S. 25. Throughout the Madras Prohibition Act, "Police Officer" is mentioned in contradistinction to a "Prohibition Officer". Hence, confessional statement recorded by a Prohibition Sub-Inspector is not inadmissible in evidence under S. 25 of the Evidence Act: A.I.R. 1948 Mad. 116: 1947 Mad.W.N. 524: (1947) 60 Mad.L.W. 530: I.L.R. (1948) Mad. 574: (1947) 2 M.L.J. 218; (1952) 1 M.L.J. 658: A.I.R. 1953 Mad. 1004. *See* also (1952) 1 M.L.J. 69: A.I.R. 1952 Mad. 299.

A member of the frontier constabulary is a Police Officer: 71 I.C. 360: 24 Cr.L.J. 146 (Pesh.) As to village headman in Burma, *see* I.L.R. 2 Rang. 31: A.I.R. 1924 Rang. 246 (F.B.). An extra-judicial confession made by the accused to a Lambardar and a Safedposh cannot be admitted in evidence: (1933) 35 Punj.L.R. 359.

Impropriety of recording confession in jail pointed out—The Courts can, however, hold that the confession is voluntary if, after properly appreciating the importance and significance of the circumstances, they find that there are other facts and circumstances which completely assure its voluntariness: 1970 Cr.L.J. 603 (All.).

A Sub-Inspector of Police even while on deputation as Security Inspector in the Heavy Engineering Corporation does not cease to be a Police Officer inasmuch as he does not cease to be an enrolled Police Officer as contemplated by the Police Act. By reason of such deputation he does not cease to be a member of the Police force as envisaged by S. 2, Police Act. That can happen only if subsequently he cannot be reverted to the general line in the Police force. Therefore, merely on the ground of such deputation he does not lose the character of a 'Police Officer' in the comprehensive and popular sense of the term in S. 25, Evidence Act. Hence, a confession made to him is inadmissible and it cannot form the basis of a conviction: 1969 Pat. L.J.R. 646: 1969 B.L.J.R. 707.

'Police Officer'—Meaning of—Liberal construction: (1970) 1 S.C.J. 701.

Extra-judicial confession suggesting mutual affeary between deceased and accused—Whether can be relied on: 1970 Pat. L.J.R. 172.

Confession made to Police Officer—Letter, written and signed by accused and addressed to Sub-Inspector stating that he, *i.e.*, accused had committed murder of his wife, found near dead body of wife—*Held*, that as letter was not written in presence of Police Officer, confession contained therein was not confession made to Police Officer within bar created by S. 25 and it was admissible in evidence. [Per *Mudholkar, J.*, and *Sarkar, C.J.*, *Bachawat, J.* Contra]: 1966 Cr.L.J. 1519: 1966 S.C.R. (Supp.) 265: A.I.R. 1966 S.C. 1906.

5. Confession leading to discovery of fact.— S. 25 to which S. 27 is a proviso applies equally to confession with regard to offences not under investigation. Where a person while under custody for a criminal breach of trust in respect of a cycle that he had taken on hire and then sold, confessed that he had similarly sold another cycle and as a result of that confession that cycle was discovered, the confession is admissible under S. 27: I.L.R. (1943) Mad. 456: (1942) 2 M.L.J. 549: A.I.R. 1943 Mad. 89.

Ss. 25, 26 *and* 27—Relative scope—S. 27 is an exception to Ss. 25 and 26 both: 1960 Cr.L.J. 1: A.I.R. 1960 All. 1 (F.B.); 1990 Rajdhani L.R. 154: 1990 Cr.L.J. (N.O.C.) 118 (D.B.); 1994 Cr.L.J. (N.O.C.) 59 (Madh. Pra.) (D.B.).

S. 27 is in the nature of an exception to the preceding sections, particularly Ss. 25 and 26—Conditions essential for bringing the section into operation laid down. *See* A.I.R. 1976 S.C. 483: 1976 Cr.L.J. 481: (1976) 1 S.C.C. 828.

Incriminating statements made to a Police Officer are hit by Ss. 25 and 26 of the Evidence Act. The statement that the axe is one with which the murder had been committed is not a statement which leads to any discovery within the meaning of S. 27 of the Evidence Act. Nor is the alleged statement of the accused that the bloodstained shirt and dhoti belonged to him a statement which leads to any discovery within the meaning of S. 27. It is fallacious to treat the 'fact discovered' within S. 27 as equivalent to the object produced. The fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. It is, therefore, wrong to admit in evidence the alleged statement of the accused that the axe had been used to commit murder or the statement that the bloodstained shirt and dhoti were his. *Held*, that if the statements relating to axe and dhoti were excluded from evidence then there remained only the circumstantial evidence. But as the chain of circumstantial evidence was not complete in this case the conviction of the accused for murder of his uncle deserved to be set aside: (1963) 2 S.C.R. 881: A.I.R. 1963 S.C. 1113.

The difficulty, however great, of proving that a fact discovered on information supplied by the accused is a relevant fact, can afford no justification for reading into the section something that is not there and admitting in evidence a confession barred by S. 25: 1990 Rajdhani L.R. 154: 1990 Cr.L.J. (N.O.C.) 118 (Del.) (D.B.).

Any confession made by the accused before a Police Officer will not be legally admissible under S. 25. But the words distinctly relating to facts discovered are clearly admissible under S. 27: 1954 Cr.L.J. 713: A.I.R. 1954 Manipur 13.

Where in consequence of the disclosure statement made by the accused no incriminating article was recovered, *held*, the statement would not be protected under S. 27 and being in the nature of confession to the Police, it would be hit by Ss. 25 and 26 and as such would be inadmissible in evidence: 1985 Cr.L.J. 1700 (Del.).

Per *Agarwala, J.*—The accused was arrested at his house. On his way to the Police Station he informed the Police Officer that he would produce the clothes of the deceased. The Police Officer stated that the accused had also confessed his guilt and then he had also said that he had placed the clothes in a pit above a brick-kiln. *Held*, that the statement that the accused had confessed his guilt was not admissible but the other statement that he had placed the clothes in a pit, was admissible. As however the statement of the Police Officer on this point was not supported by any other witnesses, probably because no questions were put to the witnesses about it, the statement could not be said to have been proved in the case and must be ignored: A.I.R. 1955 All. 443: 1956 All.L.J. 468.

If an accused tells a Police Officer that the ornaments which the deceased was wearing and which had been taken off his body are in his house and that he would recover them, that portion of the statement which relates to the taking off the ornaments from the body of the deceased is inadmissible in evidence under Ss. 25 and 26 of the Evidence Act as it amounts to a confession made to a Police Officer while the accused is in Police custody. The portion of the statement that he could recover the ornaments from his house is relevant under S. 27 of the Act: 1951 Raj.L.W. 74: A.I.R. 1952 Raj. 20.

Where no recovery could be effected pursuant to the confession made by the accused, *held*, the confession became inadmissible in

view of S. 25 and S. 27 also became inapplicable as no fact was proved to have been discovered in consequence of the information received from the accused: A.I.R. 1971 Tripura 16: 1971 Cr.L.J. 407.

Once a fact is discovered from other sources there can be no fresh discovery even if the relevant information is extracted from the accused. Where from the evidence of the photographer who was taken by the Police at the spot where the dead body was lying, it was clear that he was engaged by the Police to take photograph of a skeleton which means that the Police already knew that the dead body was a skeleton and there was nothing in the statement of the accused, recorded at the Police Station before the alleged recovery, that the accused knew that the dead body had become a skeleton, *held*, the irresistable conclusion was that the Police had already seen that dead body and that it had become a skeleton and, hence, subsequent statement of the photographer that accused had taken them to the place where the dead body was lying was *prima facie*, of no consequence and, thus, said information could not be relied on for proving the guilt of the accused: 1990 Cr.L.J. 77 (All.) (D.B.).

Ss. 25 *and* 27—Theft case—Disposal of stolen property—Confessional statement of accused leading to recovery of sale-proceeds of stolen property—Accused acquitted but not claiming money to be his—Order of confiscation—Legality—Confessional statement admissible in proceedings under S. 517—S. 162 or S. 25, Evidence Act is no bar to its admissibility: (1965) 2 Cr.L.J. 805: A.I.R. 1965 Raj. 238.

The accused after his arrest and recovery of stolen property from him pointed out the place from where the article recovered from him were stolen.

Held, that this amounted to a confession without leading to any new discovery and therefore, was inadmissible in evidence: (1956) 58 Punj.L.R. 320: (S) A.I.R. 1956 Punj. 224.

Where property is recovered on being pointed out by the accused in the presence of respectable witnesses of the neighbourhood and the recovery memo. is properly prepared, the memo. and evidence of attesting witnesses form materials for the Court to arrive at a conclusion as to the genuineness or otherwise of the alleged recovery. Discovery of property on information received from the accused and that on being pointed out by him fall equally under the exception in S. 27 and therefore, escape the mischief of S. 25, Evidence Act and S. 162, Cr.P.Code. But where there is no corroborative evidence of the imparting of information by the accused, the Court has no material to arrive at a correct decision as to the truth of the information alleged to be conveyed. Where property was alleged to be recovered on the information of the accused and the Police Officer proceeded to hold himself identification proceedings as regards such property, such proceedings do not come under the exception contained in S. 27 and hence oral and documentary evidence relating to such proceedings is barred by S. 25, Evidence Act and S. 162, Cr.P.Code: A.I.R. 1952 Him.Pra. 68: 1952 Cr.L.J. 1495.

Where persons accused of an offence under S. 411, I.P.Code made a confession during the course of the investigation of a case of theft that they had taken part in the theft and promised to deliver the loot and subsequently handed over to the Police some of the stolen articles and also the sale proceeds of some others, on a question whether the confession would be admissible in evidence, *held*, the confession would not be admissible in evidence in view of Ss. 25 and 27 of the Evidence Act for the statement could not be said to have been responsible for the alleged discoveries, the reason being that the articles were produced by the accused themselves. There was no discovery in consequence of the information. Even if it is assumed to amount to discovery within the meaning of S. 27 of the Evidence Act, the information that the accused were responsible for the theft or the other statements, does not constitute the cause of which the effect was the discovery: 1950 All.L.J. 738. Where a prosecution witness while referring to the information given by the accused leading to the recovery of a rifle, also stated that the accused had told him in the presence of the Investigating Officer that he (the accused) would point out the rifle, *held*, that the latter part of the information amounted to a confession and was inadmissible in evidence: 1957 M.L.J. (Cr.) 805: A.I.R. 1958 Mys. 1.

On a joint trial of four accused, before an accused is convicted on the basis of confession made by them, there must be evidence

on the record which leads one to conclude that it was the particular accused who made the crucial statement or that it was he who was responsible for the discovery of the relevant facts: (1942) 55 Mad.L.W. 355: A.I.R. 1942 Mad. 532 (1).

6. "Accused of any offence".—[*See* also S. 24, Note 4, *supra*; S. 27, Note 8, *infra*]. The expression "accused of any offence" in S. 25 would cover the case of an accused who has since been put on trial, whether or not at the time when he made the confessional statement, he was under or in custody as an accused in that case or not: (1994) 1 An.L.T. (Cr.) 695 (S.C.).

An information given by a person who ultimately becomes an accused, containing a confession of his own guilt amounts to 'confession' within the meaning of S. 25. The terms of S. 25 cover a confession made by the accused when he was free and not in Police custody, as also a confession made before the investigation began. The expression 'accused of any offence' in S. 25 covers a person accused of an offence at the trial, whether or not he was accused of the offence when he made the confession. [1966 Mah.L.J. 113 (S.C.): A.I.R. 1966 S.C. 119 and (1934) 36 Bom.L.R. 1117, Foll.]: 1978 Mah.L.J. 244: 1978 Cr.L.J. 891 (D.B.). *See* also 1977 B.B.C.J. 389.

S. 25 applies to a case where a confessional statement is made by a person who was not an accused person at the time of making the statement but is being tried subsequently. The section does not set out anything regarding the state of the person who is making the confession. The section merely means that when an accused person is being tried, a confession, which he on a previous occasion, made to a Police Officer, cannot be proved against him. It is not specified that the accused person must have been an accused person at the time of making the statement, nor need he have been in Police custody: I.L.R. (1961) 1 Punj. 33: (1962) 1 Cr.L.J. 186: A.I.R. 1962 Punj. 70.

The test which has to be applied in deciding whether S. 25 applies, is the position of the person at the time when it is proposed to prove the admission, not his position at the time when he is alleged to have made it: 13 Cr.L.J. 465: 15 I.C. 305; 11 Mys.L.J. 438.

A confession therefore made to a Police Officer by a person when he is not accused of any offence is inadmissible in evidence against him when he is accused of an offence. A confession made by an accused to a Police Officer might be admissible in favour of a co-accused but not against him: 15 I.C. 305. The statements of approver to a Police Inspector being really confessions, are inadmissible: I.L.R. 35 Mad. 247: 22 M.L.J. 490 (S.B.). *See* also 15 Cr.L.J. 474: 24 I.C. 562; 15 I.C. 305.

A person arrested by an Officer of the Railway Protection Force under S. 6 of the Railway Property (Unlawful Possession) Act, 1966 for the alleged commission of an offence under S. 3 of that Act, is not a "person accused of an offence" within the meaning of Art. 20(3) of the Constitution: A.I.R. 1981 S.C. 379: 1980 Cr.L.J. 1424: (1980) 4 S.C.C. 600; (1988) 1 Ker.L.J. 235: 1989 Cr.L.J. (N.O.C.) 110.

Where a stranger to whom extra-judicial confession was made reduced it to writing and sent the same to Police, *held*, when it contained the facts as given by the accused himself and was made by the accused at a time when no case had been registered against him, it was admissible: 1973 Sim.L.J. 195 (D.B.).

7. Miscellaneous.—Where in a proceeding under S. 3(2) of the National Security Act, preventive action only is sought to be taken, without deciding the guilt, *held*, confession made to the Police could certainly be relied upon by the detaining authority: (1988) 1 Crimes 969 (All.).

Guidelines for recording confession under the Terrorist and Disruptive Activities (Prevention) Act, 1987. *See* 1994 Cr.L.J. 3139 (S.C.).

Confessional statement made by a proposed detenu can be considered by the detaining authority for passing an order of his detention under the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug-offenders, Goondas, Immoral Traffic Offenders and Slum Grabbers Act, 1982 but the weight to be attached to it is for the said authority to decide. [1985 Cr.L.J. 1115: 1984 Mad.L.W. (Cr.) 182, Overruled]: A.I.R. 1986 Mad. 318; (1986) 1 Crimes 47 (Mad.).

Where the accused had made and signed a confession of having stolen and concealed the Railway property before an officer of the Railway Protection Force and did not either explain in his statement before the Court or cross-examine the officer that the confession was procured from him under threat or inducement, *held*, the confession was voluntary.

26. Confession by accused while in custody of police not to be proved against him.—No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate[1], shall be proved as against such person.

[2][*Explanation.*—In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George [3][* * *] or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882[4] (10 of 1882)].

---

1. A Coroner has been declared to be a Magistrate for the purposes of this section, *see* the Coroners Act, 1871 (4 of 1871), S. 10.

2. Inserted by Act 3 of 1891, S. 3.

3. The words "or in Burma" omitted by the A.O. 1937.

4. *See* now the Code of Criminal Procedure, 1898 (5 of 1898).

[A.I.R. 1959 S.C. 18 and A.I.R. 1956 S.C. 217, Rel. on]: 1980 M.P.L.J. 483: 1980 Cr.L.J. 1024.

Where the accused had merely stated in his 'confessions', judicial and extra-judicial, that he was brandishing his *dao* at the deceased, which is no confession, and is also contradicted by the accused's statement under S. 313 of the Code of Criminal Procedure, and there was no dying declaration and other evidence of homicidal death, *held*, the prosecution having failed to prove beyond reasonable doubt that the accused exceeded the right of private defence, conviction could not be sustained: 1993 Cr.L.J. 3742 (Gau.) (D.B.).

Section 26—Synopsis.

1. Scope and applicability.
2. Section 26 *vis-a-vis* section 27.
3. Police custody—What amounts to [*See* also S. 27, Note 14, *infra*].
4. 'Police Officer'—Who is [*See* also S. 25, Note 4, *supra*].
5. Magistrate.
6. Time for reflection [*See* also S. 24, Note 15, *supra*].
7. Retracted confession [*See* also S. 24, Notes 16 to 21, *supra*].

---

1. Scope and applicability.—The phraseology employed by S. 25 and S. 26 contains negative and positive injunctions with regard to the confessions by accused person and is indicative as to when and against whom such evidence is admissible or is not admissible: 1979 Bom.C.R. 680 (D.B.).

The Miranda [(1966) 384 U.S. 436] exclusionary rule that custodial interrogations are inherently coercive is reflected in S. 26, though the section confines it to confessions which have a narrower concept than self-crimination. [(1978) 45 Cut.L.T. 253, Reversed]: A.I.R. 1978 S.C. 1025: 1978 Cr.L.J. 968: (1978) 2 S.C.C. 424.

To render a confession or admission admissible, the prosecution must prove affirmatively that no inducement relating to the charge or accusation was held out to the accused to make it. A confession or admission must be excluded if it is made (*i*) in consequence of (*ii*) any inducement (*iii*) of a temporal character (*iv*) connected with the accusation or relating to the charge (*v*) held out to the accused by a person having some authority over the subject-matter of the charge or accusation. The words, "I need to take a statement from you", or even words covering a suggestion that a man will have to come to the Police Station because the Police need to take statement from him when he gets there, is not an inducement in any way relating to the charge or accusation. An oral admission made by the accused, in response to the suggestion is admissible against the accused: (1957) 3 All E.R. 623.

The bar of inadmissibility under S. 162 of the Code of Criminal Procedure operates not only on statements of witnesses but also on those of the accused made to Police Officer: A.I.R. 1972 S.C. 1331: 1972 Pat.L.J.R. 263: 1972 Cr.L.J. 860.

All confessions are inculpatory admissions on the part of the maker thereof. To be a confession, admission should contain an acknowledgment of the guilt. Therefore, all confessions are admissions, but every admission may not be a confession: 1979 Bom.C.R. 680 (D.B.).

A confession though made in the presence of a Magistrate is of very little value,

when the accused is not aware of his presence: 22 I.C. 150: 15 Cr.L.J. 6. *See* also 31 Sind L.R. 460: A.I.R. 1937 Sind 212.

Where a Magistrate simply accompanies a Police Officer while the Police Officer is making the investigation, the evidence of the Magistrate as to what happened is not admissible under S. 26: 34 Cr.L.J. 754: A.I.R. 1933 All. 394.

A confession made in the presence of a Magistrate though on leave, is nevertheless relevant and admissible: 22 I.C. 150.

A confession made by an accused to a Magistrate on leave in the presence of a Police Officer who had the accused under arrest at the time is not admissible in evidence, where no record was made of his statement under S. 164 of the Cr.P.Code: 118 I.C. 46: A.I.R. 1929 All. 855.

On the plain language of S. 26, the confession made in the presence of a Magistrate does not become inadmissible for the mere reason that the accused had been in the custody of the armed constable. Ordinarily, a Magistrate should not keep the accused in charge of the armed Policemen unless for reasons to be recorded he is satisfied that there was risk and danger to the life. No hard and fast rule can, however, be laid down. As far as possible the accused should be kept in charge of Magistrate's own staff: 32 Cut.L.T. 1170: I.L.R. (1966) Cut. 635.

Magistrate recording confession observing requisite formalities—Mere fact that record does not show that he told accused that he was Magistrate is immaterial: (1964) 1 Cr.L.J. 680: A.I.R. 1964 Ori. 144.

Where the learned Magistrate had taken all necessary precautions to ensure that the accused had sufficient time to reflect before he made his confessional statement and that he was under no fear or threat or allurement before appearing in the Court to make the statement and the various questions put by the learned Magistrate to him indicated that he had taken all reasonable precautions to remove any trace of fear from the accused before he made the confessional statement, *held*, such a judicial confession could very well be relied on: (1994) 1 An.L.T. (Cr.) 695 (S.C.).

A Police Officer while giving evidence should not be allowed to state that an admission of guilt was made by the accused: 13 I.C. 783: (1911-12) 16 Cal.W.N. 238: I.L.R. 15 Cal. 595 (607). *See* also I.L.R. 19 Bom. 363.

An accused's confession to some person other than a Police Officer is admissible in evidence: 26 I.C. 654 (as) at coroner's inquest: I.L.R. 50 Bom. 111: A.I.R. 1926 Bom. 151. Admissions of facts which are not of an incriminating nature are admissible in evidence: (1903) 5 Bom.L.R. 321. Actual arrest and detention are not necessary: I.L.R. 1 Rang. 609: 77 I.C. 429: A.I.R. 1924 Rang. 173. Statement made by accused to the Police in ignorance of the complaint filed against him is admissible under Ss. 25 and 26 as the accused was not in Police custody nor was he aware of the complaint against him and the statement could be used as an admission under S. 18 and to use the statement was not contrary to S. 162 of the Cr.P.Code: 9 Pat.L.T. 449: A.I.R. 1928 Pat. 473.

The accused was in the Police lock-up for three days and was subsequently brought out temporarily, and taken to the house of the Superintendent of Post Offices. The accused made a confession before this Officer and was subsequently taken back to the Police lock-up. *Held*, that the confession was inadmissible in evidence as the separation of the accused from the Police was only temporary: 108 I.C. 398: A.I.R. 1928 Lah. 282.

S. 26 is not inapplicable in cases where the arrest by the Police Officer of person making the confession is illegal. Whether the arrest is legal or illegal the mischief which the section is intended to avert remains all the same, and a confession made by the arrested persons while in the custody of the Police Officer is inadmissible under S. 26. The illegality of the arrest does not affect the operation of S. 26: I.L.R. 17 Pat. 369: A.I.R. 1938 Pat. 308.

Where an accused person makes a statement in the presence of the Police and another person, the question whether that statement was made to the other person or to the Police is a question of fact and not of law. Even if it is an extra-judicial confession, it would be excluded by S. 26 if the accused is in custody and no Magistrate is present: (1945-46) 50 Cal.W.N. 88: A.I.R. 1946 Cal. 452.

A statement of the accused, charged with murder, identifying the body discovered as that of the deceased in the presence of a Magistrate and Police officials does not come

under S. 26. The statement does not amount to a confession of a crime. Further S. 26 is expressly not applicable, when the statement is made, in the immediate presence of a Magistrate, even though the person making it might be in Police custody: 1960 Cr.L.J. 1344: A.I.R. 1960 Mad. 462.

Where the Police Officer produced the accused—a railway employee, before the Railway Emergency Officer for recording confession which was recorded in the Police Station in the presence of Executive Magistrate and he was thereafter taken back in Police custody and the accused who had earlier been suspended was taken back on duty after statement, *held*, it was inadmissible under S. 26: 1976 Mah.L.J. (Notes) 87.

It cannot be said that an under-trial prisoner was in Police custody while being taken from the jail to the Magistrate, unless it can be further shown that the escorting Police Officer was in any way connected with the investigation of the case or that he was directly under the supervision of the investigating Police Officer, as otherwise no confession can possibly be held to be free from Police influence, because it will be unreasonable to expect any person other than a Police Officer to escort such under-trial prisoners. Moreover the long interval such as of two days during which the accused was kept in jail custody, is sufficient to remove all Police influence, if any. Where the Magistrate also put several questions to the accused with a view to ascertain whether the confession was made voluntarily including the question as to why he wanted to make a confession, and the accused, like a typical Khond, replied frankly that as he had committed a crime for the sake of land he should not deny his guilt.

Held, that the confession was made voluntarily and not under duress: (1963) 5 Ori.J.D. 145: (1964) 1 Cr.L.J. 464.

A confession while in Police custody is of little value: 10 Punj. Re. 1914 (Cr.): 25 I.C. 825. *See* also 12 W.R. (Cr.) 82.

Confession made when in Police custody—Admissibility: A.I.R. 1957 Him. Pra. 52: 1957 Cr.L.J. 1254.

Confession of accused in Police custody: 1959 Cr.L.J. 940: A.I.R. 1959 All. 518.

Evidence to prove a confession made while an accused person is in Police custody, is inadmissible: 22 I.C. 150: 15 Cr.L.J. 6. *See* also I.L.R. 22 Bom. 235; A.I.R. 1929 Nag. 350. In 7 W.R. (Cr.) 56, evidence of Policeman who overheard a prisoner's statement made in another room to another held admissible. But *see* also I.L.R. 20 Bom. 165: 39 I.C. 977: (1916-17) 21 Cal.W.N. 694.

Accused kept in remand for fifteen days—Then, after keeping in jail custody for three days, produced before Magistrate for recording confession—After preliminary questioning and a warning accused sent back to jail—Confession recorded on next day, *held*, was voluntary—Accused had spent four days in judicial custody and he was not under influence of investigating agency for at least four days: A.I.R. 1970 S.C. 283.

Accused in Police custody for 10 days, before being sent to jail custody — Confession in jail — Prolonged detention in Police custody unless satisfactorily explained is a circumstance strongly mitigating against voluntariness of confession — Prolonged detention held satisfactorily explained and the confession held was voluntary: 1970 Cr.L.J. 603 (All.).

Accused charged with bribery — Trap party recovering the currency notes in question—Recovery memo. signed by the accused amounts to a confession by the accused while in Police custody in view of presumption under S. 4, Prevention of Corruption Act — Memo. cannot form the basis for conviction — However, it can be considered to test the regularity and propriety of the recovery proceedings—(Penal Code, 1860, S. 161)—(Cr.P.Code, 1898, S. 162): 1968 Cr.L.J. 391.

Confession — Voluntariness. *See* Cr.P. Code, 1898, S. 164: A.I.R. 1958 Ker. 207: 1958 Cr.L.J. 1021: 1958 M. L.J. (Cr.) 481.

For a confessional statement to be admissible and to be used against an accused, it must be proved to be voluntary. The voluntary nature of the evidence can be judged from the internal evidence of the document itself and also from the evidence of the Magistrate recording the confession: 1977 Cr.L.J. 296 (Gau.) (D.B.).

Where the accused who had surrendered in Court and had been granted bail was subsequently brought to Court in custody for the purpose of recording of confessional statement, *held*, such a confessional statement was unreliable as it would be deemed to have been made under coercion: 1994 Cr.L.J. (N.O.C.) 428 (All.) (D.B.).

A judicial confession can be taken into consideration only when it is voluntary and true: (1986) 1 Crimes 716 (Ori.).

Where to the question put by the Magistrate as to why the accused decided to make

the statement, the accused replied that he wanted to speak out the truth, *held*, the accused's confessional statement recorded under S. 164, Cr.P.Code, was really voluntary and free from Police influence: 1991 Cr.L.J. 3248 (Ori.) (D.B.).

Voluntary character of confession. *See* Cr.P.Code, 1898, S. 164: A.I.R. 1957 Madh. Bh. 72: 1957 Cr. L.J. 199.

Accused under surveillance of Police constable—Extra-judicial confession—Confession also retracted—Confession *held* was hit by S. 26: 34 Cut.L.T. 141: 1968 Cr.L.J. 765: A.I.R. 1968 Ori. 97.

When confession was made to villagers at large, *held*, the mere fact that a Policeman happened to be member of the crowd, would not render it inadmissible: 1979 M.P.L.J. 599; 1983 Cr.L.J. 1559: (1982-83) 87 Cal.W.N. 723: (1983) 2 Cal.H.N. 26: (1983) 2 Crimes 499.

The mere fact that the Court constable was allowed to remain present while the co-accused were making their confessions before the Magistrate does not involve the total exclusion of the confessions from evidence, but it certainly detracts from their evidentiary value: 14 Pat.L.T. 111: A.I.R. 1934 Pat. 586. *See* also 165 I.C. 319: A.I.R. 1936 Rang. 455.

Oral confession.—A confession to be admissible in evidence need not be recorded. It may be oral, and may be proved by the Magistrate to whom the oral confession was made: 45 I.C. 843: 11 P. R. 1918 (Cr.); (1932) 34 Punj.L.R. 896: A.I.R. 1933 Lah. 513; I.L.R. 56 All. 730: A.I.R. 1934 All. 351. *See* also A.I.R. 1933 Lah. 998; 10 O.W.N. 923: A.I.R. 1933 Oudh 423.

Plea of guilty by undefended accused enfeebled by illness.—A plea of guilty can be allowed to be withdrawn if the accused was at the time of making it, enfeebled by illness and was undefended: 28 I.C. 145: 16 Cr.L.J. 257.

Confession—Admissibility of, against co-accused.—A confession by an accused is not admissible against co-accused under S. 30, if the former is convicted on his plea of guilty: 28 I.C. 145: 16 Cr.L.J. 257; 159 I.C. 875: A.I.R. 1936 Oudh 156. A confession of an accused recorded outside British India by a Magistrate is not excluded by S. 26: 69 I.C. 257: 17 Nag.L.R. 113. As to confession not recorded under S. 164, Cr.P.Code, but recorded under S. 339(2), Cr.P.Code, before tender of pardon, *see* I.L.R. (1943) Kar. 285: A.I.R. 1943 Sind 166.

Two accused charged with murder—One of them admitting to be joint participant facilitating murder by the other—Explanation that he was threatened with death by other accused, *held*, did not exonerate him: 31 Cut.L.T. 17: (1964) 1 Cr.L.J. 680: A.I.R. 1964 Ori. 144.

Where the accused was neither named in the F.I.R. nor named by any witness nor any property was recovered from his possession, *held*, he could not be proceeded against merely on the basis of statement of co-accused made to Police; that being a confession made to Police, it will not be admissible under Ss. 25 and 26: 1993 Cr.L.J. 1499 (Madh. Pra.).

2. Section 26 *vis-a-vis* section 27.—S. 26 is the main section which lays down the general rule. S. 27 lays down an exception to the rule enunciated in S. 26 and insists upon certain conditions being fulfilled before the application of S. 27 is attracted. The statement must be made by a person already in the custody of the Police Officer, and the provable part of the information, whether amounting to confession or not, must relate distinctly to the fact thereby discovered. The actual discovery of a thing in consequence of the information is considered to be a guarantee of the truth of the information and of the fact of its communication to the Police: (1956-57) 61 Cal.W.N. 483: A.I.R. 1957 Cal. 372: 1957 Cr.L.J. 707. *See* also A.I.R. 1976 S.C. 483: 1976 Cr.L.J. 481: (1976) 1 S.C.C. 828.

S. 27 is in the nature of a proviso to S. 26 which interdicts the provision of confessional statements made by a person in custody of the Police. S. 27 partially removes the ban placed on the reception of confessional statements under S. 26. But the removal of the ban is not of such an extent as to absolutely undo the object of S. 26. So much of the statement made by a person accused of an offence and in custody of a Police Officer, whether it is confessional or not, as relates distinctly to the fact discovered is proveable.

Held, that the evidence in regard to the discovery of the key as well as the box which the accused handed over to the Police was admissible in evidence under S. 27. The confession lay in the fact that with key the shop of the complainant was opened and, therefore, that portion was inadmissible in evidence and only that portion which distinctly

related to the fact discovered, *i.e.*, the finding of the key was admissible. Similarly, the recovery of the box was proveable because there was no statement of the confessional nature in the recovery memo. relating to it: I.L.R. (1962) 2 All. 522: A.I.R. 1962 S.C. 1116: 1963 M.L.J. (Cr.) 209: (1962) 2 S.C.R. (Supp.) 830.

Where in consequence of the disclosure statement made by the accused no incriminating article was recovered, *held*, the statement would not be protected under S. 27 and being in the nature of confession to the Police, it would be hit by Ss. 25 and 26 and as such would be inadmissible in evidence: 1985 Cr.L.J. 1700 (Del.).

Recovery of articles in consequence of statement made by accused, under S. 27—Witness to recovery memo. not of locality—His evidence cannot be rejected on this ground—Provisions of S. 103, Cr.P.Code, are not applicable to recoveries made under S. 27—They are confined only to search made under Chap. VII of Code—Even under S. 103 stress is on word 'respectable' and not on word 'locality': 1967 Cur.L.J. 682: (1967) 69 Punj.L.R. 935.

Onus—Two statements by accused about place of concealment—Second statement relied on by prosecution—Prosecution to prove that the recovery is in pursuance of second statement and not the first: 1968 Cr.L.J. 372: A.I.R. 1968 Punj. 120.

Statements and reports prepared outside the Court cannot by themselves be accepted as primary or substantive evidence of the facts stated therein. S. 159 then permits a witness, while under examination, to refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in the memory. Again, with the permission of the Court, the witness may refresh his memory by referring to a copy of such document. And the witness may even refer to any such writing made by any other person but which was read by him at the time the transaction was fresh in his memory and when he read it he knew it to be correct. S. 160 then provides for cases where the witness has no independent recollection say, from lapse of memory, of the transaction to which he wants to testify by looking at the document and states that although he has no such recollection he is sure that the contents of the document were correctly recorded at the time they were. Where a case of this character arises and the document itself has been tendered in evidence, the document becomes primary evidence in the case.

The fundamental distinction between the two sections is that while under S. 159 it is the witness's memory or recollection which is evidence, the document itself not having been tendered in evidence, under S. 160, it is the document which is evidence of the facts contained in it. However, in order to bring a case under S. 160, though the witness should ordinarily affirm on oath that he does not recollect the facts mentioned in the document, the mere omission to say so will not make the document inadmissible provided the witness swears that he is sure that the facts are correctly recorded in the document itself. S. 160 of the Act applies equally when the witness states in so many words that he has no independent recollection of the precise words used, or when it should stand established beyond doubt that should be so as a matter of natural and necessary conclusion from the surrounding circumstances.

Normally, a Police Officer should reproduce the contents of the statement made by the accused under S. 27 of the Evidence Act in Court by refreshing his memory under S. 159 of the Evidence Act from the memo. earlier prepared thereof by him at the time the statement had been made to him or in his presence and which was recorded at the same time or soon after the making of it. Where the Police Officer swears that he does not remember the exact words used by the accused from lapse of time or a like cause or even where he does not positively say so but it is reasonably established from the surrounding circumstances, that it could hardly be expected in the natural course of human conduct that he could or would have a precise of dependable recollection of the same, then under S. 160 of the Evidence Act, it would be open to the witness to rely on the document itself and swear that contents thereof are correct: 1965 Raj.L.W. 418: I.L.R. (1965) 15 Raj. 989: 1965 Cr.L.J. 441: A.I.R. 1966 Raj. 74. *See* also I.L.R. (1966) Guj. 134.

Statement made in Police custody and before Magistrate is not admissible either against him or against a person jointly tried

with him, unless it has led to discovery of any fact mentioned in S. 27: 28 I.C. 145: 16 Cr.L.J. 257.

3. Police custody—What amounts to.— [*See* also S. 27, Note 14, *infra*].What S. 26 contemplates is not the arrest of an accused but his being in 'custody' of a Police Officer when the confession is made. To go to the 'custody' of a Police Officer it is not necessary that he should be formally arrested. 'Police custody' commences from the moment when his movements are restricted and he is kept in some sort of direct or indirect Police surveillance: (1990) 4 Karn.L.J. 46: I.L.R. (1991) Karn. 615 (D.B.).

Custody contemplated by S. 26 does not necessarily mean a formal arrest and what is necessary is that at the time of making the confession the accused should be in the hands of a Police Officer, *i.e.*, not free to depart at his own free will: A.I.R. 1957 Tripura 48: 1957 Cr.L.J. 1457.

Even if a confession is admissible in evidence, the Court has still to decide whether or not it is truthful. The Court should also satisfy itself whether or not the accused was a free man when he made the confession. The test is not whether he had formally been arrested; the Police custody in the real sense commences when the accused's movements are restricted or controlled by direct or indirect Police surveillance; and the Court has to take an overall comprehensive view as to the circumstances occurring before and after the confession: 1982 Cr.L.J. 2102 (Ker.).

There is a distinction between custody and arrest. 'Custody' is not always formal and includes any sort of surveillance or restraint by Police. A person, called to the Police Station to be interrogated as an accused in investigation of a crime, must be deemed to be in Police custody as his formal arrest is not then necessary. Thus, if the accused, after interrogation, is allowed to go home and formally arrested thereafter, his statements during interrogation leading to discovery are admissible under S. 27; obviously after he made such statements, he must have been under Police eye throughout. [A.I.R. 1954 All. 687; A.I.R. 1937 Lah. 620; A.I.R. 1948 All. 7 and 1968 C.L.R. 268 (S.C.), Foll.]: 1974 M.P.L.J. 429 (D.B.).

'Police custody' for the purpose of S. 26 does not commence only when the accused is formally arrested but would commence from the moment when his movements are restricted and he is kept in some sort of direct or indirect Police surveillance. As soon as an accused or suspected person comes into the hand of a Police Officer, he is, in the absence of any clear and unmistakable evidence to the contrary, no longer at liberty and is, therefore, in 'custody' within the meaning of Ss. 26 and 27 of the Evidence Act. Even indirect control over the movements of suspects by the Police would amount to 'Police custody' within the meaning of S. 26. S. 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody, submission to the custody by word of mouth or action by a person is sufficient. A person directly giving a Police Officer by word of mouth information which may be used as evidence against him may be deemed to have submitted himself to the custody of the Police Officer within the meaning of S. 27. Once the Police custody has commenced, the mere fact that, for a temporary period, the Police discreetly withdraws from the scene and leaves the accused in charge of some other person will not render the confession of the accused before that person admissible.

The accused had been interrogated by a Police Officer and was brought in a Police van the next day to the residence of the person before whom he made an extra-judicial confession. Although the regular Police Officers went away after leaving the accused with that person, some other persons, who had come in the Police van, were left there. After the accused made the confession, the Police Officer came there the next day and formally arrested him.

Held, that the accused was in Police custody for the purpose of S. 26, from the date of his interrogation by the Police Officer and that he continued to be in custody when he was brought and left at the residence of the person to whom he made the confession, as there was indirect control and surveillance over his movements by the Police which continued till the next day when he was formally put under arrest and the confession was inadmissible in evidence under S. 26: (1963) 5 Ori. J.D. 372: (1964) 1 Cr.L.J. 680: 31 Cut.L.T. 17: A.I.R. 1964 Ori. 144.

Where a person goes to a Police Officer and makes a statement which shows that an

offence has been committed by him, he accuses himself and though he is formally not arrested since he is not free to move wherever he likes after disclosure of the information to the Police, he must be deemed to be in custody of the Police. The fact that the accused was interrogated and that he made a statement and led the panchas and the Police Officer to a field and thereafter produced certain articles which were the subject-matter of dacoity was sufficient to establish that there was submission on his part to Police custody. The word 'custody' in S. 26 or S. 27, does not mean formal custody but includes such state of affairs in which the accused can be said to have come into the hands of a Police Officer or can be said to have been under some sort of surveillance or restriction. Thus, the 'Police custody' is deemed to extend even when the accused was deemed to have submitted to such custody of a Police Officer by submitting to the interrogation and by making statements about discovery and who could not thereafter be said to be a free man: I.L.R. (1964) Guj. 954: (1965) 1 Cr.L.J. 30: (1965) 6 Guj. L.R. 129: A.I.R. 1965 Guj. 5.

It is possible without even a formal arrest being made, for a person to be in the custody if a restraint has been placed upon his movement by the Police. [A.I.R. 1954 All. 633, Rel. on]: 1957 Cr.L.J. 1086: A.I.R. 1957 Andh. Pra. 729.

The custody of a Police Officer for purposes of S. 26 is not mere physical custody. A person may be in the custody of a Police Officer, though the latter may not be physically in possession of the person of the accused making the confession. Once an accused person is arrested by a Police Officer and is in his custody, the mere fact that for some purpose or other the Police Officer happens to be temporarily absent and during such absence leaves the accused in charge of a private individual does not terminate the custody of the Police Officer. The accused must be deemed to be still in the custody of the Police Officer: I.L.R. 17 Pat. 369: 19 Pat.L.T. 268: A.I.R. 1938 Pat. 308; A.I.R. 1941 Pesh. 22.

Doubtless the Chowkidar is a Police Officer for purposes of S. 26. Where the Chowkidar convened the meeting of the Panch, he himself was present in the meeting and questioned the accused persons about the occurrence and the extra-judicial confessions are made by way of replies to his questions, it is advisable to exclude the extra-judicial confession. S. 26 does not contemplate a formal custody; it may as well include a case where the accused were under some sort of surveillance or restriction when the village Chowkidar was himself present and questioned them about their guilt: I.L.R. (1962) Cut. 366: (1964) 2 Cr.L.J. 487.

A statement made by the accused at the dock before the Magistrate, if it amounts to a clear confession, is certainly admissible in evidence against the accused; its value is not discounted by the fact that the accused was at that time in the custody of the Police: 1930 Mad.W.N. 1249.

Where the handcuffed accused brought at the out-post made a statement to the Police that he had killed the deceased, *held*, being a confession made while in Police custody, it is not admissible: 1981 Cr.L.J. 1734 (Gau.).

The accused who was in the lock-up of the Magistrate was sent up by the Magistrate to a hospital for treatment with two Policemen in charge. The latter waited outside in the verandah. During his examination inside the dispensary by the Doctor, the accused made a confession within the hearing of the Doctor. *Held*, that it was excluded by S. 26: I.L.R. 42 Bom. 1: (1908) 10 Bom.L.R. 683. *See* also 1939 All.L.J. 732: 91 I.C. 806; A.I.R. 1925 Lah. 557; A.I.R. 1937 Mad. 209: (1937) 1 M.L.J. 154; I.L.R. (1940) Nag. 679: 1940 Nag.L.J. 623; A.I.R. 1936 Lah. 380; A.I.R. 1936 Nag. 200. *See* also A.I.R. 1941 Pesh. 22 (Confession to Doctor while in Police custody, but not in presence of Police Officer, is admissible).

Accused examined by Doctor on requisition from Police and actually brought to Doctor by Police—Confession to Doctor—Confession cannot be acted upon as accused must be presumed to be in Police custody: (1964) 2 M.L.J. 204.

An admission of a fact however incriminating, but not by itself establishing the guilt of the maker of such admission, would not amount to confession within the meaning of Ss. 24 to 26. Thus, statement made by the accused to the Doctor where he was taken by the Police after arrest that it was the deceased who had caused the injury to him, *held*, it was an admission of a fact, no doubt of an incriminating fact, and which established the accused's presence in the deceased's room but which clearly was not barred under S. 26.

[(1970) 2 M.L.J. 371, Affirmed]: A.I.R. 1972 S.C. 66: 1972 Cr.L.J. 11: (1972) 1 S.C.R. 450; 1984 M.L.J. (Cr.) 202: 1984 Mad.L.W. (Cr.) 23: 1984 Cr.L.J. (N.O.C.) 193; 1985 Cr.L.R. 657 (Raj.); 1986 Cr.L.J. 1865: (1987) 1 Ker.L.T. 391 (D.B.); A.I.R. 1988 Ker. 1 : 1988 Cr.L.J. 107 (F.B.); (1993) 2 Ker.L.J. 11: 1994 Cr.L.J. 322 (D.B.). *See* also 1982 Cr.L.J. 2102 (Ker.); 1983 Cr.L.J. 1578 (Gau.); 1991 Cr.L.J. 1793 (Karn.) (D.B.).

Statements made by the accused to the Daroga showing the place in the jungle where the occurrence in question, *viz.*, taking away a female and having sexual intercourse with her took place, cannot be admitted in evidence, they being in the nature of a confession made to a Police Officer while in custody, S. 27 has no application and would make the statements admissible: 143 I.C. 797: A.I.R. 1933 Cal. 146. As to meaning of 'in custody', *see* 77 I.C. 429: A.I.R. 1924 Rang. 173.

Where the accused in judicial lock-up made a confession to fellow prisoners, the Policeman whose duty was to guard the lock-up was present, *held*, that his presence did not make the confession inadmissible as accused was in magisterial custody as opposed to Police custody: 151 I.C. 894: A.I.R. 1934 Lah. 75.

Where 30 minutes after recording his confession, the Police formally arrested the accused, *held*, the accused was in constructive Police custody when his statement was recorded; his confession was hit by S. 27. [1960 Cr.L.J. 1504 (S.C.) and (1947) 48 Cr.L.J. 939 (All.) and 1966 Cr.L.J. 100 (S.C.), Foll.]: 1976 Cr.L.J. 1652: 1976 Raj.L.W. 251 (D.B.).

Where the accused came to his in-laws house and informed his father-in-law, a Police Patel, that he had committed the alleged crime and he was immediately taken in custody by father-in-law, *held*, the alleged judicial confession made to his wife thereafter would clearly be treated to have been made while in Police custody: 1980 Cr.L.R. 154 (Guj.).

Where the prosecution version was that the Investigation Officer and the Village *Pradhan* had apprehended the accused from his village, got him identified by other prosecution witnesses as the person last seen with the deceased, whereafter, the Investigating Officer went away for further investigation, leaving the accused with the *Pradhan* before whom the accused made the confession; and it was then that the accused made an extra-judicial confession to the *Pradhan*, *held*, it is incredible that the Investigating Officer would leave the accused without taking him into custody; obviously, the Investigating Officer had manipulated this artificial scenario to procure the extra-judicial confession; he could have very well taken the accused to a Judicial Magistrate and get the confession recorded under S. 164 of the Code of Criminal Procedure; that would have greater probative value and an unerring assurance of its truth to the Court. The 'extra-judicial' confession was hit by S. 26 as the accused was in Police custody: A.I.R. 1990 S.C. 2140: 1990 Cr.L.J. 2289: (1991) 1 S.C.C. 286.

A person arrested by an Officer of the Railway Protection Force under S. 6 of the Railway Property (Unlawful Possession) Act, 1966 for the alleged commission of an offence under S. 3 of that Act, is not a "person accused of an offence" within the meaning of Art. 20(3) of the Constitution: A.I.R. 1981 S.C. 379: 1980 Cr.L.J. 1424: (1980) 4 S.C.C. 600: (1981) 1 S.C.R. 175.

4. 'Police Officer'—Who is.—[*See* also S. 25, Note 4, *supra*].Police Officers referred to in S. 26 need not be Investigating Police Officers: I.L.R. 42 Bom. 1: (1917) 19 Bom.L.R. 683. S. 26 has always been taken to apply to confessions made to some person other than a Police Officer: I.L.R. (1940) Lah. 242: 188 I.C. 498: A.I.R. 1940 Lah. 129 (F.B.).

Confessional statement to dafadar after arrest not admissible. *See* 21 Pat.L.T. 171: A.I.R. 1940 Pat. 110. A confession to a Police Patel is inadmissible: 31 I.C. 340 (2): (1915) 17 Bom.L.R. 898.

Police Officers in Native States are Police Officers under section: I.L.R. 22 Bom. 235. *See* also I.L.R. 20 Bom. 795 and other cases cited under S. 25.

Jailor is not Police Officer: I.L.R. 20 Bom. 795. 'Police Officer' includes a Chowkidar: A.I.R. 1943 Cal. 612. Where the accused was in the custody of the village chaukidar when he admitted his guilt before certain villagers, *held*, that the confession was not admissible in evidence: I.L.R. 8 Luck. 410: A.I.R. 1933 Oudh 192; 11 O.W.N. 119: A.I.R. 1934 Oudh 19.

The Customs Officers who are empowered under S. 53 of the Narcotic Drugs and Psychotropic Substances Act, 1985 to be

Police Station Officers are not Police Officers and any confessions made before them are admissible in evidence under S. 17 and the same is not hit by Ss. 25 and 26: 1993 Cr.L.J. 1310 (Pat.).

A person against whom an enquiry under S. 107 or S. 108 of the Customs Act, 1962 is held is not an accused nor is the Officer holding the enquiry a Police Officer; a confession made by such a person before the Customs Officer is admissible and not hit either by S. 25 or S. 26. But if such confession is shown to have been obtained by inducement, threat, coercion or duress or extracted during his illegal and prolonged custody or obtained by using third degree methods, *held*, such confession being involuntary cannot be accepted or relied upon: (1984) 15 E.L.T. 289: 1984 Cr.L.J. 134: 1983 Mad.L.W. (Cr.) 289 (F.B.).

5. Magistrate.—The term 'Magistrate' is not restricted to a Magistrate exercising jurisdiction under the Code of Criminal Procedure; thus, a *Judge d'instruction* in French India who has the power to commit or discharge but not to convict a prisoner is a Magistrate within the meaning of S. 26; statements made to him by accused in Police custody are admissible: A.I.R. 1929 Mad. 487: I.L.R. 52 Mad. 529: 56 M.L.J. 628 (D.B.).

Confession to Honorary Magistrate—Admissibility of: 152 I.C. 998: I.L.R. 15 Lah. 856: A.I.R. 1934 Lah. 417.

Confession made before Magistrate of Native State is within the section: 144 I.C. 157: A.I.R. 1933 All. 286; 151 I.C. 311: A.I.R. 1934 Sind 103.

Though the confession before the Village Munsif is admissible, it is a very weak piece of evidence and the weight to be attached to it would depend upon the facts of each and every case: (1987) 3 Crimes 689 (Mad.).

Confession recorded by Magistrate not empowered by State Government—Oral evidence to prove such confessions—Not admissible—S. 533 of no avail: 1965 M.L.J. (Cr.) 72: I.L.R. (1964) 1 All. 340: (1964) 1 Cr.L.J. 263 (2): A.I.R. 1964 S.C. 358; 1965 All.L.J. 77; 1967 Cr.L.J. 1104 (All.); 1967 Cr.L.J. 628: A.I.R. 1967 Del. 14.

6. Time for reflection.—[*See* also S. 24, Note 15, *supra*].There is no statutory period of time to which an accused is entitled for making a confession after he is sent to the magisterial custody. All that is required is that he must have sufficient time for reflection; the mere fact that the confession was made one day after the accused was handed over to the magisterial custody would not by itself show that he had no sufficient time for reflection or make the confession bad on that account: (1945) 47 Bom.L.R. 63: A.I.R. 1945 Bom. 292. Where the accused allowed about four hours to think over before the Magistrate recorded his confession, it could not be said that the confession which he made after this time had been allowed to him to think over, was not voluntary: 1952 Raj.L.W. 269: I.L.R. (1952) 2 Raj. 93.

7. Retracted confession.—[*See* also S. 24, Notes 16 to 21, *supra*].That a retracted confession cannot be made the basis of a conviction, unless corroborated is not a rule of law but a rule of prudence. General corroboration showing that such confession was voluntary and true is sufficient. It is not necessary that each and every circumstance mentioned in the confession regarding the complicity of the accused must separately and independently be corroborated. Nor it is essential that corroboration must come from facts and circumstances discovered after the confession was made. But an accomplice's evidence should be corroborated in material particulars. The confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence.

One of the conditions in S. 30 is that the confession of an accomplice must implicate the maker substantially to the same extent as the other accused persons against whom it is sought to be taken into consideration. Where on reading confession, as a whole, it appears that he was really trying to throw the main blame on the other accused and make out that he was an unwilling spectator to the crime committed by the other accused, the utmost that can be stated is that the confession cannot be used at all against the other accused. But because there were differences between his confession and the confessional statement of the other accused, the confessional statements cannot be condemned *in limine* as untrue where some of the differences are immaterial, some others are due to the desire of the accused to throw the blame

27. How much of information received from accused may be proved.—Provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

---

on the other and the rest stand clearly resolved by other evidence in the case: 32 Cut.L.T. 1140.

When an accused retracts from the judicial confession, *held*, it should found general corroboration before it could be acted upon: (1986) 1 Crimes 716 (Ori.).

As a matter of caution and prudence some material corroboration which connected the accused with the crime in question is required before a conviction can be based upon a retracted confession.

Held, on facts.—That there was no evidence to connect those accused with the crime and it was not safe to convict them on the basis of the extra-judicial confession which was retracted. The fact that the dacoity had taken place and the further fact that some of the stolen articles specified in the confession were recovered from the house of the other accused in the case named in the confession as having participated in the dacoity was no evidence to substantiate the participation of the accused in question in the dacoity. They were, therefore, entitled to benefit of doubt: 1960 B.L.J.R. 268: I.L.R. 39 Pat. 361.

A confession of a co-accused, which is retracted cannot be used as corroboration of the evidence against the other accused. Similarly, when it appears that the co-accused has made studious attempts in his confession to show that he was an unwilling accomplice in the commission of the crime, his confession cannot be used against the other accused. But, although such confession of the co-accused cannot be used against the other accused for the reasons mentioned above, it can be used to a limited extent against himself as corroborating the evidence of a witness, when the evidence of such witness is the main evidence against him and that portion of the confession which incriminates the maker may be used as corroborative of the evidence of such witness. The rule that a confession should be used as a whole is not applicable to such a case: (1963) 5 Ori.J.D. 372: (1964) 1 Cr.L.J. 680: 31 Cut.L.T. 17: A.I.R. 1964 Ori. 144.

Section 27—Synopsis.

[*See* also Notes under Ss. 24 to 26]

1. Section does not offend against Article 14 of the Constitution.
2. Section not repugnant to Article 20(3) of the Constitution.
3. Scope of section.
4. Applicability of section.
5. Information by accused—Evidentiary value of.
6. Statements admissible under section 27—Against whom can be used.
7. How much of statement is admissible.
8. Accused of any offence [*See* also S. 24, Note 4; S. 25, Note 6, *supra*].
9. Use of First Information Report for purposes of section 27.
10. "Leading to discovery".
11. "Discovered"—Meaning of.
12. "Distinctly"—Meaning of.
13. "Whether amounts to confession or not".
14. Custody of Police Officer [*See* also S. 26, Note 3, *supra*].
15. "Police Officer"—Who is [*See* also S. 25, Note 4; S. 26, Note 4, *supra*].
16. Statement to Police—Recording of—Duty of Police.
17. Police remand for effecting recovery.
18. Information not leading to discovery.
19. Information from two persons—Only that leading to discovery is admissible.
20. Joint discovery.
21. Statement after discovery—Pointing out property—Value of.
22. Information already known to Police.
23. Statement under section 162, Cr.P.Code.
24. Place of recovery.
25. Absence or presence of human blood on articles recovered—Effect of.
26. Delayed recovery—Effect of.
27. Articles recovered must have some connection with the crime.

28. Common use articles—Recovery of—Effect.

29. Effect of seizure or non-seizure of weapon of offence when direct evidence available.

30. Witness to recovery.

31. Procedural defects.

32. Presumption as to stolen or robbed property [*See* also S. 114].

33. Illustrative cases.

34. Miscellaneous.

---

1. Section does not offend against Article 14 of the Constitution.—The law contained in S. 27 deals equally with all those who are placed in the circumstance envisaged by that section. It does not make any distinction between them. The section, therefore, would not be open to the charge of denial of equal protection on the ground that it has no application to other persons.

Further, in view of the scope and applicability of S. 27 of the Evidence Act as declared by the Supreme Court, which is binding on all Courts within the territory of India, it is clear that S. 27 is not *ultra vires* the Constitution and it does not offend against Art. 14 of the Constitution: 1958 Cr.L.J. 842: A.I.R. 1958 All. 514.

S. 27—Validity—If offends against Art. 14 of the Constitution—Cr.P.Code, S. 162(2).

Per *S. K. Das, Kapur, Hidayatullah* and *Shah, JJ.*—S. 27 of the Evidence Act and S. 162, sub-S. (2) of the Code of Criminal Procedure in so far as that section relates to S. 27 of the Evidence Act, are *intra vires* and do not offend Art. 14 of the Constitution: A.I.R. 1960 All. 1 (F.B.), Reversed. (*Hidayatullah, J.*, approached the question from a different point of view).

Per *Subba Rao, J.* (*Contra*).—S. 27 of the Evidence Act is void as violative of Art. 14 of the Constitution.

Per *S. K. Das, Kapur* and *Shah, JJ.*—By the combined operation of S. 27 of the Evidence Act and S. 162 of the Code of Criminal Procedure, the admissibility in evidence against a person in a Criminal proceeding of a statement made to a Police Officer leading to the discovery of a fact depends for its determination on the question whether he was in custody at the time of making the statement. It is provable if he was in custody at the time when he made it, otherwise it is not.

This distinction between persons in custody and persons not in custody, in the context of admissibility of statements made by them concerning the offence charged cannot be called arbitrary, artificial or evasive; the Legislature has made a real distinction between these two classes, and has enacted distinct rules about admissibility of statements, confessional or otherwise, made by them.

When a person not in custody approaches a Police Officer investigating an offence and offers to give information leading to the discovery of a fact having a bearing on the charge which may be made against him, he may appropriately be deemed to have surrendered himself to the Police and may be deemed to be in the 'custody' of the Police Officer within the meaning of S. 27 of the Evidence Act. In considering whether there has been a denial of the equal protection of the laws, a doctrinaire approach is to be avoided.

The principle of admitting evidence of statements made by a person giving information leading to the discovery of facts which may be used in evidence against him is manifestly reasonable. The fact that the principle is restricted to persons in custody will not by itself be a ground for holding that there is an attempted hostile discrimination because the rule of admissibility of evidence is not extended to a possible, but an uncommon or abnormal class of cases: A.I.R. 1960 S.C. 1125: (1961) 1 S.C.R. 14.

2. Section not repugnant to Article 20(3) of the Constitution.—Art. 20(3) of the Constitution does not contemplate the suppression of truth simply because the information is given by the accused. It only protects him against being compelled to be a witness against himself. It is, therefore, not correct to presume that information given by the accused under S. 27, Evidence Act is compelled testimony. Hence, S. 27, Evidence Act is not repugnant to Art. 20(3) and therefore, does not stand abrogated by Art. 13 of the Constitution: A.I.R. 1955 Raj. 147: 1955 Cr.L.J. 1285.

Under S. 27 of the Evidence Act, the information given to the Police relating distinctly to the fact thereby discovered is allowed to be given in evidence by the Police. The information may be either voluntary or extracted from him by compulsion. In either case, before the Constitution it was admissible in evidence if the conditions laid down in the

section are complied with. But after the enactment of the Constitution information obtained by compulsion must be excluded from evidence. Art. 20(3) of the Constitution 'embodies the principle of protection against compulsion of self-incrimination' and the protection afforded under that Article is not confined to giving oral evidence or producing evidence in the Court room but extends to compelled testimony previously obtained from him. S. 27 of the Evidence Act, and Art. 20(3) of the Constitution, however, may be reconciled. Information voluntarily obtained from an accused, relating distinctly to the fact thereby discovered, is not hit by Art. 20(3) and, therefore, is relevant evidence under S. 27 of the Evidence Act: A.I.R. 1957 Andh. Pra. 611: I.L.R. (1956) Andh. 173; (1959) 61 Punj.L.R. 912: A.I.R. 1960 Punj. 294.

The phrase used in Art. 20(3) is 'to be a witness' and not to appear as a witness. It follows that the protection afforded to an accused in so far as it is related to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him. Art. 20(3), therefore, applies to discoveries under S. 27, Evidence Act, if these discoveries are the results of compulsion. The scope of S. 27, Evidence Act is thus restricted by Art. 20(3) of the Constitution and the discoveries which follows a confession brought about by compelling an accused person cannot be used against him: 1958 Cr.L.J. 462: A.I.R. 1958 All. 293.

Validity of. *See* Constitution of India, Art. 20(3): A.I.R. 1958 Mys. 150: 1958 M.L.J. (Cr.) 341: 1958 Cr.L.J. 1489.

It is true that after the coming into force of the Constitution, the evidence which may otherwise be admissible under S. 27 of the Evidence Act may be inadmissible by virtue of Art. 20(3), if it could be established that such evidence was obtained under compulsion. There is, however, nothing on record to show that the accused was compelled to throw the stone at the place from where the knife was recovered. It is true that the accused was then under Police custody, but mere Police custody in the absence of further evidence to show that force or compulsion was used, will not suffice to show that his statement was made under compulsion so as to attract Art. 20(3) of the Constitution: 1959 Cr.L.J. 353: A.I.R. 1959 Ori. 33.

Recovery of stolen property from persons charged under S. 412, Penal Code cannot be ignored: (1961) 2 Cr.L.J. 746: A.I.R. 1961 All. 614.

3. Scope of section.—*See* I.L.R. 45 Cal. 557: (1917-18) 22 Cal.W.N. 213; A.I.R. 1941 Nag. 86. S. 27 is an exception to the rules enacted in Ss. 25 and 26: A.I.R. 1955 S.C. 104. *See* also A.I.R. 1960 All. 1 (F.B.); A.I.R. 1960 S.C. 1125.

S. 27 has to be read as a proviso not only to S. 26 but to Ss. 25 and 26 taken together: 1941 P.W.N. 653. S. 27 is an enabling section providing an exception to the previous ones which exclude confessions made to or in presence of the Police. If the conditions of the section are fulfilled, it allows a confession to be proved: A.I.R. 1936 Nag. 200.

S. 27 is in the nature of a proviso relating to the previous sections which lay down the general rules as to the inadmissibility of confessions made in certain circumstances. Whether confession to which S. 27 applies was induced by promises or not is immaterial. The general ground for not admitting confessions made either to a Police Officer, or made under any inducement or made by persons while in custody is clearly the danger of admitting false confessions; but the necessity for this precaution disappears when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given: I.L.R. (1937) Nag. 268: 168 I.C. 962: A.I.R. 1937 Nag. 220.

S. 27 is enacted as a rider and an exception to the general rule that statements containing the information received by the Police Officer from a person during investigation, whether inculpatory or not, are not admissible against such person. Being in the nature of a proviso and an exception to the general rule, it follows that before S. 27 is applied, all its conditions must be fully satisfied. Any element wanting would bring in the prohibition rendering the statements as tried to be proved to be entirely inadmissible. Under this provision, only that statement containing the information leading to discovery coming from the accused while in Police custody is rendered admissible. Two things are necessary to satisfy the requirements of the provision. Firstly, there must be a statement containing an information from a person in the Police custody accused of an offence and secondly, as the direct consequence thereof, a distinct discovery of fact

should eventually be shown to have followed: 1979 Bom.C.R. 680 (D.B.).

S. 27 is in the nature of an exception to the prohibition imposed by the preceding sections. The wording of the section clearly indicates that the information given by the accused has got to be split up. The irrelevant portion must be excluded and only that portion of the information which leads distinctly to the discovery of facts is admissible under S. 27. The section is based on the view that if a fact is actually discovered in consequence of information given by the accused, some guarantee is afforded thereby that the information is true and accordingly can be safely allowed to be given in evidence: (1981) 52 Cut.L.T. 126: 1981 Cr.L.J. 1452.

The rigor of the ban against confession under Ss. 25 and 26 is lifted under the provisions of S. 27 which now makes so much even of a confession of a person in Police custody admissible, provided that "so much" relates distinctly to the facts discovered "in consequence" of the said information. By the fact discovered in consequence of the information, the information acquires the hall-mark of truth which is what the Court administering justice always seeks to reach: A.I.R. 1972 Gau. 7: 1972 Cr.L.J. 779; (1986) 1 Crimes 25 (Ori.); 1993 M.P.L.J. 197.

S. 27 qualifies not only Ss. 25 and 26 but also S. 24 all three of which lay down general rules excluding confessions and the same broad grounds underlie all the three: I.L.R. 45 Cal. 557. *See* also I.L.R. 6 All. 509; 11 B.H.C.R. 242; I.L.R. 9 Lah. 671: A.I.R. 1928 Lah. 476; I.L.R. 15 Lah. 856: A.I.R. 1934 Lah. 417; 1958 M.P.L.J. 745: A.I.R. 1959 Madh. Pra. 17; A.I.R. 1959 Pat. 54.

The broad ground for not admitting confessions made under inducement or to a Police Officer is the danger of admitting false confessions, but the necessity for the exclusion disappears in a case provided by S. 27 when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given: A.I.R. 1928 Lah. 476. *See* also I.L.R. 63 Cal. 1053: 63 Cal.L.J. 232: A.I.R. 1936 Cal. 316; (1942) 1 M.L.J. 503: A.I.R. 1942 Mad. 450.

S. 27 has nothing to do with the question whether the fact discovered is or is not relevant: I.L.R. 10 Lah. 283: A.I.R. 1929 Lah. 344 (F.B.). S. 27 being a proviso to the two preceding sections must be strictly construed and any relaxation must be sparingly allowed, care being exercised to see that the purpose and object of Ss. 25 and 26 and the safeguard provided in S. 27 are not rendered nugatory by any lax interpretation: I.L.R. 57 Cal. 1062: (1929-30) 34 Cal.W.N. 106: A.I.R. 1930 Cal. 291. *See* also 18 Pat.L.T. 964: A.I.R. 1938 Pat. 60.

S. 27, although an independent section, opens in the manner of a proviso. The object of the section which has been expressed in the nature of a proviso was to provide for the admission of evidence which, but for the existence of the section, could not, in consequence of the preceding sections be admitted in evidence: 1958 Cr.L.J. 842: A.I.R. 1958 All. 514.

S. 27 controls the prior Ss. 24, 25 and 26. If, therefore, a confession comes within the purview of S. 27, it is admissible in evidence, even if it is hit by S. 24 of the Act. S. 27 is not merely a proviso to S. 26, but also to Ss. 24 and 25. S. 27, however, only refers to the statement of a person accused of any offence and in the custody of a Police Officer: A.I.R. 1946 Pat. 210: I.L.R. 24 Pat. 671.

Under S. 27, Evidence Act, so much of the information as strictly relates to the discovery of fact is admissible. This section is an exception to the prohibition imposed by Ss. 25 and 26, Evidence Act. It is always permissible to admit that portion of the evidence in the statement under S. 27, Evidence Act, which merely leads to the discovery of any fact. Any other incriminating statement combined with that should be ignored. The fact that both these statements are part of one statement given by the accused would not make that portion relating to the discovery inadmissible in evidence: I.L.R. (1956) Hyd. 205: A.I.R. 1956 Hyd. 99.

S. 27 itself is a proviso to Ss. 25 and 26, and must be construed strictly and in accordance with the limitations which the language of the proviso imposes upon the proof of certain statements made by an accused person. The fact discovered must be connected with the accused so as in itself to be a relevant fact against him. Only such particular part of the confession as set the person to whom it was made in motion, and led to his ascertaining the fact or facts of which he gives evidence can be proved: I.L.R. (1946) Kar. 194. The

only portions given by the accused which can be admitted under S. 27 are those which relate distinctly to the facts discovered thereby. But statements made by one accused involving another accused, cannot be admitted when they do not in any way relate to those facts: 1940 Mad.W.N. 764: (1939) 52 Mad.L.W. 284.

S. 27 renders admissible in evidence so much of a statement which would otherwise be excluded by S. 25 as leads to the discovery of a fact. The object of S. 27 is to admit evidence which is relevant to the matter under inquiry, *viz.*, the guilt of the accused. The discovery of a material object is of no relevancy to the question whether the accused is guilty of the offence charged against him, unless it is connected with the offence. Hence, it is the connection of the thing discovered with the crime that renders its discovery a relevant fact. Though the connection between the offence and the thing discovered may be established by evidence other than the statement leading to the discovery that is no reason for excluding proof of the connection by the statement itself. S. 27 should be read so as to make it effective, if it can be so read and not in any restricted sense: I.L.R. 25 Pat. 279: A.I.R. 1947 Pat. 162.

S. 27 is an exception to Ss. 25 and 26, which prohibit the proof of a confession made to a Police Officer or a confession made while a person is in Police custody, unless it is made in immediate presence of a Magistrate. S. 27 allows that part of the statement made by the accused to the Police 'whether it amounts to a confession or not' which relates distinctly to the fact thereby discovered to be proved. Thus, even a confessional statement before the Police which distinctly relates to the discovery of a fact may be proved under S. 27 and is admissible as a whole.

Held, on facts, that the whole of the statement relates distinctly to the discovery of ornaments and is admissible under S. 27. The words 'where he had hidden them' have nothing to do with the past history of the crime and are distinctly related to the actual discovery that took place by virtue of that statement and would, therefore, not be inadmissible: (1963) 3 S.C.R. 412: A.I.R. 1962 S.C. 1788.

Generally speaking, the discoveries of material objects, the mode of discovery and its place permitted to be proved under S. 27 consist of (*i*) articles connected with the commission of the offence, like weapons, arms, mechanical or other devices, or (*ii*) the subject of the offence, like dead bodies or stolen property, or (*iii*) objects or materials otherwise having evidentiary value and provide a connecting link between the offence and the offender like blood-stained clothes. Once the information leading to discovery of articles is established or proved, inferences primarily arising from the informatory statements against the giver of information, depending upon the case can be: (*a*) the informant accused is connected with the incriminatory fact discovered; (*b*) the fact discovered was within the exclusive knowledge of the informant; (*c*) the fact is referable to the informant's culpable possession; (*d*) the informant had secreted away the fact with culpable motive and (*e*) the informant was a person responsible for the culpable act. These inferences are not by themselves informatory statements containing an admission of guilt by the accused; they may be merely circumstantial taking the accused nearer the offence; they may not even be enough to inculpate the accused conclusively in the offence charged and, would not be confessional: 1979 Bom.C.R. 680 (D.B.).

S. 27 is apparently lifted from an English authority; but unlike in England, the Indian law (*1*) does not permit proof at the trial of any statement made by any person or accused to the Police and (*2*) does not require cautioning the person making such statement that it might be used against him; otherwise both the English and the Indian law evince greater solicitude for the person making such statement if he is unaware of the danger of his involvement in the offence that for the person who is so aware; in England it is caution and in India it is Police custody which warns him of the danger. S. 27 extends to the entire statement, not merely those portions which relate to the discovery of relevant facts: A.I.R. 1967 J.&K. 22: 1967 Kash.L.J. 162: 1967 Cr.L.J. 484 (D.B.).

The provisions of S. 27 of the Evidence Act are applicable where information is received from a person accused of an offence who is in the custody of a Police Officer and that information leads to the discovery of a relevant fact. The section does not insist on the information being in the custody of the Police Officer investigating the offence to

which the information relates. Whoever may be the Police Officer who has custody of the accused, if the information leads to the discovery of a relevant fact, that information is clearly admissible under S. 27: 1966 M.L.J. (Cr.) 4: (1965) 2 Mys.L.J. 158: 1966 Cr.L.J. 848.

It is only proper for prosecution if they want to adduce evidence under S. 27 of the Evidence Act, which is an exception to the bar enjoined by S. 25 of that Act, to prove by production of written record only so much of the statement as led to the discovery of the article. The oral statement of witnesses without corroboration by any written record of any such statement contemporaneously made, even if admissible is unsafe to rely on, because of the very nature of the evidence: 1968 Cr.L.J. 40: A.I.R. 1968 Cal. 38.

The expression "Provided that" together with the phrase "whether it amounts to a confession or not" in S. 27 shows that the section provides for an exception to the preceding Ss. 25 and 26. The conditions necessary for attracting S. 27 are: (*1*) the discovery of the relevant fact in consequence of information received from the accused; (*2*) the discovery must be deposed to; (*3*) at the time of the receipt of information, the accused must be in Police custody; and the last, and the most important (*4*) only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of information has to be excluded. [Cr. App. No. 1954 of 1969-D/4-3-1971 (Bom.), Reversed]: A.I.R. 1976 S.C. 483: (1976) 1 S.C.C. 828: 1976 Cr.L.J. 481: (1976) 1 S.C.R. 715; (1971) 1 Cut.W.R. 351 (D.B.); A.I.R. 1972 S.C. 3; (1972) 1 Cut.W.R. 1023 (D.B.); (1983) 2 Karn.L.J. 1: A.I.R. 1983 S.C. 446; (1985) 60 Cut.L.T. 423; 1990 Rajdhani L.R. 154: 1990 Cr.L.J. (N.O.C.) 118 (Del.) (D.B.); A.I.R. 1990 S.C. 2140: (1991) 1 S.C.C. 286: 1990 Cr.L.J. 2289; 1994 Cr.L.J. (N.O.C.) 59 (Madh. Pra.) (D.B.); 1995 Cr.L.J. 625 (Raj.).

There are two conditions for attracting S. 27: (*i*) the information must have caused discovery of the fact; (*ii*) the information must relate distinctly to the fact discovered. Only so much of such information, whether it amounts to confession or relate distinctly to the fact thereby discovered, may be proved. It also assumed that there should be a statement first and it would be followed by the discovery and if there was first discovery followed by the statement, such statement would be admissible. It is also settled proposition of law that the statement of the accused must be volunteered. It should not be given by prompt or threat with any pointed question. Thus, where specific questions were put to the accused by the Investigating Officer before alleged statements by the accused were made, *held*, statements of the accused were inadmissible in evidence: 1993 Cr.L.J. 730: (1992-2) 12 Guj.L.H. 330: 1992 Cr.L.R. 519.

S. 27, an exception to Ss. 24 to 26, lays down that only such information received from the accused can be used against him (*i*) which caused discovery of the fact, and (*ii*) which was distinctly related to the fact discovered; and both these conditions have to be satisfied. It is of no relevance that the information received from the accused was voluntary or otherwise; Art. 20(3) of the Constitution is not attracted either: (1973) 39 Cut.L.T. 291 (D.B.).

Broadly speaking, there are four conditions, before S. 27 is applied; first, that the accused must be in the custody of a Police Officer, secondly, the accused must give an information to the Police, thirdly, there must be discovery of an instrument, and fourthly, the information must relate distinctly to the fact discovered. Thus, where the accused made a statement about pointing out the weapon and it was only thereafter that he was arrested, *held*, the recovery made at the time when he was not in the custody of the Police Officer could not be relevant under S. 27: 1992 All.L.J. 1182: 1992 Cr.L.J. 3972 (D.B.); 1993 M.P.L.J. 197.

The condition necessary to bring S. 27 into operation is that discovery of a fact in consequence of information received from an accused in Police custody must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The words 'as relates distinctly to the fact' are very significant and must not be lost sight of. S. 27 is based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence. The extent of the information admissible must, however, depend on the exact nature of the fact discovered to which such information is required to relate distinctly. Generally S. 27 is brought into operation when a person in Police custody produces from some place of concealment some object, such as a dead

body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. It is fallacious to treat the 'fact discovered' within the section equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact. Information as to past user or the past history of the object produced is not related to its discovery in the setting in which it is discovered.

A was charged with murder and robbery. On information received from him, while in Police custody certain gold ear-rings, silver bangles, blood-stained napkin and tangia were seized by the Police. *A* after confessing to have pledged with one *H* the gold ear-rings belonging to the deceased *B*, led the Police Officer to the house of *H* who produced the ear-rings. Later, *A* also confessed to have removed silver bangles from the person of *B* and kept them in his house and produced the bangles. *A* also produced a blood-stained napkin saying that he had used it at the time of commission of the offence. *A* also confessed to have assaulted *B* with a tangia. He got it from his brother and produced it before the Police Officer. The question was how much of such information received from *A* was admissible in evidence.

Held, that the portions of the information that *A* had pledged the gold ear-rings with *H* which he got after murdering *B*, that he removed silver bangles from the person of *B* and kept them in his house, that he had used blood-stained napkin during commission of crime, that he assaulted *B* with tangia and any other information not relating 'distinctly to the fact thereby discovered' were all inadmissible. All that information related to the past history or user of the object produced: I.L.R. (1962) Cut. 955: (1963) 1 Cr.L.J. 788: A.I.R. 1963 Ori. 93.

In order to bring the evidence of discovery within the scope of S. 27, it is necessary that the party making statement should be both an accused person and he must be in the custody of the Police at the time of making statement. S. 27 does not apply to information from a person who is not in Police custody: 1953 M.P.C. 521: 1958 M.P.L.J. 732.

Before the provisions of S. 27 are attracted, two essential requirements should be satisfied, namely, that the person making the statement is accused of any offence and is also in the custody of a Police Officer. It is only then that the information leading to the discovery could be received in evidence. If either of the two conditions is not complied with, the statement would fall outside the purview of this section: 1956 Cr.L.J. 201: A.I.R. 1956 Andh. Pra. 56; (1957) 2 An.W.R. 63: A.I.R. 1958 Andh. Pra. 37. When a person not in custody approaches a Police Officer investigating an offence and offers to give information leading to the discovery of fact having a bearing on the charge which may be made against him, he may appropriately be deemed to have surrendered himself to the Police. S. 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody; submission to the custody by word or action by a person is sufficient. The expression 'accused of any offence' is descriptive of the person against whom evidence relating to information alleged to be given by him is made provable by S. 27. It does not predicate a formal accusation against him at the time of making the statement sought to be proved, as a condition of its applicability: I.L.R. (1961) Andh. Pra. 123: (1963) 1 Cr.L.J. 142: A.I.R. 1963 Andh. Pra. 87.

S. 27 which provides an exception to the general rule that confessions made to a Police Officer are inadmissible in evidence, is based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly can be safely allowed to be given in evidence. For the application of the section, it is necessary that the person giving information must be accused of an offence, that he must also be in Police custody and the information must be such as has caused discovery of the fact, *i.e.*, the fact must be the consequence, and the information the cause of its discovery. In other words the information must relate distinctly to the fact discovered. It is, therefore, obvious that where the information relating to the discovery of the fact is already in possession of the Police, S. 27 will not be applicable and any evidence relating to such information will not be admissible: 1967 All.L.J. 473.

Before S. 27, can come into play, there must be a fact discovered and the fact must

be discovered in consequence of some information received from an accused person. The section lays down a further qualification, namely, that only so much of the statement as relates distinctly to the fact discovered is admissible and not the whole thereof. Where, therefore, a relevant fact is discovered by reason of a statement made by the accused to the Police Officer, the Court must scrutinise the statement in order to find out which portion of that statement bears a distinct relationship to the discovery of the fact. The relationship contemplated is not any relationship; it must be unmistakable and it must be unequivocal: I.L.R. (1952) Bom. 652: 54 Bom.L.R. 316: A.I.R. 1952 Bom. 299 (F.B.).

It is only that portion of the confession made to a Police Officer or of information given to him by an accused person which might reasonably be held to relate distinctly and positively to the fact discovered and which is necessary to be proved in order to adequately explain such discovery that would be admissible under S. 27. So where an accused has stated that he had kept the stolen articles with a particular person and they are recovered from that person, the statement of the accused would be admissible in evidence: A.I.R. 1950 All. 615.

The intention of the Legislature in enacting S. 27 was that the minimum portion of a confession made to a Police Officer or of information given to him should be admitted in evidence which might reasonably be held to relate distinctly and positively to the fact discovered and which is necessary to be proved in order to adequately explain such discovery: I.L.R. (1937) All. 710: A.I.R. 1937 All. 497; (1940) 53 Mad.L.W. 567: A.I.R. 1941 Mad. 658.

In order that S. 27 of the Evidence Act may apply the prosecution must establish that the information given by the accused led to the discovery of some fact deposed to by him. The discovery must be of some fact which the Police had not previously learnt from other sources and that the knowledge of the fact was first derived from information given by the accused: (1971) 73 Bom.L.R. 26; A.I.R. 1970 S.C. 1934.

The Legislature has prescribed two limitations in order to define the scope of the information provable against the accused: (*1*) the information must be such as caused the discovery of the fact, and (*2*) the information must 'relate distinctly' to the fact discovered. The requirements of both the conditions must be satisfied before an incriminating statement can be received in evidence. Thus, only that portion of the information is provable which was the immediate or proximate cause of the discovery of the fact: I.L.R. 10 Lah. 283: A.I.R. 1929 Lah. 344 (F.B.). *See* also A.I.R. 1929 Lah. 338; A.I.R. 1929 Sind 175; A.I.R. 1930 Sind 225; (1934) 36 Bom.L.R. 384: A.I.R. 1934 Bom. 233; 30 Nag.L.R. 269: A.I.R. 1934 Nag. 71; 28 Sind L.R. 41: A.I.R. 1934 Sind 159; A.I.R. 1933 Nag. 252.

The Legislature had a purpose in excluding from evidence a confession made to a Police Officer by an accused person and also a confession made while in the custody of the Police except in the immediate presence of the Magistrate. Under S. 27 only that portion of the information which led to the recovery, is made admissible. The practice of introducing wholesale confessions to the Police under the guise of a recovery under S. 27 is to be deprecated. The Court expressed its disapproval of the Police recording a confession by accused running to four or five pages incorporating most incriminating statements against a co-accused and getting it attested by witnesses and then making it invisible by a legal fiction of 'bracketing' as it was bound to seriously prejudice both the accused: 1962 Ker.L.T. 120: A.I.R. 1963 Ker. 54: 1963 M.L.J. (Cr.) 194.

What is admissible under S. 27 is the information relating to the discovery of a concrete or material fact, which could not have been discovered but for the information. After such a recovery, which lends credence to the information, what is really discovered is the concealment of the "fact" and the accused being its author. For this purpose, it cannot be held that the accused apart from saying that he had concealed the object at a particular place, must also say in so many words that he shall point out the place. Of course, if the object is discovered not on being led by the accused but due to pre-knowledge on the part of the Police, S. 27 would not apply. [(1947) 48 Cr.L.J. 533 (P.C.) and 1983 Cr.L.J. 846 (S.C.), Foll.]: 1984 Cr.L.J. 536 (D.B.).

The difficulty, however great, of proving that a fact discovered on information supplied by the accused is a relevant fact, can afford no justification for reading into the

section something that is not there and admitting in evidence a confession barred by S. 25: 1990 Rajdhani L.R. 154: 1990 Cr.L.J. (N.O.C.) 118 (Del.) (D.B.).

An accused's statement before the Investigating Officer is admissible only to the extent it relates distinctly to the fact thereby discovered as a direct and proximate consequence of it, provided the Investigating Officer concerned deposes that the discovery was made in consequence of the information and that the information conveyed by the accused was not previously known to the Police: (1989) 1 Ker.L.J. 253: 1990 Cr.L.J. (N.O.C.) 124 (D.B.).

The provisions of S. 27 are based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and consequently said information can safely be allowed to be given in evidence because if such an information is further fortified and confirmed by the discovery of article or the instrument of crime and which leads to the belief that the information about the confession made as to the articles of crime cannot be false: A.I.R. 1994 S.C. 2420: 1994 Cr.L.J. 3271.

The exact nature of the discovery has to be taken into consideration in determining the extent of the information admissible. Consequently, the whole statements of the accused in this case stating that they gave property to *R* through some persons are admissible in evidence: 1966 Cr.L.J. 1332: A.I.R. 1966 Raj. 241.

Where there is practically no evidence at all against an accused except an incriminating statement under S. 27, the latter should be viewed with great caution and suspicion: 14 Cr.L.J. 190: 19 I.C. 190.

Statement of accused to Police—Not primary evidence—Proof of such statement—Mode of—Practice indicated: A.I.R. 1966 Raj. 74.

The discovery under S. 27 is not of guns and daggers used in the offence; it is, mostly and really, as regards the authorship of their concealment; his conduct and concealment being incriminating circumstances, the discovery becomes relevant and admissible under S. 27: A.I.R. 1983 S.C. 349: 1983 Cr.L.J. 686: (1983) 2 S.C.C. 305. *See* also 1981 Cr.L.J. 1060 (Ori.).

Where discovery of articles is accompanied by a statement made by the accused that he had buried them there and would produce them and if the discovery is made in consequence of the information received from the accused, the statement is admissible in evidence under S. 27 of the Evidence Act: A.I.R. 1955 Sau. 93: 8 Sau.L.R. 339; 1957 Jab. L.J. 460.

The prosecution has to establish that the accused while in custody gave the information as to the place of concealment of the weapon of offence and thereafter led the Police and the witnesses to the place of such concealment and gave recovery of the same from that place: 1992 Cr.L.J. 762 (Ori.) (D.B.). A recovery under S. 27 has to satisfy the condition that the discovery is made by virtue and exclusively as a result of the information given by the accused: (1988) 1 Crimes 843 (Bom.).

A statement made by the accused to the Police that the articles recovered in his house were articles of loot is not admissible in evidence in view of the provisions of Ss. 24, 25 and 26 of the Evidence Act. S. 27 of the Evidence Act is virtually a proviso to Ss. 24, 25 and 26 and a statement made to Police would be admissible in evidence if it comes within the four corners of S. 27. The Legislature has prescribed two limitations in order to define the scope of the information provable against the accused. The information must be such as has caused the discovery of the fact and the information must relate distinctly to the fact discovered. The requirements of both the conditions must be satisfied before an incriminating statement can be received in evidence. Thus, only that portion of the information is provable under S. 27 which was the immediate or proximate cause of the discovery of the fact. The language of the section and its place in the Act make it clear that discovery therein referred to is discovery to or by Police Officers: A.I.R. 1957 All. 459: 1957 Cr.L.J. 803.

Before a confessional statement made by a person accused of an offence who is in the custody of a Police Officer may be proved against him, two conditions must be observed, firstly, that some incriminating thing must be proved to have been found as the direct result of the information supplied by the accused and, secondly, it must be confined to that portion which refers exclusively to the thing found; in other words, when any incriminating object is proved to have been found as the direct result of information given by a person accused of an offence in the custody of a Police Officer that portion of the information which has led to the object being found may be proved—Provided it

refers clearly to that object, even though the information provable is self incriminating. The fact deposed to and the fact discovered obviously must be relevant and the fact or thing discovered can only be relevant if it is connected with the offence of which the accused is charged; and the confession in S. 27 is a confession of the offence charged and not of anything else: I.L.R. (1937) Mad. 695: A.I.R. 1937 Mad. 618: (1937) 2 M.L.J. 60 (F.B.). *See* also 14 Mad.L.W. 418: 69 I.C. 377; 11 Mad.L.W. 8.

The section does not apply when the person making the confession is not in the custody of a Police Officer at the time when the confession is made: I.L.R. 24 Pat. 671: A.I.R. 1946 Pat. 210.

S. 27 has no application to a confessional statement made to a Police Officer before the deponent has come into the custody of that Police Officer: I.L.R. (1942) Mad. 77: A.I.R. 1941 Mad. 765: (1941) 2 M.L.J. 209.

The statement must be made by a person already in the custody of the Police Officer, and the probable part of information, whether amounting to confession or not, must relate distinctly to the fact thereby discovered: (1956-57) 61 Cal.W.N. 483: A.I.R. 1957 Cal. 372. But *see infra*. It would be the better way of reading the provisions of S. 27, which of course is permissible in order to make the meaning of the section sensible, if the words 'even if' are read before the words 'in the custody of Police'. So read, for the statement to be made admissible under S. 27, the person making the statement need not be in Police custody: A.I.R. 1959 Bom. 534: (1959) 61 Bom.L.R. 715.

If an accused makes a statement which is admissible under S. 27, the whole of the statement which leads to the discovery of the stolen property is admissible and sentences should not be cut up so as to reduce the statements only to the actual words which the accused may use to express the fact that he has hidden the properties: I.L.R. (1936) Nag. 78: A.I.R. 1936 Nag. 200. *See* also 17 Mys.L.J. 158; I.L.R. (1940) Mad. 254: A.I.R. 1940 Mad. 710; 1941 All.L.J. 86.

The exact information received from the accused must be established before S. 27 can be resorted to: I.L.R. (1942) 1 Cal. 436: A.I.R. 1942 Cal. 593.

The extent of the statement admissible under S. 27 does not depend upon whether the extent serves to corroborate or not the other evidence in the case. The only limitation is that the extent must relate distinctly to the facts discovered, subject to its relevancy being proved by other evidence. Case-law discussed: (1949) 62 Mad.L.W. 768: (1949) 2 M.L.J. 451.

Even a confessional statement would be admissible if the existence of the fact disclosed by the statement was first known from the accused, and the fact was relevant to his complicity. Thus, the statement of the accused that he had concealed the prosecutrix in a house from which she was recovered pursuant to that information would be admissible in evidence: I.L.R. (1953) Patiala 328: A.I.R. 1954 Pepsu 72.

S. 27 provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in Police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of an offence in the custody of a Police Officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. It is fallacious to treat the "fact discovered" within S. 27 as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user or the past history, of the object produced is not related to its discovery in the setting in which it is discovered and so would not be admissible in evidence: 74 I.A. 65: I.L.R. (1948) Mad. 1: A.I.R. 1947 P.C. 67: (1947) 1 M.L.J. 219 (P.C.); 1952 Ker.L.T. 216: A.I.R. 1952 Trav.-Co. 300; (1960) 62 Bom.L.R. 80: A.I.R. 1960 Bom. 263.

The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly can be safely allowed to be given in evidence. But clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Under S. 27, Evidence Act what is allowed to be proved is the information or such part thereof as relates distinctly to the fact thereby discovered. Court would have to consider whether it relates distinctly

to the fact thereby discovered and allow the proof thereof only if that condition was satisfied. If, however, the Police Officer does not want to prove the information or any part thereof, S. 27 does not come into operation at all: Per *Jagannadhadas, J.*:—It may be that when a Police Officer speaks to a recovery being 'on the information of' or 'at the instance of' an accused, S. 27 of the Evidence Act is not in terms attracted. But when a Police Officer speaks to a recovery of this kind as having been 'at the instance of an accused' or 'in consequence of information given by an accused' he is being allowed to place on record not merely the fact of his having received some information but also the implication thereof, *viz.*, that the information is of a character which directly connects the accused with the objects recovered. The prosecution cannot be permitted to rely on such evidence without placing the admissible portion of the information on the record: (1955) 1 S.C.R. 903: A.I.R. 1955 S.C. 104.

The whole of the statement of an accused which occasions the discovery can be proved. Thus, the statement of the accused that he had thrown a pistol in such and such a ditch can be proved and not only the statement that the pistol was in the ditch: 1954 All.L.J. 93: A.I.R. 1954 All. 687.

The principle that portions of statement of confession may be admitted and others excluded is recognised in the Evidence Act itself and also in judicial decisions. But the conditions mentioned in S. 27 have to be strictly fulfilled, before a portion of the statement can possibly be allowed in evidence under that section.

Where, there is nothing on the record to indicate that any discovery was made in consequence of the information which is said to have been given by the accused to the Police and that the accused person was not in Police custody at the time he made the statement, *held*, S. 27 does not apply and hence it cannot be taken into consideration at the trial: (1956-57) 61 Cal.W.N. 483: A.I.R. 1957 Cal. 332: 1957 Cr.L.J. 630.

4. Applicability of section.—S. 27 is a proviso to Ss. 24, 25 and 26. Statement made to the Police is admissible though the accused himself makes the discovery about which the statement is made: 12 Cr.L.J. 119: 9 I.C. 718; A.I.R. 1930 Cal. 291. *See* also (1939) 1 M.L.J. 756 (P.C.); I.L.R. 24 Pat. 671: A.I.R. 1946 Pat. 210.

Where facts are discovered by the accused himself who also gave a statement, *held*, his statement is not admissible under S. 27. The Court must distinguish between a discovery made in consequence of information given and disclosure made by the accused and a discovery by the accused himself. It is the accused's statement leading to the discovery which alone is admissible: 1940 Mad.W.N. 1238: (1939) 52 Mad.L.W. 898: A.I.R. 1941 Mad. 306; 1941 Mad.W.N. 956: A.I.R. 1942 Mad. 237.

The information given by the accused person to the Police is admissible in evidence if it leads to the discovery of a relevant fact even if the actual recovery is made by the accused himself in pursuance of the information: A.I.R. 1954 Punj. 97: I.L.R. (1954) Punj. 876 (F.B.).

S. 27 does not deal with the accused's conduct or acts; they are admissible under S. 8. The accused's conduct, in response to a Police Officer's question even if it is not 'information supplied by the accused which relates distinctly to the fact thereby discovered' as contemplated by S. 27 is admissible as the 'effect of a relevant fact' under S. 7, and 'as conduct' with reference to a relevant fact under S. 3 or even as part of a set of facts necessary to explain a relevant fact or tending to establish the identity of anything under S. 9; it is not a confession which necessarily must be a statement; the modern tendency is to admit, and not to exclude, pieces of evidence if reasonably and legally possible: (1971) 1 Cut.W.R. 351.

Where the accused's statement was not recorded but he led the Police to a tank and brought out stolen articles from it, *held*, it amounts to the accused's conduct relevant under S. 8, though as his statement, it is not admissible under S. 27; the evidence of recovery not being contradicted, it could not be contended that the accused merely knew about the articles being there in the tank. [1979 Cr.L.J. 329 (S.C.), Foll.]: 1984 Cr.L.J. 518 (Cal.).

A statement not partaking the character of a confession envisaged by S. 27 would not be admissible because of S. 162 of the Code of Criminal Procedure; however, the accused's going to a place and getting recovered some clothes, etc. is admissible as his conduct under S. 8: 1992 All.L.J. 588: 1992 Cr.L.J. 1755 (D.B.). *See* also 1994 Cr.L.J. 162 (Ker.) (D.B.).

There is a clear distinction between the conduct of an accused admissible under S. 8 and his statement to a Police Officer during investigations which is hit by S. 162 of the Code of Criminal Procedure; S. 162 excludes the accused's statement to a Police Officer

during investigation but not his conduct when confronted or questioned by a Police Officer during the investigation. Thus, evidence of the circumstances, simpliciter, that the accused had led a Police Officer, and pointed out the place where stolen articles or weapons were found hidden is admissible as his conduct under S. 8 whether or not any statement made by the accused contemporaneously with or antecedent to such conduct falls under S. 27: A.I.R. 1979 S.C. 400; 1972 Mys.L.J. (S.N.) 377.

An information or a portion thereof which is not distinctly connected with the fact discovered but merely explains the thing discovered, being not admissible under S. 27, cannot be proved; if the thing concealed not known to the Police is discovered by such information, it would lend assurance that the information was true. No witness with whom some material fact like a weapon or stolen property or other incriminating article is not hidden or sold or kept, unknown to the Police, can be said to be discovered as a consequence of the information furnished by the accused. These examples are only illustrative, not exhaustive. What makes the information leading to the discovery of the witness admissible is the discovery from him of the thing sold to or hidden or kept with him which the Police otherwise did not know; the information which merely disclosed the witness's identity is not admissible under S. 27; besides, the evidence of the Investigating Officer and the *panchas* that the accused had taken them to a shopkeeper who sells daggers and pointed him out, as corroborated by the shopkeeper himself, would be admissible under S. 8 of the Evidence Act as conduct of the accused: A.I.R. 1972 S.C. 975: 1972 Cr.L.J. 606. *See* also (1987) 3 Karn.L.J. 407: I.L.R. (1988) Karn. 1129 (D.B.).

Where certain statements made by accused while in Police custody are recorded in the panchanama that the articles in question were hidden in a particular place it would be admissible in evidence if it leads to the discovery of the articles. Further, it is also admissible under S. 8 of the Evidence Act as it is indicative of the conduct of the accused: A.I.R. 1950 Madh.Bh. 104.

S. 27 assumes that recovery of incriminating articles is effected on the basis of a prior information given by the accused; thus, where the prosecution did not establish that any such information was given by the accused which led to the recovery, *held*, S. 27 was not attracted; however, the factum of the articles having been produced by the accused is admissible in evidence: (1972) 38 Cut.L.T. 754 (D.B).

It is the statement giving information leading to the discovery which is admissible in evidence. The mere discovery by the accused cannot be said to be of any legal consequence, if it is not preceded by the informative statement on the part of the accused. It is the informative statement which is evidence. The discovery by the accused in the absence of such informative statement is for all practical purposes barred and Court would hardly be able to draw any inference from the mere discovery. [1979 Cr.L.J. 908 (S.C.), Foll.]: 1982 Cr.L.J. 2189 (Bom.).

Where the accused had given the information that the stolen property was sold to a named shopkeeper from whose shop the property was recovered, *held*, the statement clearly fell within the four corners of S. 27; it could not be contended that since the accused had not mentioned the place of recovery, S. 27 was not complied with; such a narrow construction of the section is impermissible. [1971 M.P.L.J. 324, Rel. on; 1961 M.P.L.J. 353 and A.I.R. 1934 Nag. 71, Dist.]: 1973 M.P.L.J. 707: 1973 Jab.L.J. 706: 1973 Cr.L.J. 1559 (D.B.).

Where the F.I.R. itself stated that the dead body was buried in a field specified therein but the dead body was recovered in pursuance of the accused's disclosure statement, *held*, such recovery was not under S. 27; it was, however, a very valuable piece of circumstantial evidence against the accused: 1985 Cr.L.J. 1416 (Raj.).

Accused telling Inspector of Police about place where articles were hidden—Statement recorded later on—*Held*, that the statement cannot be admitted in evidence under S. 27: 1976 Kash.L.J. 253: 1976 Cr.L.J. 1310 (D.B.).

Where apart from the memo of recovery / discovery of the dead body prepared under S. 27, there was no other independent or documentary evidence of the arrest of the accused and the witness on the memo had seen the accused already under the Police control when he came at the spot, *held*, may be, the place of recovery had already been shown and made known to the accused much before his so-called arrest; the recovery does not fall within the ambit of S. 27 and is rendered inadmissible; it may once again be stressed that in cases of recovery / discovery at the instance of the accused, investigation should not be entrusted to the arresting officer; a discovery by the arresting officer himself would go to discredit investigation: 1994 Cr.L.J. 3446 (All.) (D.B.).

Where discovery of the deceased's slippers and remnants of wearing apparels was made at the accused's showing but without any statement having been made by him, *held*, S. 27 was not attracted: 1988 Cr.L.J. 1293 (Cal.) (D.B.).

Where alleged weapon of offence was discovered on information of the accused but there was no disclosure statement preceding the discovery relied on by the prosecution, *held*, discovery of weapon of offence was meaningless. [A.I.R. 1993 S.C. 1469, Rel. on]: 1994 Cr.L.J. 3372: (1994) 3 Karn.L.J. 187 (D.B.).

Police is empowered to conduct search and make recoveries even without recording statement under S. 27: (1985) 2 W.L.N. 523 (Raj.).

The language of the section and its place in the Act make it clear that discovery therein referred to is discovery to or by Police Officers: I.L.R. 49 Cal. 167: (1920-21) 25 Cal.W.N. 788: A.I.R. 1924 Cal. 342.

Information furnished to the Police by the accused leading to discovery of a fact, *held*, is admissible: 1977 M.P.L.J. 620: 1977 Jab.L.J. 583 (D.B.).

A portion of the information, given in custody, which merely explains the material thing discovered, *held*, is not admissible under S. 27: (1992) 1 Crimes 423: 1992 Cr.L.R. 1 (Raj.).

Where the information contained in the disclosure statement does not disclose the exact place where the weapon was kept concealed by the accused and all that he stated was that the weapon had been thrown by him but he was unable to give exact details and the Police recovered it in the absence of the accused, *held*, it could not be said to have been recovered in pursuance of the information furnished by the accused so as to make it an admissible piece of evidence under S. 27: 1990 Cr.L.J. 1491 (Mad.) (D.B.).

Where in a prosecution for robbing a pair of silver paijans, there was no evidence that the accused gave any information to the Police about any paijans or that he was present at the time the jeweller, to whom allegedly paijans were sold and who melted them along with other ornaments into a silver *silli*, gave a piece of said silver *silli* to the Police, *held*, the discovery of said *silli* could not be used against the accused under S. 27: 1990 M.P.L.J. 99.

The statement of the accused that he had concealed a rifle in a manure heap is admissible under S. 27 whether the accused thereafter produced the rifle from the manure heap himself or the Police did so on the basis of the information: (1953) 55 Punj.L.R. 112: A.I.R. 1953 Punj. 101.

It must be strictly construed: A.I.R. 1930 Cal. 291: I.L.R. 57 Cal. 1062; 10 O.W.N. 937: A.I.R. 1933 Oudh 404.

As it is found that the Police is making indiscriminate use of S. 27 for discovery of incriminating articles, the Courts must insist upon a very strong proof of highest standard for finding that an accused did suffer disclosure statement and incriminating article was discovered in consequence thereof: (1983) 2 Crimes 497: (1983) 1 Rec.Cr.R. 409 (P.&H.).

Information given by accused while in Police custody — Discovery of a fact — Admissibility — Information given by an accused while in Police custody leading distinctly to the discovery of a fact, can be admitted in evidence—Section has to be strictly construed as it is an exception to Ss. 25 and 26—Accused charged under Ss. 302, 97 and 201, Penal Code—After arrest while in Police custody accused gave information about currency notes taken by him from the deceased—Accused, alongwith Police, went to the place where he had kept the money in a trunk and himself produced it—*Held*, that the requirements of S. 27 were satisfied and information leading to the recovery of money was admissible in evidence: 1967 Cr.L.J. 357: A.I.R. 1967 Goa 21 (F.B.).

Confession to person in authority who holds out inducements to confess is not admissible even so far as it relates to the discovery of articles: I.L.R. 4 Rang. 72: 96 I.C. 145.

Confessions caused by inducement, threat or promise are inadmissible under S. 24. But though they are inadmissible, they may lead to discovery of facts or of things in consequence of the information received from the accused in custody. When the statements made by accused persons in Police custody are confirmed by the finding of the property or facts, those portions of the confessions that lead to the discovery cannot be held to be false. S. 27 is based on the theory of confirmation by subsequent facts. The theory is that where, in consequence of a confession otherwise inadmissible, search is made and facts are discovered which confirm it in material particulars, the possible influence which through caution had been attributed to the improper inducement is seen to be nil, and the confession may be accepted without

hesitation: 1958 M.P.C. 648: 1958 M.P.L.J. 745: 1959 Cr.L.J. 48: A.I.R. 1959 Madh. Pra. 17.

There is no reason why the general rule that a confession should be voluntary should not apply to a confessional statement under S. 27. If it has been induced, it is of no evidential value, and the Court would exclude it from consideration: (1937) 50 Mad.L.W. 435: 1939 Mad.W.N. 873: A.I.R. 1940 Mad. 13. *See* also A.I.R. 1957 All. 197; A.I.R. 1958 All. 293, cited below.

Portion of the statement made by accused to the Police is rendered admissible by the law, purely because of the discovery of a relevant fact to which it led and, not because it inherently amounts to any confession of a crime. Consequently, the question whether it was voluntarily made after arrest, or whether accused was earlier under Police influence for some time, is really not material: 1960 Cr.L.J. 1344: A.I.R. 1960 Mad. 462.

Where there is immediate connection between discovery and statement made to a Police Officer, the latter is admissible in evidence: 20 Cr.L.J. 305: 50 I.C. 481.

If the discoveries were made in consequence of the information supplied by the accused, the statements made by them are admissible: A.I.R. 1923 Lah. 434. A statement is admissible in evidence under S. 27 if as a consequence of it, there is discovery incriminating the person making the statement: 72 P.L.R. 1916: 33 I.C. 823. *See* also 16 Cr.L.J. 545: 11 P.R. 1915 (Cr.); 47 P.L.R. 254.

Where in consequence of the information supplied by the accused, some fire-arms were recovered from a place shown by the accused, the discovery of the fire-arms at the instance of the accused was genuine and in no respect in contravention of the provisions of S. 27: 1958 Cr.L.J. 1084: A.I.R. 1958 Punj. 294.

Where before recording the confession, the Magistrate gave all due caution to the indigent accused that if he made a confessional statement that might be used against him and thereafter he recorded the confession in his chamber and further there was a general corroboration to the confessional statement, *held*, as such the confession was not only voluntary but it was trust-worthy and non-engagement of a defence counsel at the State expenses at the stage of recording confession did not cause any miscarriage of justice: 1992 Cr.L.J. 367 (Cal.) (D.B.).

Information received from accused leading to discovery of weapon of murder—There is no presumption that the information was the result of Police compulsion—Case of accused that the whole thing was false and not that information was the result of compulsion—Information is not violative of Art. 20 (3) and is admissible under S. 27, Evidence Act: 1968 Cr.L.J. 1362 (Ker.).

Where (*i*) the total period of interrogation was only about two hours, (*ii*) the interrogation was made in the presence of many persons, and (*iii*) the interrogation was regarding the discovery of the handle of the knife of which the blade was found lying near the dead body, *held*, the statement was not only voluntary but it fell within the purview of S. 27 in as much as the "fact discovered" was the place from which the various articles were produced by the accused and his knowledge of it. As the information given by him related to that important fact, it was clearly admissible under S. 27: A.I.R. 1978 S.C. 1183: 1978 Cr.L.J. 1107: (1978) 3 S.C.C. 279.

Voluntary confessions leading to discovery of facts alone are admissible; where the accused, in the Police custody, was persistently questioned before he furnished the information, *held*, his statement could not be deemed to be voluntary: (1975) 1 An.W.R. 304 (D.B).

Where disclosure, leading to discovery was made while the accused was handcuffed, *held*, disclosure was made under duress, pressure or threats and, therefore, it was not admissible in law in terms of Art. 20, Part. III of the Constitution: 1992 Cr.L.J. 3034 (Bom.) (D.B.).

Recovery made after the accused has remained in Police custody for a long period is generally viewed with suspicion and is attributed to use of third degree methods or even planting by the Police: (1967) 5 Del.L.T. 68; (1990) 42 Del.L.T. 1 (D.B.).

Where facts disclosed point to the accused having been subjected to third degree methods prior to the discovery of a dead body, the genuineness of the discovery is rendered doubtful and the discovery becomes worthless as a piece of evidence. The reason is that although discovery by itself is a guarantee of the genuineness of the discovery, there may be cases where the circumstances are such

that the fact that the discovery was induced by a promise would raise a doubt as to genuineness of the discovery and render the evidence almost worthless: 1957 Cr.L.J. 431: 1957 All.L.J. 330: 1957 All.W.R. (H.C.) 114: A.I.R. 1957 All. 197.

One of the purposes of remanding the accused to Police custody is to enable the Police to effectively investigate the case and for that purpose, if need be, to question the accused from time to time. Merely because the Investigating Officer might have interrogated or questioned the accused, a number of times, during the course of the investigation, that would not render the statement made by the accused before the Investigating Officer involuntary or a statement extracted from the accused by mentally torturing him: 1992 Cr.L.J. 3298 (Guj.) (D.B.).

'Fact discovered'—Statement of accused that the articles were kept by him in one of the rooms in P.W. 32's house—Articles not found on search—Subsequently articles were recovered on the basis of a statement given by P.W. 31—Recovery could not be treated as a recovery in pursuance of the information supplied by the accused—Recovery not one under S. 27: 1970 M.L.J. (Cr.) 123.

S. 27 often times has been mis-used by the investigating agency and the Courts should be vigilant about the circumvention of its provisions. The condition necessary to bring the section into operation is that discovery of a fact in consequence of the information given by a person accused of an offence in the custody of a Police Officer must be deposed to and thereupon so much of the information as relates distinctly to the fact thereby discovered must be proved. If a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence. There is no doubt that the portions of the confessional statement relating to the removal of the chains from the two ladies would be clearly inadmissible. The learned Magistrate was not justified in relying upon the whole of the statement contained in Exhibit P-3. But the other portion is admissible in evidence under S. 27: 1969 M.L.J. (Cr.) 374: 17 Law Rep. 803 (Mys.).

Murder case—Accused informing Police about their having concealed pieces of rope—Evidence disclosing that the dead body was tied with ropes—Discovery of ropes given—Statement admissible under S. 27. 1969 Cr.L.J. 1255: A.I.R. 1969 Ori. 245.

A confessional statement made by the accused and recorded by the Police Officer to whom it is made is not taken out of statements admissible under S. 27 merely because it is attested by witnesses present at the time: (1943) 56 Mad.L.W. 479 (1): (1943) 2 M.L.J. 293. *See* also 20 Mys.L.J. 367.

It does not follow that a statement falling under S. 27 by an accused person is inadmissible, because it is made by him to a Sub-Inspector of Police at an interview in violation of the Jail Rules and Police Standing Orders: 1943 Mad.W.N. 11: A.I.R. 1943 Mad. 315. *See* also (1950) 1 M.L.J. 467.

5. Information by accused—Evidentiary value of.—Whatever statement is attributed to an accused person in Police custody giving information leading to the discovery must be proved by witnesses like any other fact. S. 27 is enacted as a qualifying rule of evidence and the Courts should be jealous in safeguarding the purpose and object of the provisions embodied in Ss. 25 and 26. It is the duty of the Courts to ascertain from the witnesses the exact words of the accused in which information was conveyed to the Police Officer which led to any discovery and to find out if the Investigating Officer had written the statement of the accused in the words of the accused or in his own words. In case there is any doubt on the point, the accused person will be entitled to its benefit. But the whole evidence relating to discovery will be rendered doubtful, if there is evidence of accused persons having been subjected to third degree methods prior to the discovery; and if the stolen property is recovered from a place not inside the house of an accused person but from some place outside it, the possibility that the Police had planted it there and compelled the accused person under threat to point out that place will have to be excluded before any reliance can be placed upon it: 1958 M.P.C. 648: 1958 M.P.L.J. 745: 1958 Jab.L.J. 900: 1959 Cr.L.J. 48: A.I.R. 1959 Madh. Pra. 17.

Statement made by accused in presence of village Gountia about concealment of weapons used for murder—Statement is admissible in evidence under S. 27 of Evidence Act: (1965) 1 Cr.L.J. 744: A.I.R. 1965 Ori. 99.

S. 27 of the Evidence Act is an exception to Ss. 25 and 26 of the Act which prohibit proof of confession made to a Police Officer while in Police custody, unless it is made in the immediate presence of a Magistrate. S. 27, however, allows that part of a statement made by the accused to the Police which 'relates distinctly to the fact thereby discovered' to be proved even though it may amount to confession. In other words, a confessional statement made before the Police, if it relates distinctly to fact thereby discovered, may be proved under S. 27 of the Evidence Act. The emphasis is not on the actual statement made by the accused, but on the information connected with the knowledge of the accused as to the place from which the object is produced. All that is necessary for the purpose of S. 27 is that the accused in custody shall give some information which shall relate to the fact thereby discovered. The law does not require anything more than that. The 'discovery' under the section not only embraces the knowledge of the accused as to the place, but also the place from which the articles are produced. Hence, where the accused are charged under S. 411 of the Penal Code, the evidence regarding the discovery of the stolen articles at the instance of the accused, is admissible under S. 27 of the Evidence Act: (1964) 6 Ori.J.D. 284.

There are four possibilities which have to be guarded against in the case of any recovery: (*1*) the complainant might have been persuaded by the Police to state in the first information report that property which in fact was not stolen had been stolen and to hand over such property to the Police to be used in fabricating recoveries from the accused persons; (*2*) the Police might have obtained property similar to the stolen property from the complainant or some one else and used it for the purpose of fabricating the recoveries. In considering this hypothesis regard must necessarily be had to the nature and value of the property recovered; (*3*) the Police might have suppressed some of the stolen property recovered from an accused person and utilized it in inventing a recovery from another accused person; (*4*) the property might have been recovered from a third party and used by the Police in one of the impugned recoveries: 1956 Cr.L.J. 1134: A.I.R. 1956 Ajmer 57.

Recovery of incriminating articles pursuant to the information given by the accused is an important piece of evidence against him. The nature of the recovered articles, the manner of the acquisition by the accused, on the basis of whose information they were recovered, length of the intervening period between the disappearance of the articles from the owner and its recovery are some of the crucial aspects to be adverted to by the Court: (1995) 1 Ker.L.J. 265: 1995 Cr.L.J. 1880 (D.B.).

The word 'information' cannot be used as synonymous with the word 'statement'. The word 'information' as distinct from the word 'statement' connotes two things, namely, a statement or means employed for imparting knowledge possessed by one person to another, and the knowledge so derived by other person: 115 I.C. 1: A.I.R. 1929 Lah. 338.

There is nothing is S. 27 that only that disclosure shall be admissible which is made at the instance (pointing) of the accused. It is just possible that the accused may give some information and the Police Officer thereafter may discover that object of which he has no previous knowledge, then though there has been no pointing out by the accused, yet it can be said that the disclosure took place in consequence of the information given by the accused: I.L.R. (1976) 26 Raj. 719: 1976 Raj.L.W. 290: 1976 Cr.L.R. 386.

For establishing possession, the statement under S. 27 would have been "I have concealed a key or I have placed a key which I am willing to produce". Unless it is an admitted fact that it is he who has placed it or concealed it, possession cannot be imputed to him. Production can impute knowledge. If a person has a knowledge that a particular thing is lying at a particular place, that will only establish that he knew that at a particular place a particular thing is lying. This would impute knowledge and not possession: (1984) 25 Guj.L.R. 118: (1983) 3 Guj.L.H. 1053.

Where there was no information being given by the accused regarding the silver *pajeb* being given by him to any particular person or being concealed by him at any particular place from where he could get the same recovered, *held*, such a disclosure statement was not admissible in evidence: (1992) 47 Del.L.T. 239.

The mere knowledge of the place of concealment does not show that the person having such knowledge actually received the stolen articles or participated in the act of concealment: A.I.R. 1923 Lah. 238 (2). Where on a proper view of S. 27 the only portion of the statement made to the Police by an accused charged with murder was 'I have buried in the margin of the eastern ridge of my sugarcane garden the knife. If you come with

me I shall take and give it' and there was no other evidence connecting the knife or the accused with the murder and the chemical analysis of the knife did not disclose stains of human blood. *Held*, that the statement did not connect the accused with the murder and in the circumstances the charge of murder cannot be held to have been proved: A.I.R. 1948 Mad. 242: (1947) 2 M.L.J. 427.

To make the discovery incriminating it has to be shown that the concealment was made within knowledge or consent of the accused and he disclosed the fact to the Investigating Officer on interrogation: (1990-2) 38 B.L.J.R. 1242 (D.B.).

Where the statement accompanying the discovery is woefully vague to identify the authorship of concealment, *held*, the pointing out of the weapon may at best prove the accused's knowledge as to where the weapon was kept and not that he used it in the offence: A.I.R. 1981 S.C. 911: (1981) 2 S.C.C. 166.

Mere recovery of a weapon on information furnished by the accused does not attract S. 27 unless it is also established that the incriminating article was also concealed by him; if no such information is furnished by the accused, no criminal nexus between him and offence is established: (1984) 25 Guj.L.R. 78.

A single circumstance of recovery of a pistol from one of the accused will not be enough to act upon for convicting but one out of eleven accused: A.I.R. 1983 S.C. 349: (1983) 2 S.C.C. 305.

The recovery of weapon is incriminating not because it was effected at the accused's instance but because it tends to connect him with the authorship of concealment, namely, that the information leading to its discovery was of the person who had concealed it. Thus, in case of two accused, it is possible that the one at whose instance the weapon is recovered may have only the knowledge of the place of concealment; to incriminate the accused in crime it must be shown that the accused himself had concealed the weapon; thus, when two constructions are possible, *viz.*, (*i*) that he himself had concealed it, or (*ii*) he only had the knowledge of its being hidden there, *held*, the benefit of doubt should be given to the accused. [Cr. A. No. 1329 of 1971 (Bom.), Reversed]: A.I.R. 1979 S.C. 1949.

Where at the bank of the river where the dead body was thrown, broken teeth and parts of the human body were lying, *held*, when only incriminating circumstance against the accused was his pointing out the place where the dead body had been thrown, same was of no consequence as anyone who saw those parts of the body could have inferred that the dead body must have been thrown into the river near about that place: A.I.R. 1971 S.C. 2016.

Mere recovery of dead body at the instance of the accused, *held*, would not necessarily lead to the conclusion of commission of murder by him: (1987) 2 Crimes 376 (Ori.). Recovery of a dead body from the spot pointed out by the accused to the Police, *held*, is capable of three hypotheses: (*i*) he had seen some one placing the body there; (*ii*) someone had told him that the dead body was lying there; or (*iii*) the accused himself had placed it there. In order to determine as to which of the three is reasonable and probable, the Court must consider the site where the body was placed or buried: (1978) 80 Punj.L.R. 106. *See* also 1983 Cr.L.J. (N.O.C.) 167 (All.).

Where the dead body is discovered pursuant to the accused's disclosure statement, *held*, it only proves the dead body's recovery at the accused's instance, nothing more; the accused cannot be convicted of murder on such evidence alone. [1966 S.C.D. 243, Foll.]: (1985) 59 Cut.L.T. 93.

Discovery of dead body and confession—Evidentiary value: A.I.R. 1957 All. 197: 1957 Cr.L.J. 431.

The information acting as the 'cause' and the discovery of 'fact' operating as the immediate and proximate 'effect' of the information, when put together, should only lead to a legitimate inference; information about the whereabouts of the dead body (subject to identification in case of dispute) and its consequent discovery may, in the absence of cogent exculpatory explanation, in some cases may lead to the inference of concealment by the informant and his involvement in the crime; but if information only leads to the inference of the informant's knowledge about the presence of the dead body without his involvement in the crime, it is not by itself sufficient to fix criminality; the remaining links will have to be supplied by the prosecution because the informant's knowledge may be that somebody else had placed the dead body there; but if authorship of the concealment is also part of the information given by the accused that is an additional circumstance to fix criminality on him: (1989) 1 Ker.L.J. 253: 1990 Cr.L.J. (N.O.C.) 124 (D.B.).

Where the statement of an accused before Police is clean as to his commission of crime

with assurance to produce or point out the dead body or articles concerned in the crime and the same is discovered being led by the accused, and such statement with his act of discovery being proved by reliable witnesses, the discovery of dead body or article becomes a strong circumstance towards his guilt. [1986 Cr.L.J. 1057 (Gau.), Foll.]: 1989 Cr.L.J. (N.O.C.) 200 (Gau.) (D.B.).

Discovery of dead body at the instance of the accused under S. 27 is an important factor which would support the prosecution case regarding *corpus delicti*: 1993 Cr.L.J. 3151 (Ker.) (D.B.).

Where Police Officer failed to testify that recovery of the dead body was effected on the basis of information given by the accused, *held*, it could not be contended that the recovery was as per S. 27; there was no information which could be said to be distinctly related to the dead body's discovery: 1981 Cr.L.J. 430 (D.B.).

Murder charge—Statements by accused while in Police custody as to where the dead bodies were and where valuables robbed from murdered persons were hidden—Discovery of dead bodies and valuables by accused themselves after the statements—Statements held admissible under S. 27: (1963) 2 S.C.R. 890: (1963) 2 S.C.J. 422: 1963 M.L.J. (Cr.) 509.

The accused's statement to the Police that he could point out the places where arms and ammunition relating to the offence were kept, *held*, is admissible: 1977 Cr.L.J. 1508 (Cal.) (D.B.).

Where the accused, after having confessed to the Police that he had committed the murder, was leading the Police to the murder site but the deceased's son had meanwhile found the dead body before arrival of the Police party, *held*, the dead body's discovery could not be attributed to the accused's disclosure statement: 1981 Cr.L.J. 1734 (Gau.) (D.B).

Where an accused charged with murder had given information to the Police that he had concealed the stick, the weapon of murder, in his cow-shed about 13 meters from his house, when in fact he had thrown the stick in the cow-shed and not concealed it there, *held*, since the Police was not aware about the place where the stick was lying, its recovery by the accused was admissible under S. 27, which is based on the confirmation by subsequent facts; the production of the stick by the accused is also admissible as *res gestae*, that is, a closely connected subsequent fact: 1969 Cr.L.J. 1393: A.I.R. 1969 Goa 116.

Weapons discovered from place of concealment on being pointed out by accused—They must be considered to be in exclusive possession of accused—Discovery can be made as a relevant factor to be used against accused under S. 27: 6 Sau.L.R. 421: A.I.R. 1954 Sau. 115.

Accused who had admitted having killed the deceased told the Police that he threw away the knife with which he inflicted stab wounds near a certain tank. When Police went near the tank, while they were searching for the knife they got information from a girl there, that she had found a knife which she gave to another person. Upon her information the Police went to this person and recovered the knife from him who admitted that what the girl said was true. *Held*, that what is made admissible in evidence by S. 27 is so much of the information received from an accused person by a Police Officer as relates distinctly to any fact discovered in consequence of the said information. The relevancy of the said information and of the fact discovered is governed by other provisions of the Evidence Act, in this case, the fact discovered was the knife and if it was discovered consequent on any information received from the accused, so much of the information which distinctly related to its discovery was admissible in evidence. Whether it was discovered consequent on the said information was mainly a question of fact. Here it was the information which the accused gave to the Police to the effect that he had thrown away the knife by the side of the tank, which caused them to search the premises of the tank. It was during the course of that search that the Police got the further information that the knife had been picked up from that place by the girl, and handed over to another. Thus, the information received from the accused led to the discovery of the knife: 1968 Cr.L.J. 1362: I.L.R. (1968) 2 Ker. 303: 1969 M.L.J. (Cr.) 553.

Information is actually the content or substance of a statement and may be the same in several statements which may substantially be repetitions. The discovery for the purposes of S. 27 need not be the direct consequence of this or that statement, but should

be the direct consequence of this or that information. So, where the information is the same, it is immaterial if the statement is repeated: 1961 M.P.C. 178: 1961 M.P.L.J. 353: (1961) 2 Cr.L.J. 238.

Information supplied by accused leading to discovery: 1967 Cr.L.J. 1332: A.I.R. 1967 Ker. 197.

Where an accused person does some act such as pointing out in criminating articles and taking them out from the places where they were hidden, and accompanies his act by certain statements, evidence of the act itself is no doubt admissible; but whether the statements are admissible or not would depend on whether they distinctly relate to the discovery. Even when they are directly explanatory of the act, they cannot be admitted, because the explanation, however, closely connected with the fact, does not relate to the discovery itself, and hence the statements have to be ignored: 1952 Cr.L.J. 986: A.I.R. 1952 Vindh. Pra. 42.

Certain articles stolen in a dacoity were found in the house of *D*. At the time of recovery of the articles, the accused who was *D*'s brother, made a statement that it was he who had handed over these articles to *D*.

Held, that the fact that the accused gave the property to his brother *D*, might represent the history of the matter but could not be a circumstance admissible under S. 27, Evidence Act: 1960 M.P.L.J. (Notes) 197.

Statement of the accused that he had concealed the ornaments in a one foot high grass near a particular tree, *held*, is admissible in evidence under S. 27: 1985 Cr.L.R. 579 (Raj.). *See* also 1991 Cr.L.J. 2941 (Ker.) (D.B.); 1991 Cr.L.J. 570 (Ker.) (D.B.).

The mere fact that the ornaments, which the deceased was wearing, were recovered at the instance of the accused, *held*, is not enough for inferring that it was accused who murdered him: (1986) 3 Crimes 350 (Madh. Pra.).

When premises were virtually taken charge of by the Police even before any information by the accused was given, *held*, theory of discovery consequent upon the information given by the accused stands shattered: (1985) 2 Bom.C.R. 518 (D.B.). *See* also 1991 Cr.L.J. (N.O.C.) 25 (Ker.) (D.B.).

The statement of accused that he would show the place where he had thrown the arrow is admissible under S. 27: (1983) 55 Cut.L.T. 254 (D.B.).

Statement of accused—Admissibility of in evidence: I.L.R. (1961) 1 Andh. Pra. 123: (1963) 1 Cr.L.J. 142: A.I.R. 1963 Andh. Pra. 87.

Testimonial compulsion—Statement by accused in Police custody admitted in evidence under S. 27—Fact of prolonged interrogation by Police not enough to attract Art. 20(3): (1963) 4 Guj.L.R. 543: (1963) 2 Cr.L.J. 16: A.I.R. 1963 Guj. 159.

Police Officer asking accused whether he knew of certain dacoity—Accused taking Officer to grain bin and producing ornaments—Conduct of accused even if not covered by S. 27 is covered by Ss. 7, 8 and 9: 1965 All.L.J. 344.

Proof of accused holding deceased by neck—Deceased missing thereafter—Accused in Police custody stating that he had thrown dead body into cave—Discovery of dead body from cave—*Held*, that deceased died as result of homicide of which accused was author: (1965) 7 Ori.J.D. 170: 1965 All.Cr.R. 258: 1965 All.W.R. (Supp.) 11: 31 Cut.L.T. 229.

The disclosure statement made by accused upon interrogation by an Investigating Police Officer in the presence of a disinterested witness is admissible in evidence against the accused, even if the Interrogating Officer, for some reason or the other cannot be examined, when the person in whose presence the statement was made is examined, S. 27 which is an exception to Ss. 25 and 26 nowhere lays down that to prove a disclosure statement it is obligatory to examine the Investigating Officer who interrogated the accused. The requirement of this section is that the person when he makes the disclosure statement should be accused of an offence and should be in custody of a Police Officer. Even then only so much of the information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, can be proved: (1965) 67 Punj.L.R. 497: I.L.R. (1965) 2 Punj. 224: (1965) 2 Cr.L.J. 699.

The condition necessary to bring S. 27 into operation is the discovery of a fact in consequence of an information received from a person, accused of an offence in the custody of a Police Officer—Thus, only that part of the information is admissible which

leads to the discovery of a certain fact in consequence of the information received from the accused but no more. The admissibility of the information depends entirely on the exact nature of the fact discovered in pursuance of such information.

Where the accused produced the murder weapon and cut leg of the deceased in the Police Station but the prosecution did not prove that the murder weapon belonged to the accused, production of those articles cannot lead to the only conclusion that he committed the murder: 1969 Pat.L.J.R. 364: 1969 B.L.J.R. 578.

Though a person points out a place not his own where stolen property is concealed, the Court should not conclude that the person had received or retained it: 39 I.C. 330: 1 P.R. (1917) (Cr.).

Where a woman in Police custody though not formally arrested, disclosed during the night that she had concealed the murder weapon under grass at a certain place; the matter was not then pursued; on her formal arrest next morning, her formal disclosure statement was recorded; thereafter accompanied by the *Panchas* and the Police Officer, she went to the place and took out the weapon from under the grass, *held*, as the accused had given the same information before and after her formal arrest, the recovery effected in pursuance thereof was not irregular: 1971 M.P.L.J. 829 (D.B.).

Where the accused, while in the Police custody, did not furnish any information leading to recovery rather he just pointed out the weapon with which the alleged murder was committed, *held*, the recovery of the weapon was not admissible in evidence under S. 27: 1993 Cr.L.J. 551 (All.) (D.B.).

Where the statement made by the accused before the Police that he had hidden the pistol in the roof resulted in the discovery of it, *held*, that it was admissible under S. 27: A.I.R. 1956 Bom. 217: 1956 Cr.L.J. 487.

Attention of jury drawn only to portion of statement of accused which led to discovery of skeleton and knife, etc.—Extracts from decisions in A.I.R. 1947 P.C. 67 and A.I.R. 1960 S.C. 1125, indicating scope of S. 27 quoted to the jury—*Held*, no misdirection: 1964 M.L.J. (Cr.) 19: 1963 (Supp.) 2 S.C.R. 852: A.I.R. 1963 S.C. 1074.

Accused making certain statement before discovery of dead body — Statement recorded by Police constable—Constable stating that he had already recorded statement wherein accused had disclosed everything—Such statement not on record—Subsequent statement held could not be said to be statement which led to discovery of dead body and was, therefore, inadmissible. According to witness accused stating that he could discover dead body of deceased since he alongwith four others had buried it—Latter portion of statement is inadmissible under S. 27: 1953 Cr.L.J. 708: A.I.R. 1953 Bilaspur 3.

Where the appellant made a statement in the presence of the panchas that he and his brothers had buried the dead body and that he would point it out and the dead body was discovered from his field, the appellant himself joining in the digging, the statement so far as he involved himself, would be clearly admissible, though so far as the appellant involved his brothers, the statement would not be admissible: 1956 Cr.L.J. 715: A.I.R. 1956 Bom. 393.

The accused was produced before the Sub-Inspector of Police in connection with the murder of a woman. He then made a statement that he has buried the ear-rings of the deceased near a pipul tree and they were recovered from the place pointed out by him. However, in the confession made by him to the Magistrate he did not say that he retained possession of the ear-rings. The husband of the deceased who went to another village a fortnight before her death gave evidence that he saw the deceased wearing those ear-rings three or four days before his departure. The goldsmith who made them for her also gave evidence. Still the Sessions Judge did not accept the evidence of recovery as showing the connection of accused with the crime on the ground that there was no evidence to show that the deceased was wearing them at the time when the crime was committed. He drew a distinction between possession and knowledge and held that the accused merely knew where the ear-rings were concealed but did not possess them. *Held*, that the distinction drawn by the Sessions Judge was not justified by the evidence in the record and the reasons given by him for not accepting the evidence of recovery were fantastic. The statement of the accused that he had buried the ear-rings was admissible in evidence

under S. 27 and the High Court was right in holding that the recovery was a circumstance which connected the accused with the crime: 1957 Cr.L.J. 481: A.I.R. 1957 S.C. 216.

Where, in a murder charge, the appellant (accused) had stated to the Police that he would give the clothes of the deceased, which he had placed in a pit above a brick-kiln, and thereafter, the appellant, in the presence of witnesses, dug the pit in the brick kiln and took out the clothes, which were identified as the clothes of the deceased, the statement of the appellant to the Police is admissible: 1957 Cr.L.J. 328: A.I.R. 1957 S.C. 211.

Where the accused had stated that "Revolver is concealed at Dadar.....I will point out the place and revolver", *held*, that statement is capable of an interpretation that the accused had the knowledge about the concealment of the revolver at the particular place from where it was got recovered and not that he had concealed the same; the accused could not be said to be in conscious possession of the revolver and the cartridge: 1995 Cr.L.J. 2632 (S.C.).

Where on information received that the accused was indulging in illicit distillation activities, the Sub-Inspector of Police proceeded to the village of the accused who after being arrested took him to a place in front of his house and pointed out a spot, from where a pot with fermented wash kept buried was dug out, the discovery made was as a consequence of the information given by the accused and such information may be proved under S. 27: 1957 M.L.J. (Cr.) 829: 1958 Cr.L.J. 1196: A.I.R. 1958 Mad. 451.

Conviction of the accused under S. 411, I.P.Code was based on the basis of an alleged discovery of a gun from a well in a field on the outskirts of a village in pursuance of a confessional statement made by him, which the prosecution sought to introduce under S. 27 of the Indian Evidence Act. The gun was brought out alongwith other guns and a sword by *N*, a prosecution witness, from the well which was accessible to all. The gun had been satisfactorily identified. The only question was whether its recovery could be said to be at the instance of the accused.

Held, that in order to permit an inference that the accused was in possession of the incriminating gun, the prosecution had to prove that part of the confessional statement (as far as possible in the words of the appellant) which related to the fact thereby discovered. But instead of proving that, it had only sought to prove the memorandum itself as if by itself that was substantive evidence. When the memorandum alone was thus sought to be proved, there was no guarantee whether the accused had really made any statement which led to the discovery. From the material on record it had not been proved that the accused was in possession of the gun to warrant his conviction under S. 411, I.P. Code: 1962 M.P.L.J. (Notes) 43.

Where the instrument was an instrument of the kind possessed ordinarily by persons in the village, situation and condition of the hut were such as to afford easy access and entry to any one and the accused persons were living together and both were accused of the murder, *held*, that the production of the instrument by one of the accused was not by itself sufficient to incriminate him though it might raise suspicion. It only implied that he was aware of the instrument being kept or left in the hut. As means of connecting the accused with the offence its value depended on the other evidence: I.L.R. (1953) Mys. 625: A.I.R. 1954 Mys. 81.

6. Statements admissible under section 27—Against whom can be used.—Statements admissible under S. 27 are not admissible against the persons other than maker of the statements: 1992 Cr.L.J. 2190: (1992) 2 Crimes 735 (Pat.); (1984) 26 Del.L.T. 109; (1983) 23 Del.L.T. 487.

Statements which are admissible under S. 27 can be proved only against the person who made them. The section does not sanction the letting in of the statement of one person as evidence against another person: I.L.R. (1944) 2 Cal. 76. *See* also A.I.R. 1945 Oudh 235; 49 Mys.H.C.R. 444.

Discovery statement made by one accused cannot be used against the non-maker accused persons but can be used only against the maker thereof and he only can be fastened with the knowledge of the concealment of the dead bodies: (1990-2) 38 B.L.J.R. 1242: 1991 Cr.L.J. 1030 (D.B.); (1992-2) 12 Guj.L.H. 330: 1993 Cr.L.J. 730: 1992 Cr.L.R. 519.

What is permitted to be proved having the information received from the accused pursuant to which discovery is made, is intended to be proved against such accused and not against non-informant co-accused: 1979 Bom.C.R. 680 (D.B.).

Where an accused who had retracted his confession was acquitted from the charge under S. 302 read with S. 120-B of the Indian Penal Code in appeal by the Supreme Court, *held*, his confession cannot be used against another co-accused convicted by the lower Court for the offence under S. 302 read with S. 34 of the Code; the two accused were not charged for the same offence: A.I.R. 1984 S.C. 1793.

The statement of a co-accused person in the course of investigation is not and cannot be treated as evidence being hit by the provision contained in S. 162 of the Code to the effect that no statement made by any person to a Police Officer in the course of investigation shall be used for any purpose save as provided therein. The statement of a co-accused person is, therefore, inadmissible in evidence against other accused: (1983) 56 Cut.L.T. 405.

Extent of information admissible—Statement of person, in custody of Police, made to Police Officer, is not admissible against another person: I.L.R. (1965) 1 Punj. 677: (1965) 67 Punj.L.R. 359.

Recovery of dagger in pursuance of confession of accused 2—Confession not admissible against accused 1 even if first accused's ownership of dagger is taken to be established: 1962 Ker.L.T. 120: A.I.R. 1963 Ker. 54: 1963 M.L.J. (Cr.) 194.

Statement of accused in Police custody cannot be admissible unless covered by exception provided for by section—Only fact of discovery assures correctness of confession—Information by co-accused regarding place of stolen property, lying with accused—*Held*, recovery was not result of any statement made by accused within the meaning of S. 27: 1968 All.W.R. (H.C.) 100: 1968 All.Cr.R. 91.

7. How much of statement is admissible.—When a statement made to a Police Officer by a person in Police custody, leads to the discovery of the material objects in pursuance of the said statement that will alone be admissible under S. 27. The further statements of the accused to the effect that they attacked and killed the deceased with certain weapons could not be admitted: 1977 Cr.L.J. 1309 (Gau.) (D.B).

The use of the words 'so much of such information' in S. 27 clearly postulate that long and detailed statements unconnected with any fact thereby discovered are not to be proved. That information alone is provable which advances the investigation of the Police in any way. It should be information of a relevant fact and there must be some fact discovered as a result of the information. It is for the Investigating Officer to record the words of the accused persons and it is for the Court to see what portion or portions should be allowed to be proved. It is not for the Investigating Officer to make a selection. He must record the information given by the accused. It is for the Court to consider the admissibility of the information. In doing so the Court must not allow extensive statements unconnected with any fact discovered thereby to be tendered in evidence: I.L.R. (1948) Nag. 57: A.I.R. 1948 Nag. 78.

A statement by the accused that he had committed the offence does not fall within S. 27 because such a statement is not at all required to lead up to the production of property. If, however, the accused states that he would show the property belonging to the victim and leads to the recovery of such property, then that statement would be admissible: (1981) 52 Cut.L.T. 126: 1981 Cr.L.J. 1452.

That much portion of the statement of the accused which leads to the discovery of weapon with which he is alleged to have killed the deceased is admissible in evidence: 1967 Cr.L.J. 1654: A.I.R. 1967 Manipur 41.

The statement of the accused that he could point out a spot and the blood stains would be found there is admissible, but not that it was at that spot that he committed the crime: 14 Cr.L.J. 190: 19 I.C. 190.

Where the accused stated that he had made the victim stand on the brink of the pit and pushed him therein, that he had picked up that very brick and hit it on the victim's head twice and that he could point out the pit, *held*, only the last statement is admissible; the earlier two statements, being pure and simple confession of the offence, and not related distinctly to the discovery of the pit, are inadmissible. It must be kept in mind that the 'fact discovered' includes the physical object produced and the accused having knowledge of the same prior to its recovery: (1979) 6 Cr.L.T. 43: (1978) 80 Punj.L.R. 56 (Del.) (D.B.).

Where a weapon was recovered from the accused under a seizure memo. in which it was recited that accused made the statement that he would show the weapon with which he assaulted the deceased, *held*, the first part in the seizure memo. would be inadmissible because the fact that accused assaulted the

deceased is not discovered in pursuance of the information given by accused; it would be a confessional statement to Police Officer hit by S. 25: A.I.R. 1979 S.C. 1042. *See* also 1971 Raj.L.W. 266; (1984) 26 Del.L.T. 109.

Where the accused stated that he had thrown the murder weapon in the well near his shop and when the weapon was recovered he was stated to have admitted further that it was the same one which he had thrown in the well and a part of it was cut by him, on the question of admissibility of the statement in evidence against the accused:

Held, no clear inference as to the guilt of the accused could be drawn from the facts of the recovery of the weapon, as the latter part of accused's statement as to identity of weapon and that he had cut part of that weapon was clearly inadmissible in evidence as no statement subsequent to the recovery was covered by S. 27 of the Evidence Act and the same had, therefore, to be ignored. In order that a statement may be admissible under S. 27 of the Evidence Act it must relate to such information as relates distinctly to the fact thereby discovered. The part of the statement of the accused to the effect that he had himself cut away a part of the handle of the weapon was not a statement of that description and it was, therefore, inadmissible: 1966 Cr.L.J. 369: A.I.R. 1966 All. 142.

Where in an F.I.R. lodged by the accused himself he stated that he had murdered his wife because of her bad character and that her dead body and the *khurpi* with which he killed her were later on recovered, *held*, only that part which led to recovery of the dead body and the *khurpi* was admissible under S. 27: 1977 Cr.L.J. 358: 1977 All.Cr.R. 29; 1973 All.W.R. 142: 1973 All.L.J. 251: 1973 Cr.L.J. 1478; 1979 W.L.N. (U.C.) 252 (Raj.) (D.B.).

The statement that accused had killed his brother with an axe would be clearly inadmissible. The words 'I removed and buried the dead body of the deceased in the Kuvewala field' and the fact of the discovery, which was the distinct result of this information, could be proved under S. 27 as accused could be deemed to be in the Police custody at the time when he made the statement in question. He was no longer a free man when he made the statement and led the persons including the Police patel and the panch witness to the Kuvewala field and discovered the dead body which was identified to be the deceased. The portion of the confessional statement, *viz.*, 'I killed the deceased with the axe' must be excluded. But the rest of the statement, *viz.*, that 'I had removed and buried the dead body in the Kuvewala field' alongwith the fact of the discovery must be held to have been duly proved by the prosecution: I.L.R. (1964) Guj. 954: (1965) 1 Cr.L.J. 30: (1965) 6 Guj.L.R. 129: A.I.R. 1965 Guj. 5.

Statement of accused leading to discovery of shirt — Statement that shirt belonged to murdered person is not admissible in evidence under S. 27 as it did not relate distinctly to discovery of shirt: 1967 Cr.L.J. 62: A.I.R. 1967 Him. Pra. 10.

Extent of information admissible—Theft case—Disclosure statement by accused that he had stolen ornaments from temple and after extracting gold from them had buried their copper linings in forest—Accused leading Police party to forest and digging out copper linings—*Held*, that part of the statement that he had stolen the ornaments was not admissible but the words that he had extracted gold from ornaments and had hidden copper linings were admissible under S. 27, as they related to the discovery of stolen articles and to the knowledge of the accused about them: (1964) 2 Cr.L.J. 293: A.I.R. 1964 Him. Pra. 27.

Where the accused stated "I will tell the place of deposit of articles which I took from ....", *held*, only the first part of the said statement, *viz.*, 'I will tell the place of deposit' was the immediate and direct cause of the fact discovered and, therefore, only this portion was admissible under S. 27. The rest of the statement constituted only the past history of the articles or their theft by the accused; it was not the distinct and proximate cause of the discovery and had to be ruled out of evidence altogether: A.I.R. 1976 S.C. 483: (1976) 1 S.C.C. 828: 1976 Cr.L.J. 481: (1976) 1 S.C.R. 715.

Where during investigation, the Investigating Officer recorded the statement of the accused in the form of a memorandum in which the accused gave out the details of the occurrence and also promised to point out the stone with which he had struck the deceased and on the strength of this information the stone was discovered at the scene of occurrence and was seized by the Police, *held*, that what was admissible was that the accused promised to point out the stone actually discovered on the spot. Anything which the accused stated to show the relevancy of the stone to the crime was ruled

out and was not admissible in evidence: 1953 Cr.L.J. 217; A.I.R. 1953 Bhopal 1.

In the limited class of cases where the gist of the offence is possession, words such as 'I hid', 'I pledged', 'I sold', 'I gave', or 'I have kept' are admissible on the ground that words are distinctly related to the fact discovered though in the circumstances of the case they may amount to a confession. 'Hiding' and 'pledging' have been construed as showing possession because by doing either the hider or pledger shows that he has both animus and corpus and selling, giving or keeping have been construed as showing possession because no one who has no possession can sell or give or keep: 55 Cr.L.J. 583: A.I.R. 1954 Mad. 433; 1958 M.P.L.J. 745: A.I.R. 1959 Madh. Pra. 17; (1960) 62 Bom.L.R. 80: A.I.R. 1960 Bom. 263.

Where one of the accused in his confessional statement implicated himself as the person who decoyed the deceased to the rickyard and assisted in his murder by holding the legs and that after the murder he and others carried the dead body and buried it in the burial ground practically the entire statement will have to be excluded from the evidence except the portion in which it was stated that the body was buried at a particular place, which by itself will not in any manner incriminate any of the accused: (1947) 2 M.L.J. 295.

During the Police investigation following a dacoity, the accused made a statement to the Police Officer and the *panchas* which was recorded in the panchnama: "About three months ago I had gone alongwith some others and after breaking open the *A* Bank had stolen the amount therefrom and I will produce the amount that is with me now at my house at *M* of the *A* Bank Dacoity"... "So saying he took the *panchas* and the Police to *M* in a bus—and there at his house he produced Rs. 40 in currency notes". *Held*, that out of the statement made the only part admissible was "I will produce the money", and the rest was inadmissible under S. 27: (1946) 48 Bom.L.R. 542: A.I.R. 1947 Bom. 90. The charges against accused 1 were in the alternative: (*1*) that he broke into the house of P.W. 1, and committed theft of a bicycle; and (2) that he dishonestly possessed a dynamo and light which formed part of the bicycle alleged to have been stolen. The bicycle was stolen on 6th December, 1946. The bicycle itself was abandoned. Only the light and dynamo were removed. On the day of his arrest on 27th June, 1947, accused 1 made a statement to the Sub-Inspector of Police saying *inter alia* "I gave the dynamo and the light to *V* (accused 2). I got back from *V* the dynamo light and the dynamo stolen from my next house and sold them to *X*". The light was recovered from the possession of accused 2 but there was no independent evidence to show that accused 1 gave the light to accused 2. The dynamo was recovered from *X* who also gave evidence that he purchased it from accused 1. In the circumstances, *held* (*1*) the portion of the statement "I sold the dynamo to *X*", is admissible in evidence as the statement led to the discovery of the sale by accused 1 to *X* and the conviction of accused 1 for possession of the dynamo was justified on the admissible portion of the statement and the subsequent evidence of *X* that he purchased the dynamo from accused 1. (2) All that was discovered on the basis of the statement was possession of the light with accused 2 and not original possession with accused 1 and subsequent transfer of that possession from accused 1 to accused 2. So the portion of the statement, "I gave the dynamo and light to *V*" is not admissible in evidence, since the requirements of S. 27 were not satisfied: (1950) 1 M.L.J. 467: A.I.R. 1950 Mad. 613.

A person accused of murder had made the first information report himself. It consisted of three parts. In the first part the accused described the events that led to the murder. The second part dealt with the murder proper. The third part dealt with the subsequent events and in the end of the report the accused stated that he had put blood-stained axe in a fence. On a question as to the portions of the first information report that are admissible—*Held*, that the third portion of the report which led to the discovery of the axe would be admissible: A.I.R. 1950 Ajmer 75.

Where the fact discovered was that the grave in which the corpse of the deceased was interred dug up with a spade produced by the accused, the only part of the information given by him which can be admitted is that relating strictly to the discovery of the spade with which the grave was dug. It is not only possible to admit any statement by him that he murdered the deceased: 1937

Mad.W.N. 881. *See* also 1939 All.L.J. 732: A.I.R. 1939 All. 685.

It is legitimate to record evidence that an accused person said: 'I will point out certain property' if such statements lead to a discovery, but it is not legitimate to record as evidence that an accused said 'I will point out certain property which I obtained as my share of the booty in the dacoity': 44 I.C. 967: 19 Cr.L.J. 459.

An accused gave information to the Police in these words: 'I shall produce the lathi with which I killed Ismail'. It had been admitted as evidence under S. 27. The lathi which the accused handed over had no marks of blood whatsoever. *Held*, that if the mere fact of the lathi having been handed over to the Police might be relied upon, for the purpose of introducing an alleged confession made by the accused to the Police, the provisions of S. 26 would become nugatory: A.I.R. 1929 Sind 175. Where the accused surrendered himself to the Police Station and gave the first information in which he confessed to have murdered the deceased and also made a reference to the strong motive he had, produced an axe with which he murdered the deceased and also surrendered the blood-stained clothes he was wearing, *held*, that the statement relating to the surrender of the axe and of the blood-stained clothes would be admissible under S. 27: 6 Sau.L.R. 519: A.I.R. 1955 Sau. 25.

Per *Siadat Ali Khan, J.* (*Reddy , J.*, dubitante)—Where the words used by the accused, according to certain P.Ws. panchas about the discovery of the body of the deceased in a well were that 'he will show where the child is', and, according to the Investigating Officer, were that 'he will point out the well where he threw the child', and it was contended that the entire statements were inadmissible and that as the information regarding the corpse being in the well was given in the first place to the Investigating Officer and then to the panchas, it could not be said that the discovery of the dead body by the panchas was done in pursuance of the information of it given by the accused. *Held*, that the statement deposed to by the P.Ws. was admissible in full and in the statement deposed to by the Investigating Officer the portion that 'he drew the child' was not admissible and the rest was admissible; (2) that investigation meant furnishing of evidence and if for that purpose the Investigating Officer called the panchas and the panchas heard the statement for the first time and then discovered the fact, it could not be said that the fact was not discovered in pursuance of information given by the accused: I.L.R. (1954) Hyd. 256: A.I.R. 1955 Hyd. 200.

Where a person accused of murder makes a statement in the presence of the Police and the panch that he had committed the murder and had removed the ornaments of the deceased, which he afterwards produces, the statement that the accused had committed the murder does not fall within S. 27, because it is not a statement required to lead up to the production of the property. It is quite enough to say that he would show the property which belonged to the deceased: (1943) 45 Bom.L.R. 884. *See* also A.I.R. 1943 Mad. 418: (1943) 1 M.L.J. 192; A.I.R. 1943 Mad. 661: (1943) 2 M.L.J. 283.

A statement made by the accused after he brought out certain clothes from a pond to the effect that he had removed them from the person of the deceased after he had killed him and thrown them into the pond, does not come under the purview of S. 27, Evidence Act, and is not admissible in evidence: A.I.R. 1952 Pepsu 23.

Recovery of blood-stained payjama and banyan of accused kept concealed by accused, at instance of accused—Statement of accused that 'I have kept concealed' my 'payjama and banyan'—*Held*, that statement that these articles belonged to accused was not admissible in evidence: (1965) 67 Punj. L.R. 1010: 1966 All.Cr.R. 41: 1966 All.W.R. (Supp.) 9.

Before pointing out the pile of stones under which the dead body lay buried, the accused stated to the Police Officer that the dead body had been buried by him, *held*, that the statement was admissible under S. 27: (1945) 47 Punj.L.R. 254.

8. "Accused of any offence".—[*See* also S. 24, Note 4; S. 25, Note 6, *supra*]. A husband assaulted his wife and his wife died as a result of it. The husband immediately went to the Police Station and reported that he went to the west facing room and finding his wife sitting, wounded her and she became senseless. On receipt of this information the Police went to the house and found the corpse. *Held*, that the statement to the Police was not

admissible under S. 27 as the husband was not, at the time making the statement, a 'person accused of an offence' not having been charged with any offence then: I.L.R. 7 Pat. 411: A.I.R. 1928 Pat. 491. But *see infra*. The words information received from "a person accused of any offence" in S. 27 cannot be read to mean that he must be an accused when he gives the information but would include a person if he became subsequently an accused person, at the time when that statement is sought to be received in evidence against him: (1959) 61 Bom.L.R. 715: I.L.R. (1959) Bom. 1244: A.I.R. 1959 Bom. 534.

The expression 'accused of any offence' used in S. 27 is merely descriptive of the person against whom the information furnished could be used as evidence; it is not necessary that a formal accusation must have existed against him when he furnished the information; it would even include a person who subsequently became, and was, an accused when the information was sought to be proved against him in the trial. Thus, where a person directly furnished oral information to a Police Officer to be used as evidence against him, *held*, the person must be deemed to have submitted himself to Police custody. [1960 Cr.L.J. 1504 (S.C.) and 1959 Cr.L.J. 1419 (Bom.), Rel. on]: 1975 Cr.L.J. 354 (Gau.) (D.B.).

The term 'accused' for the purposes of S. 27, Evidence Act, cannot be narrowly interpreted. The expression 'accused of any offence' does postulate firstly an offence committed or alleged to have been committed and, secondly accusation of the person or persons therefor. The accusation may come even from the offender himself. It is a mistake to believe that a person cannot be the accused unless his name appears in the F.I.R. All that is required for purpose of S. 154, Cr.P.Code, is that there should be clear definite information about the commission of a cognizable offence to set the investigation machinery in motion. Investigation shall be taken up under the provision of S. 157, Cr.P.Code, even if there is reason for the Police Officer in charge of the station to suspect the commission of a cognizable offence, whether on the basis of such information or otherwise. Further the information required under S. 154, Cr.P.Code, need not contain the circumstances of the commission of the offence nor the names of the offenders or the witnesses, for, the main purpose of investigation is to ascertain these matters. Thus, from the time of the commission of offence whoever are shown or have come to the knowledge of the Police as offenders or suspected offenders are indeed the accused persons in law though it may be that these persons after arrest are released on security bonds during investigations under the provisions of S. 169 or S. 170, Cr.P.Code. In order to attract the provisions of S. 27, Evidence Act, the facts must beyond controversy satisfy all the conditions, one of which is that the person must at the time be a person accused of an offence; but it is not necessary that his name must be found in the F.I.R. Hence, a person whose name is not mentioned in the F.I.R. as the culprit but who is arrested by the Police during the investigation after ascertaining his complicity is an accused person within the meaning of Ss. 167 and 169, Cr.P.Code, whether he be forwarded to the Magistrate or not. A statement made by him leading to discovery while he was in custody would be admissible under S. 27, Evidence Act: (1957) 2 An.W.R. 63: 1957 M.L.J. (Cr.) 368: A.I.R. 1958 Andh. Pra. 37.

9. Use of First Information Report for purposes of section 27.—The contention that the first information report is inadmissible in evidence for purposes of S. 27, Evidence Act, is not correct. If the first information report contains information which satisfies the requirements of S. 27, it can be used for that purpose: 1963 Jab.L.J. 137: 1962 M.P.L.J. (Notes) 317: (1964) 1 Cr.L.J. 596.

First information by accused followed by discovery—Information admissible under S. 27, Evidence Act—(*Obiter*): 1960 All.L.J. 721.

First Information Report by accused—Only that part of report which is covered by S. 27 is admissible in evidence: 1968 Cr.L.J. 15: A.I.R. 1968 All. 37. *See* also 1981 M.P.W.N. 106; 1977 All.Cr.R. 29.

First Information Report—Value and use of—First information by accused containing confession—How far admissible in evidence: 1966 M.L.J. (Cr.) 134: 1966 Cr.L.J. 100: A.I.R. 1966 S.C. 119. *See* also S. 21, Note 6; S. 24, Note 1; S. 25, Note 3, *supra*.

10. "Leading to discovery".—Statement leading to discovery not immediately but ultimately admissible: 1940 Mad.W.N. 163: A.I.R. 1941 Mad. 290.

Statement leading to discovery—What constitutes—Fact discovered not because of statement made but due to act of another—Statement not admissible: A.I.R. 1940 Mad. 744: (1940) 1 M.L.J. 758. *See* also 1941 Mad.W.N. 956: A.I.R. 1942 Mad. 237; 50 Mys.H.C.R. 106; 49 Mys.H.C.R. 444.

Statement leading to discovery—Prisoner tutored—Whole force of recovery artificial—Discovery cannot be said to be made in consequence of statement: I.L.R. (1954) Patiala 316: A.I.R. 1955 Pepsu 33.

11. "Discovered"—Meaning of.—The recovery of the articles cannot be described as a discovery under S. 27, where they are recovered from any hidden place and if in the normal course of investigation the investigating agency is bound to see them and take them in possession without the accused making any statement of pointing them out. It has become the normal device of the investigating agency to turn an ordinary recovery into a discovery in order to utilise the provisions of S. 27 against an accused person: 1958 Cr.L.J. 462: A.I.R. 1958 All. 293.

The incriminating statements made by accused before the Police Officer are hit by Ss. 25 and 26 of the Evidence Act. The statements made by him such as relating to the weapon used by him in the commission of the offence and clothes put on by him at that time are incriminating statements suggestive of his showing the weapon which he used in committing the offence and also relating to the clothes put on by him at the time of commission of the offence. The statements in the case were made before the panchas in the presence of Police Officer at the Police Station and were not statements leading to discovery of the articles so as to come within the purview of S. 27. 'Discovery' implies finding out a thing from being concealed or secreted which cannot be easily seen or discovered on making a search of the house or so. It should lead to the discovery of such articles only on the basis of the information given by the accused persons. It is then that it can be called as discovered in consequence of that information. Where the articles were easily seen lying and an effort was necessary to find out the same except going to the house of the accused, no question of discovery of those articles would arise: (1966) 7 Guj.L.R. 306: I.L.R. (1966) Guj. 134.

The word 'thereby' in 'fact thereby discovered' in S. 27 refers to that portion of the information only which may be held to be the proximate cause of the discovery. In order that this may be admissible against the accused, (*1*) the information must be the one given by the accused—The statement conveying the information must be his own statement in his own language, and then (2) only so much of the information as is necessary and sufficient to cause the discovery will be admissible: (1941-42) 46 Cal.W.N. 180: A.I.R. 1942 Cal. 593; A.I.R. 1942 Mad. 444: (1942) 1 M.L.J. 517. *See* also 49 Mys.H.C.R. 444; 50 Mys.H.C.R. 106.

S. 27 mentions abouts disclosure of fact and not of any object: (1983) 23 Del.L.T. 41.

It is fallacious to treat the 'fact discovered' within S. 27 as equivalent to the object produced; the fact discovered embraces the place from which the object is discovered and the knowledge of the accused as to this, and the information given must relate distinctly to this fact: I.L.R. (1948) Nag. 147: A.I.R. 1948 Nag. 344: 1948 Nag.L.J. 489; A.I.R. 1950 All. 615; A.I.R. 1953 Bhopal 1; I.L.R. (1952) Trav.-Co. 261: A.I.R. 1952 Trav.-Co. 300.

The words 'so much of such information' and 'distinctly' in S. 27 of the Evidence Act, which is an exception to Ss. 24, 25 and 26, limit what may be proved against the accused. Only that portion of the accused's statement can be admitted which was the direct or immediate cause of the discovery of the fact deposed to. Anything which is not directly or clearly connected with or which is not the immediate cause of the discovery is not admissible. Information as to the past history of the fact or object discovered is not related to its discovery and is, therefore, not inadmissible: I.L.R. (1952) Bom. 201: (1951) 53 Bom.L.R. 834: A.I.R. 1952 Bom. 72.

What has to be explained by evidence is unexplained possession of an incriminating article by the accused soon after commission of the crime, so that from such unexplained possession a reasonable inference that he was the criminal can be drawn. The fact of possession can be proved by discovery of an article at the instance of the accused because if the evidence shows that he had in any way dealt with the article prior to its discovery by him, he can reasonably be credited with its possession sometime before such an event. It is in this context that so much of the

confessional statement made by him as leads to the facts thereby discovered becomes admissible under S. 27 of the Evidence Act. But this confessional statement must be proved by persons to whom or before whom it was made and as the Courts want to know the exact words used by the accused when making the statement, the Investigating Officer is required by the Police Regulations to record it in the form of a memorandum in the presence of witnesses so that its authenticity may be beyond doubt and the witnesses may refresh their memory when deposing about it in Courts. The memorandum itself cannot be used as substantive evidence: 1962 M.P.L.J. (Notes) 251.

Statements by accused leading to discovery — Prior statement vague — Subsequent statement which led to discovery is admissible: 1960 Raj.L.W. 4: I.L.R. (1959) 9 Raj. 762.

Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered: A.I.R. 1948 Nag. 344: I.L.R. (1948) Nag. 147: 1948 Na.L.J. 489. *See* also (1952) 54 Punj.L.R. 408: A.I.R. 1953 Punj. 81.

Section makes relevant and admissible only such portion of an accused's statement, as 'relates distinctly to the fact thereby discovered'. The rest of the information relating to the past history or user of the physical object has to be rejected as mere dross: (1989) 1 Bom.C.R. 135 (D.B.).

The words 'fact discovered' used in S. 27 have been held to mean not only the object produced but also to embrace the place from which the object was produced and the knowledge of the accused about its location: A.I.R. 1976 S.C. 483: (1976) 1 S.C.C. 828: 1976 Cr.L.J. 481: (1976) 1 S.C.R. 715. The information relating distinctly to this fact understood in the aforesaid larger perspective, is admissible in evidence. Only information as to past user or the past history of the object produced is not admissible in evidence as it does not relate to the discovery of the object produced. [1960 All.L.J. 733 (S.C.), Foll.]: 1981 All.L.J. 991 (D.B.).

In order that a 'discovery' may come under the provisions of S. 27 of the Evidence Act, the place from which the incriminating article was recovered must be a place of concealment which it would be difficult or impossible for the Police to discover without some assistance from the accused: 1966 Cur.L.J. 37: I.L.R. (1966) 1 Punj. 765: 1967 Cr.L.J. 118: A.I.R. 1967 Punj. 14.

In the recovery memo. the full information as to how the gold chain was recovered had not been given. The information given by the accused leading to that discovery had not been produced. The Investigating Officer stated in his deposition during the murder trial that the accused stated that he had killed the deceased (*R*) and thrown him down from the bridge and had kept concealed the necklace after snatching it.

Held, that in that statement except this much portion that he had concealed the necklace, rest was inadmissible in evidence: 1967 Cr.L.J. 125: A.I.R. 1967 Tripura 1.

Accused making statement that he had kept gun in his village—Statement admissible even though place of discovery not specifically mentioned: (1965) 2 Cr.L.J. 520: A.I.R. 1965 Ori. 175.

Where one of the circumstances relied on by the prosecution against the accused was the recovery of article of the offence on the information and at the instance of the accused, *held*, the article in question was found lying in the house when the house was opened by the Police and, therefore, it had already been recovered by the Police. Thus, it could not be said to be a discovery made under S. 27 of the Indian Evidence Act: 1995 Cr.L.J. 1853 (Raj.) (D.B.).

Under S. 27, the fact of admission by the accused that she committed theft in the house of P.W. 1 will not be admissible in evidence, but the fact that she informed that she had kept concealed the articles at a certain place is clearly admissible under the above section. Where the accused stated that she had concealed the articles and also led the party and the Investigating Officer to the place of concealment and gave recovery of the articles from the place, where they were actually hidden the statement would be admissible in evidence under S. 27. 'Discovery' in S. 27 embraces not only the knowledge of the accused as to the place, but also the place from which it was produced: (1964) 6 Ori.J.D. 12: I.L.R. (1964) Cut. 323: (1964) 1 Cr.L.J. 602.

Statement of one accused person leading to discovery — Statement is admissible against him: (1962) 4 Ori.J.D. 156: I.L.R. (1962) Cut. 366: (1964) 2 Cr.L.J. 487.

S. 27 does not envisage that the stolen articles must be kept concealed or that there must be some sort of concealment before a discovery is made. Information leading to discovery may be made in relation to a thing which was not kept under any concealment:

1964) 6 Ori.J.D. 12: I.L.R. (1964) Cut. 323: 1964) 1 Cr.L.J. 602.

A confessional statement made by a person, which leads to the discovery of some resh material, at a time when he was neither n accused person nor in the Police custody, annot be proved against him when he is ubsequently accused of an offence. The confessional statement which is being considered in S. 27, is a statement which is made by person in Police custody. It is also made by person 'accused of an offence'. If these two hrases are considered together, it follows nevitably that the person when he made the tatement, was an accused person and he vas also in Police custody. Only those confessional statements are being considered nder S. 27 which are made by accused persons while they are in Police custody. Such onfessional statements are admissible in vidence provided they have led to the discovery of a fresh fact. If the statement is nade by a person who is a stranger or is a rosecution witness, then such statement is ot admissible in evidence despite the fact nat it amounts to a confession and does lead o the discovery of a new fact: I.L.R. (1961) 1 unj. 33: (1962) 1 Cr.L.J. 186: A.I.R. 1962 Punj. 0.

The discovery should be of a palpable hysical fact: secondly, it should be the finding of something which had been partly or holly concealed and which might have not een found out, except as a consequence of ne statement. If it is merely a statement that ne accused went to this or that place and got is or that article, then the statement would ot be evidence unless made to a Magistrate: 961 M.P.C. 178: 1961 M.P.L.J. 353: (1961) 2 r.L.J. 238.

Where in a case under S. 201, Penal Code, ne first intimation that the Police got regarding where the missing person was, was the eport made by accused that report would ot be substantive evidence. Only that part f that report, which would be covered by 27, would be read as evidence. But, before nat can be done, it has to be established that ne statement containing the information overed by S. 27, was actually given.

The documents, or the memoranda of hat accused said and covered by S. 27 are ot by themselves substantive evidence. It is hat the witness deposes in Court as having een said by an accused, when giving information leading to discovery of a fact, that is vidence. The memorandum of a statement repared is only for refreshing memory of the witness who has drawn it at that time, or of the attesting witness in whose presence that information was given: 1961 Jab.L.J. 1250: 1961 M.P.L.J. 1291: (1962) 2 Cr.L.J. 680.

Where the accused had made a statement to the Police that he knew where the stolen articles were and would lead them to the person (accused No. 3) who had them, it can be said that the discovery of the articles with the third accused was a fact deposed to by the accused and admissible in evidence under S. 27, if the Police had no information about the complicity of the third accused with the crime. If an accused charged with a theft of articles states to the Police. 'I will show you the articles at the place where I have kept them' and the articles are actually found there, there can be no doubt that the information given by him led to the discovery of a fact, *i.e.*, keeping of the articles by the accused at the place mentioned. The discovery of the fact deposed to in such a case is not the discovery of the articles but the discovery of the fact that the articles were kept by the accused at a particular place. In principle there is no difference between the above statement and that made by the accused which in effect is that 'I will show you the person to whom I have given the articles'. The only difference between the two statements is that a named person is substituted for the place where the articles are kept. In neither case are the articles, the fact discovered.

However, if it be shown that the Police already knew that accused No. 3 had got the articles but did not know where the said accused was to be found, the discovery in pursuance of the information given by the accused that accused No. 3 had the articles and could be pointed out in a large crowd at the waiting hall merely relates to the whereabouts of accused No. 3. There is no discovery of any fact deposed to by the accused within the meaning of S. 27.

Although such a statement might otherwise have been admissible in evidence, there is no discovery of a fact connecting the accused with the receipt of the articles which were stolen within the meaning of S. 27 of the Evidence Act because the Police already knew that the third accused had the articles: 1970 Mad.L.W. (Cr.) 128: (1970) 2 S.C.R. 332: A.I.R. 1970 S.C. 1934.

'Any fact'—If includes discovery of witness.

Per *Krishna Rao, J., Umamaheswaram, J.*, dubitante.—Discovery of witnesses is a

discovery of fact within the meaning of S. 27: 1956 An.W.R. 360: 1957 Cr.L.J. 930: A.I.R. 1957 Andh. Pra. 456.

S. 27 refers to a fact being discovered; a fact means and includes, according to the definition in S. 3, 'anything, state of things or relations of things capable of being perceived by the senses': 1940 Mad.W.N. 163.

The discovery of a witness is discovery of a fact within the meaning of S. 27. On accused being arrested he gave information that he sold one gold belt with one side short, four silver golusus, one silver plate, one pair of solid silver Kadivalu Golichuttu and one silver waist string of one row to one *B* at Ongole for Rs. 1,227-0-0 and produced from a secret place Rs. 1,223-12-6 which had been seized by the Police. *Held*, that both those pieces of information were admissible and were not affected by the limits placed upon the admission of evidence under S. 27: A.I.R. 1954 Mad. 433: 55 Cr.L.J. 583.

The discovery of a person who is afterwards proved to be a dacoit is not the discovery of a fact within S. 27: 43 I.C. 111: 14 Nag.L.R. 192.

The expression 'fact' as defined in S. 3 includes not only the physical fact but also the psychological fact or mental condition of which any person is conscious. It is in the former sense that the word is used in S. 27: I.L.R. 10 Lah. 283: A.I.R. 1929 Lah. 344 (F.B.).

The accused in the presence of the Investigating Officer and two witnesses, offered to hand over the gandasa which he said he had thrown into a tank, and thereafter he led the officer and the witnesses to the tank and in their presence waded into the tank and fetched the gandasa out of the water. This gandasa was found by the Chemical Examiner and Serologist to be stained with human blood.

Held (per *S. K. Das, Kapur and Shah, JJ.*), that the information given by the accused was provable in so far as it distinctly related to the fact thereby discovered and his statement that he had thrown the gandasa in the tank was information which distinctly related to the discovery of the gandasa: A.I.R. 1960 S.C. 1125: 1960 All.W.R. (S.C.) 568: (1960) 2 S.C.A. 371.

12. "Distinctly"—Meaning of.—The word in S. 27 means 'directly' 'indubitably', 'strictly', 'unmistakably': A.I.R. 1976 S.C. 483: (1976) 1 S.C.C. 828: 1976 Cr.L.J. 481: (1976) 1 S.C.R. 715.

Under S. 27, the information to be proved must relate distinctly to the fact thereby discovered. The word 'distinctly' in S. 27 is used in some sense other than the word 'directly'. It is meant to exclude certain things and to limit and confine the information which may be proved within definite limits and not necessarily to include everything which may relate to that information. Even more important is the word 'discovered'. It is used in a peculiar sense. The test is that the fact discovered must be discovered in the sense, that the proof of the existence of that fact, no longer rests on the credibility of the statement of accused, but rests on the credibility of the witnesses who depose to the existence of that fact. The rest of the information is not admissible: A.I.R. 1929 Lah. 338: 115 I.C. 1.

S. 27, which is in the nature of an exception to the previous Ss. 24, 25 and 26, has to be narrowly interpreted; 'facts discovered' in the section mean the physical perception of a material fact and not merely learning of a mental fact or the contracting of a witness. The word 'distinctly' in the section excludes the admission of a statement if there is any other conscious will or agency intervening between the information and the discovery. Where there has had to be further inquiry of an independent nature before the discovery is made, it cannot be *held* that it is 'distinctly' related to the information or confession: 1952 Cr.L.J. 986: A.I.R. 1952 Vindh. Pra. 42.

Statement of accused to Police—Leading to discovery—Admissibility of—Scope of S. 27—'Distinctly' in S. 27—Meaning of—Compound statement—Duty of Court: A.I.R. 1966 Raj. 74.

13. "Whether amounts to confession or not".—The statements containing information leading to discoveries under S. 27 may or may not, depending upon the facts and circumstances, be confessional; those may simply be incriminating: 1979 Bom.C.R. 680 (D.B.).

In construing S. 27, the word 'confession' does not necessarily mean a complete confession of guilt but means and includes any incriminating statement: 115 I.C. 1 A.I.R. 1929 Lah. 338. *See* also A.I.R. 1941 Nag 86.

Statements made during the investigation whether inculpatory or exculpatory, whether confessional or not, cannot be excluded from

consideration by the Investigating agency, while submitting a charge-sheet; the bar of Ss. 25 and 27 applies to a stage when the case is being tried by a Court before whom evidence is recorded: 1983 All.W.C. 289: 1983 All.Cr.R. 154: 1983 All.L.J. 309.

The preamble in a confessional statement which has no relation to the discovery of the facts is not admissible under S. 27: (1939) 2 M.L.J. 487: A.I.R. 1939 Mad. 593.

Discovery of fact—Accused producing articles alleged to be stolen and making confession—Subsequent claim to articles as own—Admissibility of confession. *See* 46 Cr.L.J. 613: A.I.R. 1945 Pat. 161.

Information received from the accused in Police custody is admissible if it leads to discovery of a fact and it is immaterial whether such information amounts to confession or not: 1990 Cr.L.J. (N.O.C.) 6 (Ker.) (D.B.).

Confession need not relate to offence in respect of which accused was in custody: 1960 Ori.J.D. 317: 27 Cut.L.T. 159.

14. Custody of Police Officer.—[*See* also S. 26, Note 3, *supra*]. 'Custody' meaning of. *See* I.L.R. 18 Lah. 106: A.I.R. 1937 Lah. 620; I.L.R. (1936) Nag. 78: A.I.R. 1936 Nag. 200. Per *Bhide and Din Mahommed, JJ.*—'Police custody' does not necessarily mean custody after formal arrest and it also includes 'some form of Police surveillance and restriction on the movements of the person concerned by the Police'. It is open to an accused person to prove in every case that arises that he was actually in the custody of a Police Officer, although in the Police diaries he was not shown to have been formally arrested: I.L.R. (1940) Lah. 242: A.I.R. 1940 Lah. 129 (F.B.).

The word 'custody' in S. 27 does not mean formal custody. An accused is in Police custody within the meaning of the section when he is under surveillance of the Police and cannot break away from the company of the Police Officer and get away: 1954 All.L.J. 93: A.I.R. 1954 All. 667.

S. 27 speaks of custody; 'custody' is not equivalent to arrest and, thus, the word 'custody' in S. 27 does not necessarily mean detention or confinement, if the accused is under surveillance, it amounts to custody. Thus, where the accused who was arrested in connection with some other case, was taken by the Station House Officer in custody in the instant case for investigation, *held*, it could not be said that he was not in custody when he gave the information leading to the discoveries of the stolen articles: 1984 Raj.L.W. 225; (1993) 1 Ker.L.J. 437.

There is a distinction between custody and arrest. 'Custody' is not always formal and includes any sort of surveillance or restraint by Police. A person, called to the Police Station to be interrogated as an accused in investigation of a crime, must be deemed to be in Police custody as his formal arrest is not then necessary. Thus, if the accused, after interrogation, is allowed to go home and formally arrested thereafter, his statements during interrogation leading to discovery are admissible under S. 27; obviously after he made such statements, he must have been under Police-eye throughout. [A.I.R. 1954 All. 687; A.I.R. 1937 Lah. 620; A.I.R. 1948 All. 7; 1968 C.L.R. 268 (S.C.), Foll.]: 1974 M.P.L.J. 429 (D.B.). *See* also 1978 M.P.L.J. 706: 1978 Jab.L.J. 347 [No requirement that the accused be first arrested, before the information received from him is accepted in evidence as admissible].

Where the accused himself lodged first information report at Police Station and produced the axe which he carried to Police Station, *held*, statements leading to discovery of weapon and body were statements made while under Police custody but were admissible under S. 27: 1978 M.P.L.J. 742: 1978 Jab.L.J. 616.

In the case of mere suspects who have not been formally charged with any offence or arrested under any section of the Cr.P.Code, their presence with the Police under some restraint amounts to the 'custody' which is contemplated by the section. If a statement made by a person in the above circumstances leads to the discovery of any matter, it is admissible: I.L.R. 18 Lah. 106: A.I.R. 1937 Lah. 620. The spirit of the language employed in S. 27 of the Evidence Act, appears to imply that where a person submits himself to the custody of a Police Officer with the consciousness that temporarily at least he is in such custody or under such control whether formally authorised or not, the information given by him to such officer leading to the discovery of a relevant fact may be proved within the scope of the section: I.L.R. (1960) Mad. 224: (1960) 1 M.L.J. 112: 1960 M.L.J. (Cr.) 127.

S. 27 of the Evidence Act does not create an unjustifiable discrimination between

accused persons in custody and accused persons out of custody and in that way does not offend Art. 14 of the Constitution.

If the two clauses occurring in S. 27 of the Act, 'persons accused of any offence' and 'in the custody of a Police Officer' separated by a comma, are read distributively as referring respectively to persons referred to in Ss. 25 and 26 there can be no question of the admissibilities being restricted only to the confession of a person in the custody of a Police Officer. Thus viewed the law embodied in S. 27 cannot be stated to make a discrimination in favour of persons who are not in Police custody as against persons in Police custody. The term 'custody' in S. 27 should be interpreted in wide terms and should not be restricted only to a custody after formal arrest: I.L.R. (1960) Mad. 1082: (1961) 1 M.L.J. 307.

It is now too well settled that the portion of the statement regarding the place which was pointed out and ultimately led to the discovery of the stolen articles would clearly be admissible in law. The word custody in S. 27 of the Evidence Act does not mean physical custody by arrest. When a person states that he has done certain acts which amount to an offence he accuses himself of committing the offence, and if he makes the statement to a Police Officer, as such, he submits to the custody of the officer within the meaning of S. 46(1) of the Code of Criminal Procedure and is then in the custody of a Police Officer within the meaning of S. 27 of the Evidence Act. There can, therefore, be no doubt that on the facts of this case, the three accused persons who made the statement to the Police Officer were in custody within the meaning of S. 46(1) of the Code of Criminal Procedure and S. 27 of the Evidence Act: 1966 B.L.J.R. 133.

For the purpose of S. 27 the word 'custody' does not necessarily mean detention or confinement. Submission to custody by any action or by words is also custody within the meaning of the section. Where the appellant, after committing homicide went to the Police station and made a confessional first information report in which he gave the details of his act and the circumstances which led to the same, his intention to submit to the Police was evident from his conduct and, therefore, he must be deemed to be in the custody of the Police Officer the moment he mentioned his having caused the death. The information contained in that first information report is, therefore, admissible under S. 27: 1959 Cr.L.J. 850: A.I.R. 1959 Madh. Pra. 267.

When a person stated that he has done certain acts which amount to an offence he accuses himself of committing the offence; and if he makes the statement to a Police Officer as such, he submits to the custody of the officer within the meaning of S. 46(1), Cr.P.Code and is then in the custody of a Police Officer within the meaning of S. 27: I.L.R. 12 Pat. 241: A.I.R. 1933 Pat. 149 (S.B.); I.L.R. (1959) Bom. 1244: (1959) 61 Bom.L.R. 715: A.I.R. 1959 Bom. 534.

Where a person had been suspected from the beginning itself and was treated as accused person and was not kept under such restraint as he could hardly have absconded, *Held*, that he was in custody of Police and statements leading to discovery of things were admissible: I.L.R. 15 Lah. 310: A.I.R. 1934 Lah. 150 (2); (1932) 34 Punj.L.R. 637: A.I.R. 1933 Lah. 516.

Even if an accused is not formally arrested when he gives information leading to discovery, if it is proved that he was arrested before he went to the spot from which the articles are recovered, the accused shall be deemed for all practical purposes as in Police custody when giving such information: I.L.R. (1936) Nag. 78: A.I.R. 1936 Nag. 200.

Where a Police Officer, although he arrested a person charged with being in possession of cocaine after the finding of the cocaine with him, interviewed the accused and was with him for a considerable time and walked with him to the place where the accused pointed out the spot where the cocaine might be found; *held*, that the accused was in Police custody at the time when he made the statement as to the spot where the cocaine could be found and his statement was admissible under S. 27: 144 I.C. 74: A.I.R. 1933 Cal. 148, followed in (1960) 62 Bom.L.R. 80: A.I.R. 1960 Bom. 263.

Where a confession is made by the accused while in Police custody after he was arrested by the Chaukidar and was being escorted under his control, its admissibility is not affected by the possibility of its having been made during the temporary absence of the Chaukidar. Where a place is pointed out by the accused to a Police Officer as the place

of occurrence and nothing is found there, the pointing out of the place is really evidence of a confession of his guilty and is, therefore, inadmissible under S. 26: 1941 O.W.N. 953: A.I.R. 1941 Oudh 563.

Where 30 minutes after recording his confession, the Police formally arrested the accused, *held*, the accused was in constructive Police custody when his statement was recorded; his confession was hit by S. 27. [1960 Cr.L.J. 1504 (S.C.) and (1947) 48 Cr.L.J. 939 (All.) and 1966 Cr.L.J. 100 (S.C.), Foll.]: 1976 Cr.L.J. 1652: 1976 Raj.L.W. 251: 1976 W.L.N. 160: I.L.R. (1976) 26 Raj. 648 (D.B.).

Where the Magistrate while passing the order of Police remand ignored the provisions of S. 167, Cr.P.Code and remanded the accused to Police custody for a period exceeding 15 days, *held*, the statement made by the accused leading to discovery while in such custody could not be said to be tainted because of illegality or irregularity of custody as he did not cease to be in physical custody of the Police while he made the said statement: 1992 Cr.L.J. 3298 (Guj.) (D.B.).

No importance can be attached to recovery made on basis of statement made while in illegal custody, *i.e.*, Police custody obtained after expiry of 15 days: 1989 Cr.L.J. (N.O.C.) 217 (Mad.) (D.B.).

15. "Police Officer"—Who is.—[*See* also S. 25, Note 4; S. 26, Note 4, *supra*]. An Excise Officer, exercising powers of entry, search, seizure, arrest and investigation of offences under the Assam Opium Prohibition Act 1947, is a 'Police Officer' for the purpose of S. 27: A.I.R. 1972 Gau. 7: 1972 Cr.L.J. 779.

16. Statement of Police—Recording of—Duty of Police.—It is not the duty of the Police to decide what evidence is admissible and what is not, and a statement made by the accused person should not be mutilated. The duty of the Police, if they desire to record a statement, is to record it as given and leave it to the Court to decide what evidence is admissible. The practice of Police Officers giving statements not made to them in the first instance in evidence but statements made obviously for the second time before panchayatdars, must be condemned. Such a second statement is inadmissible in evidence. It is the first statement of the accused, to whomsoever made, that leads to the discovery of a fact, if a fact is discovered: I.L.R. (1940) Mad. 254: A.I.R. 1940 Mad. 710.

The correct procedure for recording and proving a confessional statement, admissible under S. 27 of the Evidence Act, is for the Police Officer to record in the first person the statement of the accused, and when he gives evidence, to say that the accused made a confessional statement, that he took it down, and then, for the purpose of refreshing his memory, to refer to the actual statement, which is in the Police diary and prove before the Court by that method what the accused had said: A.I.R. 1945 Mad. 202: (1945) 1 M.L.J. 223.

They should be recorded in the first person, that is to say, as far as possible in the actual words of the accused. They should not be paraphrased. It will be for the trial Judge who has such a record before him to decide how much of it is admissible under the section: I.L.R. (1937) Mad. 695: A.I.R. 1937 Mad. 618: (1937) 2 M.L.J. 60 (F.B.). *See* also 171 I.C. 225: (1937) 2 M.L.J. 32; A.I.R. 1957 All. 459: 1957 Cr.L.J. 803 [Practice of not recording the actual words used by the accused persons by the investigating agency disapproved]; 1958 Cr.L.J. 821: A.I.R. 1958 All. 467.

Whenever a Police Officer is intimated that the accused proposes to give information leading to discovery, he should proceed to record it as far as possible in the language spoken by the accused and in the first person, otherwise, doubts are likely to be entertained as to the accuracy and correctness of the information: I.L.R. (1964) 14 Raj. 715: 1964 Raj.L.W. 171.

Recording of information said to have been voluntary given by the accused not in the first person form but in the third person form, *held*, is not improper; it cannot be discarded on that count: I.L.R. (1976) 26 Raj. 719: 1976 Raj.L.W. 290.

S. 27 of the Evidence Act is in the nature of an exception to the prohibition imposed by the two preceding sections of the Evidence Act, and a statement which is sought to be made admissible under that provision must be construed strictly and with exactitude. Even a slight variation in the language of the statement may substantially change its meaning and import and have a far-reaching effect on the inference to be drawn from it. While, therefore, a verbatim reproduction of the words used by the accused may not be expected in the recovery memo. prepared by the Police Officer or in the deposition of the

witnesses of recovery, precision is a matter of utmost importance in the interpretation of the statement of the accused as incorporated in the recovery memo. and as proved in Court. Only such information should be deemed to have been given by the accused as the words used by him expressly conveyed and the scope of the information cannot be extended by reading possible implications in it or by judging its meaning with reference to all the facts that were discovered. The facts discovered may quite frequently exceed and go beyond the information given by the accused and the information cannot, therefore, be regarded as having contained all the discovered facts: 1970 Cr.L.J. 603 (All.).

Where a Police witness alleges that the accused made a certain statement to him, which led to discovery of articles stolen, it is not for him to say whether it is confessional or not. The witness should state the very words of the accused, and it is for the Court to decide what part of it would be admissible under S. 27 of the Evidence Act, and whether it is confessional or not.

Similarly where it was alleged by the Police Officer that the recoveries were made in consequence of the confessional statement of the accused, the alleged statement must be proved by independent witness: A.I.R. 1958 Tripura 40: 1958 Cr.L.J. 1549.

The statement which is admissible under S. 27 is the one which is the information leading to discovery. Thus, what is admissible being the information, the information itself has to be proved and not the opinion formed on the information by the Police Officer. In other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. A mere statement that the accused led the Police and the witnesses to the place where he had concealed the articles is not indicative of the information given: 1992 Cr.L.J. 2059 (Ori.).

Where the information by the accused to the Investigating Officer which led to the seizure was not recorded and as such the exact information given by them was not available for scrutiny, *held*, in the absence of recording of the exact words and any corroboration available from the independent sources as regard the information given, the solitary statement of Investigating Officer under S. 27 cannot be relied upon to exclusively form the basis of conviction: 1992 Cr.L.J. 2271 (Ori.). *See* also 1976 Mah.L.J. 195.

If evidence otherwise confessional in character is to be admissible under S. 27, it is obligatory upon the Investigating Officer to state and record who gave the information; when he is dealing with more than one accused, what words were used by him so that a recovery pursuant to the information received may be connected with the person giving the information so as to provide incriminating facts against that person: A.I.R. 1983 S.C. 367: (1983) 1 S.C.C. 143: 1983 U.J. (S.C.) 145.

It has become the practice in Madras State for Police Officers, when they expect the accused to make a confession either on information received or from deduction from surrounding circumstances or their own intuition born of experience—a professional sixth sense—to take with them or procure respectable mediators and a Panchayatnama is then prepared reducing into writing the information given by the accused and it is then attested by the Police Officer and mediators present. The practice is safe and in no way irregular. But the Panchayatnama is not substantive evidence and can be used for corroborating or contradicting or refreshing the memories of the persons who participated in it: 55 Cr.L.J. 583: A.I.R. 1954 Mad. 433.

Statements made by an accused person which are or may be provable under S. 27 should be clearly and carefully recorded by the Police Officers concerned. The law expects a good deal of precision in regard to statements brought on record under S. 27: 1953 All.L.J. 115: A.I.R. 1953 All. 526. Statement of the accused leading to the discovery of incriminating articles, is not legally required to be attested: A.I.R. 1959 Him. Pra. 3.

Verbatim statement and not paraphrased statement can alone be proved: (1966) 7 Guj. L.R. 119: 1966 Cr.L.J. 1541 (1).

Information leading to discovery of weapon with which death was caused—Actual words used by accused not proved—No reliance can be placed on such information and discovery: 1968 Cr.L.J. 1237 (Manipur).

17. Police remand for effecting recovery.—Merely because the accused states that he does not intend to point out to the Police any article used in the offence, the Magistrate is not automatically stripped off his powers

expressly vested in S. 167(2) of the Code of Criminal Procedure to grant Police remand to detain the accused for not exceeding 15 days. Each case has to be decided on its own merits. If the accused volunteers to help recovering incriminating articles and such statements exist in the case diary, the Magistrate can take note of them for granting Police remand; of course the Magistrate may make the remand subject to certain safeguards so that the power of investigation is not misused by the Police and no third degree methods are resorted to against the accused: 1989 Cr.L.J. 2552 (All.) (D.B.).

Merely because the accused surrenders before the Court and states that he has no disclosure to be made is no ground to deny to the investigating agency the opportunity to question him during investigations; he is certainly 'any person' envisaged under Ss. 161 and 162 of the Code of Criminal Procedure and can, thus, be remanded to the Police custody for purposes of effecting recovery from him of the weapon used in the offence. [1979 Ker.L.T. 652; 1980 Ker.L.T. 829, Dissent.]: 1985 Ker.L.T. 1156. *See infra.*

Where the accused had categorically asserted before the Court that they had no knowledge about the existence of material objects sought to be recovered or the place where they were concealed, *held*, it is unlikely that they would give any information to the Police unless they were subjected to unlawful mode of interrogation; therefore, no useful purpose would be served if the accused on bail were given in Police custody for recording their disclosure statements: 1980 Ker.L.T. 829: 1981 Cr.L.J. 119.

18. Information not leading to discovery.—Statements leading immediately to the discovery of property are properly admissible. Other statements connected with the one thus made and immediately, but not necessarily or directly, connected with the fact discovered are not admissible: 32 I.C. 136: 13 All.L.J. 1077; A.I.R. 1930 Bom. 244. *See* also 53 Mad.L.W. 567: A.I.R. 1941 Mad. 658; 1937 A.M.L.J. 18; 31 Sind L.R. 494: A.I.R. 1937 Sind 251; I.L.R. (1942) 1 Cal. 436: A.I.R. 1942 Cal. 593; A.I.R. 1942 Mad. 444: (1942) 1 M.L.J. 517.

Where in pursuance of disclosure made by the accused, no incriminating article was recovered, *held*, such a statement would be inadmissible: 1985 Cr.L.J. 1700 (Del.); A.I.R. 1971 Tripura 16; (1975) 16 Guj.L.R. 782; 1979 Chand.Cr.C. 170 (Punj.) (D.B.); (1986) 3 Crimes 454 (M.P.); (1989) 1 Ker.L.J. 253: 1990 Cr.L.J. (N.O.C.) 124 (D.B.); 1992 Cr.L.J. 3674 (Del.) (D.B.); (1993) 50 Del.L.T. 631.

Where the accused in his statement merely pointed out the scene of occurrence which led to no discovery of any fact as envisaged under S. 27, *held*, it is inadmissible in evidence: (1994) 1 Ker.L.J. 136 (D.B).

Any portion of the information conveyed by the accused which does not relate distinctly to the discovery will not fall within S. 27 of the Evidence Act and will, therefore, be barred under S. 25 of the Evidence Act or S. 162, Cr.P.Code. If a statement does not come within the exception of S. 27, Evidence Act, it cannot be admitted in evidence by circumventing the provisions of S. 162, Cr.P.Code, on the ground that it is relevant under some other section of the Evidence Act: A.I.R. 1951 Him. Pra. 28: 53 Cr.L.J. 267.

Witness deposing to what accused purported to have stated before Police—Accused's statement not leading to any discovery within S. 27—Witness's deposition is inadmissible: 1953 Cr.L.J. 1900: A.I.R. 1954 Him. Pra. 11. *See* also (1956-57) 61 Cal.W.N. 483: A.I.R. 1957 Cal. 332.

Discovery not as a result of interrogation of accused but as a result of search made by Customs Officers—Memo. signed by accused not admissible: (1959) 61 Punj.L.R. 235: A.I.R. 1959 Punj. 287.

19. Information from two persons—Only that leading to discovery is admissible.—Once property has been discovered in consequence of information received from a suspected person, it cannot be rediscovered in consequence of information received from another suspected person: 64 I.C. 502: A.I.R. 1922 Lah. 315; A.I.R. 1949 Ori. 67. *See* also 1939 A.M.L.J. 56; 1938 Mad.W.N. 1272: A.I.R. 1939 Mad. 266.

It is only the information that was given by the first person and which led to the actual discovery which may be proved under the terms of S. 27: A.I.R. 1939 Mad. 266.

Where more than one accused person give information regarding discovery of a fact and thereafter the discovery is made by only one of those accused persons or the discovery takes place without any pointing by any of the accused persons, the individual information given by the several accused preceding such

discovery can be proved against the author thereof: 1976 Raj.L.W. 290: I.L.R. (1976) 26 Raj. 719: 1976 Cr.L.R. 386.

In case of an information given by several accused leading to discovery of a fact, *held*, the information which was given first is only admissible: (1989) 3 Crimes 721 (Madh. Pra.).

Statements to the Police made by a second accused about the place of burial of the murdered person is not admissible in evidence when the Police already know about it from the first accused: A.I.R. 1959 Ker. 46.

Where two or more persons are alleged to have given certain information to the Police which led to the arrest of the accused, it is only the information given first which is admissible under Ss. 27 and 29: 17 Cr.L.J. 273: 34 I.C. 993; A.I.R. 1927 Lah. 739. *See* also 1981 Jab.L.J. 344.

Information by two persons which leads to the discovery of a fact is relevant and so much of the statement of each which relates to the fact discovered is admissible against both; statements of co-accused after the discovery are irrelevant: 17 Cr.L.J. 506: 36 I.C. 474; A.I.R. 1930 Bom. 244.

After one accused has made a discovery the other should not be asked to do the same: 36 I.C. 474: 10 Sind L.R. 7.

The word 'person' is used in S. 27 in the singular designedly. The section ought to be construed strictly. In cases where one accused has agreed to point a place where a fact will be discovered in pursuance of his statement, that section would not cover similar statements of other accused persons in Police custody: 1945 O.W.N. 44: 1945 All.W.R. (C.C.) 23: 1945 O.A. (C.C.) 23: A.I.R. 1945 Oudh 235; A.I.R. 1945 Cal. 137. *See* also I.L.R. (1944) 2 Cal. 76.

Where in consequence of a joint information given by the accused persons a dead body is discovered and the evidence is too vague as to who gave the information first and who next, the joint statement is not admissible in evidence to establish the guilt of the accused person: I.L.R. (1949) Cut. 207: A.I.R. 1949 Ori. 67.

Each of the two accused making separate statements and pointing out the same place where stolen property was concealed—Subsequent discovery in pursuance of such information must be taken to have been made only in pursuance of the information given by the accused who made the first statement—Statements of the second accused who gave the information later is inadmissible in evidence under S. 162, Cr.P.Code, as it did not fall within the purview of S. 27: 1954 Cr.L.J. 801: A.I.R. 1954 Kutch 22.

Statement connecting fact discovered with offence charged is not admissible—Fact discovered in consequence of information given by several accused—Only the information which is first given by one of the accused is admissible if it leads to discovery: I.L.R. (1953) Hyd. 32: A.I.R. 1953 Hyd. 161.

It is possible to prove the statement of that accused only who comes first on the scene and whose statement leads to the discovery first of all. Where it is not possible to prove who made the statement first, the evidence is to be discarded: 1953 All.L.J. 115: A.I.R. 1953 All. 526.

Where the statements leading to discovery have been made by several accused the mere fact of the statement of any particular accused appearing in the case-diary before others is no guarantee that the statements were made in that order. The fact is to be made out independently of it: 1958 Cr.L.J. 821: A.I.R. 1958 All. 467. The question as to what should be the rule as to admissibility when there is clear and unimpeachable evidence as to independent and authentic statements of the nature referred to in S. 27 of the Evidence Act, having been made by several accused persons either simultaneously or otherwise left open: 1952 S.C.R. 839: A.I.R. 1952 S.C. 167: (1952) 2 M.L.J. 100.

Under S. 27, simultaneous statements made by accused persons are not *'per se'* inadmissible in evidence and are liable to be considered if the discovery made in consequence thereof affords a guarantee about the truth of the statements. The words "a person" in S. 27, do not in any way exclude admission of information from more than one person simultaneously received provided it fulfils the requirements of S. 27. S. 13 (2), General Clauses Act, provides that words in the singular shall include the plural and *'vice versa'* provided there is nothing repugnant in the subject or context. There is nothing repugnant in the provisions of S. 27 of the Evidence Act, for acceptance of statements jointly made by more than one person provided that facts discovered in

consequence thereof afford some guarantee about truthfulness of their statements. It will depend on the facts of each case: I.L.R. (1955) Nag. 169: A.I.R. 1955 Nag. 71; A.I.R. 1958 All. 467: 1958 Cr.L.J. 821.

Where a relevant fact is discovered in consequence of statements made by one or more accused in custody so much of those statements as relates distinctly to the discovery of that fact is admissible under S. 27. Information received from more than one person accused of an offence, whether it amounts to a confession or not, may relate distinctly to the fact thereby discovered and may be proved under S. 27 of the Act. What should be insisted upon by the Courts is that the statements should be recorded as precisely as possible attributing the respective words to each accused, whether they made the statements simultaneously or immediately one after the other before the discovery of the fact was made. There is no sufficient reason to hold that a fact cannot be said to be discovered in consequence of the information of more than one person accused of any offence. No principle in support can be found for the view, that the statements of two or more accused leading to the discovery of a relevant fact will be admissible only if they are simultaneously made: 1958 Pat.L.R. 387: 1959 Cr.L.J. 219: A.I.R. 1959 Pat. 54.

What guarantees the truthfulness of the information is not the fact whether the information was given by one accused person or by several accused persons either simultaneously or otherwise but it is the actual discovery in consequence of the information that affords some guarantee about the truth of the information. Even in the case of simultaneous information given by several accused persons, the information given by one of the accused would be admissible if he followed it up by conducting the Police to the actual spot where the 'fact' was actually discovered: I.L.R. (1956) Madh. Bh. 104: A.I.R. 1956 Madh. Bh. 262.

Where a joint statement of the two accused led to the discovery of certain facts but it was not clear as to which fact was distinctly related to the information furnished by a particular accused, *held*, it could not be inferred that the accused themselves were involved in the offence; it only meant that they had knowledge about the place where the weapon was and no more. [A.I.R. 1941 Mad. 297; A.I.R. 1949 Ori. 67; A.I.R. 1958 All. 467; A.I.R. 1932 Cal. 297; A.I.R. 1955 S.C. 104, Foll.]: 1971 Ker.L.T. 244 (D.B.).

Where both the recovery memo. as well as the Investigating Officer's statement were silent as to which one of the two accused had pointed out the gunny bag containing the stolen property, *held*, the stolen property could not be said to have been recovered in pursuance of the accused's information; S. 27 was not attracted: 1978 All.Cr.R. 29.

Though individual statements had been recorded from each of the accused they were all of the same pattern, and referred to the same articles, and all of them declared that if the Inspector accompanied them, they would point out the place at which the articles were hidden.

Held, that these statements but constituted one composite statement about the same articles, which did not serve to fasten the individual guilt, as there was no knowing on whose information the material fact was discovered: 1960 M.L.J. (Cr.) 284: 1960 Cr.L.J. 912: A.I.R. 1960 Ker. 238.

Successive information about possession of crime weapons given to Police by several persons—Weapons recovered from last person—Information on each occasion not covered by S. 27—Earlier information are only clues for investigation: 1961 M.P.L.J. (Notes) 156.

20. Joint discovery.—Where more than one accused person in custody of the Police point out this or produce that jointly such an evidence of joint discovery is not sufficient for a conviction: 24 I.C. 587: 63 P.L.R. 1914. *See* also 1981 Jab.L.J. 344.

There can be no joint discovery of facts and no joint statement of accused. A statement can be made only by one person at a time. Similarly, discovery can be made only by one person at a time: I.L.R. (1963) Guj. 955.

Joint discoveries are not admissible at all against any of the accused unless it can be shown who first made the discovery: 116 I.C. 619: A.I.R. 1929 Lah. 665.

The very language of S. 27 contemplates statement by an individual accused, and the discovery which may follow such statement. A joint statement of several accused or joint recovery of articles by several accused persons is not contemplated. A joint statement followed by a joint recovery is not admissible

against either of the accused: 1957 Raj.L.W. 401. But *see infra*. Where it is alleged that two of the accused persons made statements leading to the discovery of some fact, evidence must be led to indicate which of them first made the statement which led to the discovery, and only the statement made by the first individual and only so much of it as related distinctly to the fact discovered can be admitted in evidence against him under S. 27. The statement of the other accused cannot be used in evidence. If, however, the prosecution is in a position to establish that the statements or the action which led to the discovery were actually made, or took place, simultaneously—a state of affairs which though not perhaps entirely impossible is certainly distinctly improbable—evidence in regard to the simultaneous statements or the simultaneous action would not be entirely shut out by the section, but there must be clear and satisfactory evidence on this point as will enable the Court to decide and to give a specific direction to the jury whether the evidence is admissible against both of the accused or against either and if so, against which: (1945-46) 50 Cal.W.N. 88: A.I.R. 1946 Cal. 452. *See* also A.I.R. 1955 Nag. 71, noted above.

In view of S. 13 of the General Clauses Act, the words 'a person' used in S. 27 of the Evidence Act in singular number must be held to include the plural: 1958 Pat.L.R. 387: 1959 Cr.L.J. 219: A.I.R. 1959 Pat. 54.

S. 27 must be very strictly construed. The expression "from a person accused of any offence" appearing therein is significant and it seems to have been used designedly because a joint statement of a number of persons cannot be said to be an information received from any particular one of them. As a necessary corollary, facts discovered in consequence of joint information cannot be used as against any one of them. [1955 Cr.L.J. 196 (S.C.); 1972 Cr.L.J. 815 (All.); 1978 Cr.L.J. 945 (Sikkim), Foll.]: 1982 Cr.L.J. 1656 (Del.); (1981-82) 86 Cal.W.N. 479; 1980 Mah.L.J. 72.

A joint statement made by the accused is not *per se* inadmissible in the evidence but it is very weak piece of evidence on which any reliance can be placed by the prosecution. In case of joint statement by the accused, it would be very difficult to come to the conclusion which of the two accused persons gave any specific and definite information to the Police which related distinctly to the discovery: 1993 Cr.L.J. 730 (Guj.).

Where information is given by "several accused", it is only the information which is first given that is admissible, and once a fact has been discovered in consequence of information received from a person accused of an offence, it cannot be said to be rediscovered in consequence of an information received from another accused person. But where all the three accused were present together and each was interrogated in the presence of the other two and for recoveries also all the three went together, *held*, as in such a situation of simultaneous statements, it was not possible to specifically give a finding that a particular accused initially pointed out or was the first to point out the actual place of discovery, such an information leading to discovery was not admissible under S. 27: 1989 M.P.L.J. 809 (D.B.). *See* also (1975) 16 Guj.L.R. 782; 1980 Cr.L.R. 203 (Mah.).

Where evidence against the accused was that he along with other two co-accused gave information to the Investigating Officer that the ring stolen by them was sold to a jeweller, but who gave this information leading to the recovery of the ring was not known and also the evidence of the jeweller did not make any sense, as he stated that all the accused came to him to sell the ring and also that they all came with Police and asked to produce same, because all the accused could not have spoken simultaneously, *held*, jeweller's evidence did not provide any incriminating fact against the accused; this way of recording evidence was most unsatisfactory: A.I.R. 1983 S.C. 367: (1983) 1 S.C.C. 143: 1983 U.J. (S.C.) 145.

Where only a joint statement of all the accused was recorded and the recoveries were made pursuant thereto by the Police, *held*, the joint statement is wholly inadmissible; only recoveries based on separate and individual statements of an accused are admissible: (1985) 2 An.W.R. 357: (1985) 1 An.L.T. 325: 1985 Cr.L.J. 1822.

Where weapons were discovered by the Police pursuant to the confessional statement jointly made by the accused, *held*, the confession could not be used as evidence under S. 27: 1988 Cr.L.J. 1364 (Ker.) (D.B.).

21. Statement after discovery—Pointing out property—Value of.—A statement by accused not leading to discovery of property

but made after discovery and production of the property is irrelevant. The production or the pointing out may indicate that the accused was in possession or that he had innocent knowledge that the articles had been left there by some one else: 13 Cr.L.J. 529: 15 I.C. 801; A.I.R. 1939 Mad. 15: 48 Mad.L.W. 780.

In absence of any disclosure statement, the recovery of weapon of offence is meaningless: A.I.R. 1993 S.C. 1469.

When a material fact has already been discovered, the accused's statement while in Police custody relating thereto is not admissible under S. 27: 12 Cr.L.J. 35: 9 I.C. 232; (1934) 36 Punj.L.R. 40: A.I.R. 1934 Lah. 786. *See* also 48 Mad.L.W. 780: A.I.R. 1939 Mad. 15.

If an accused first made a statement to the Sub-Inspector that he took the corpse to the bed of the dried-up nullah and in consequence of that statement that Sub-Inspector went there and found human blood stains on the sand and the begunia leaves, there may be some justification for the view that the discovery of human blood on the sandy bed of the nullah and the leaves was in consequence of the statement admissible under S. 27 of the Evidence Act. But where the accused first conducted the S.I. to the sandy bed of the nullah and there the S.I. found blood stains on sand, with blood-clots, and also a begunia branch with blood stains and it was then that the accused made a statement to the S.I., to the effect that the body of the deceased was kept there, that statement could not be said to be the cause of the discovery so as to attract S. 27. Such statement is, therefore, inadmissible in evidence: 1957 Cr.L.J. 530: 23 Cut.L.T. 229: A.I.R. 1957 Ori. 102.

The accused after his arrest and recovery of stolen property from him pointed out the place from where the article recovered from him were stolen. *Held*, that this amounted to a confession without leading to any new discovery and, therefore, was inadmissible in evidence: (1956) 58 Punj.L.R. 320: A.I.R. 1956 Punj. 224. The discovery previously need not be necessarily by the Police Officer: 152 I.C. 565: A.I.R. 1934 Lah. 313.

22. Information already known to Police.—Where the information given by the accused in his confession leading to the discovery of facts is already known to the Police Officer before the confession is made and before the panchayatdars appear on the scene, the confession is inadmissible. But the mere circumstance that the Police Officer sent for the panchayatdars, because the accused was going to give some useful information, cannot lead to the inference that the officer had the information already so as to render the confession inadmissible in evidence under S. 27, Evidence Act. It may be that in some cases the Police Officer concerned has the information and after having that information from the accused, he sends for the panchayatdars to witness the discovery. In such cases, the confession is inadmissible. But the Police Officer might learn from some source that the accused was giving information about the articles connected with an offence, and may consequently send for panchayatdars to witness the discovery. From that it cannot be inferred that the Police Officer had information furnished to him already by the accused, and the information leading to the discovery cannot be excluded or shut out: 27 Mys.L.J. 42.

Where the evidence on record shows that the discovery of the articles was not the result of the information furnished by the accused and that the Police knew before hand what the accused was going to say that would be hit by S. 27. But that section will not apply where the discovery is made after the accused have pointed out the articles before the panchas and the panchanamas were completed at the places where the articles were recovered: 1959 Cr.L.J. 947: A.I.R. 1959 Andh. Pra. 387.

A fact previously discovered by the Police from other source cannot be regarded as discovery, when the same information is received again from the accused with the object of making his statement admissible; to make such a statement admissible, it is necessary that the statement is made before the discovery and not thereafter: 1993 M.P.L.J. 197: 1994 Cr.L.J. (N.O.C.) 263; 1990 Cr.L.J. 77 (All.) (D.B.); 1994 Cr.L.J. (N.O.C.) 69 (Raj.) (D.B.); I.L.R. (1972) 22 Raj. 25; A.I.R. 1971 S.C. 1871: 1971 Cr.L.J. 1314: (1971) 1 S.C.R. 215.

The underlying principle seems to be that the information is such information as cannot be said to be already in the possession of the Police and that the discovery is made in consequence of that information and further that the discovery is not rediscovery of something already discovered: 1958 Cr.L.J. 821: A.I.R. 1958 All. 467.

It is the first statement of the accused to whomsoever made, that leads to the discovery of the fact, if a fact is discovered. Thereafter, if the accused repeats his statement to another Police Officer and points out the place of burial of the person murdered it cannot be said that there is a 'discovery' of the place pursuant to the information the accused gave to that officer. Hence, such a statement is not admissible in evidence: 1958 M.L.J. (Cr.) 869: A.I.R. 1959 Ker. 46.

Mere existence of other information by which discovery was facilitated does not make information under S. 27, inadmissible. It depends upon the circumstances of each case whether the discovery was really made in consequence of the information given by the accused: 55 Cr.L.J. 583: A.I.R. 1954 Mad. 433.

Information given by an accused, leading to discovery of facts under S. 27, is not inadmissible on the ground that the officer recording the information knows before so recording what information the accused is going to give: 1943 Mad.W.N. 11: A.I.R. 1943 Mad. 315.

Discovery of incriminating articles alleged to have been recovered by the accused is inadmissible in evidence if the Police already knew where they were hidden: (S.) A.I.R. 1956 S.C. 217: (1955) 2 S.C.R. 1285.

If the fact is already known to the Police there cannot be a discovery again of that fact as a result of a statement made by the accused subsequent to the original discovery.

Where long prior to the furnishing of the information by the accused to the Police in the Police custody that he secreted the dead body of the deceased at a particular place, the whole village and the Police were knowing that there was a possibility of discovering some remnants of human body from that place in the vicinity of which the Police had recovered a human hand, it cannot be said that recovery of skull by the Police from that place subsequent to the information furnished by the accused was the result of such information furnished by him. The discovery made cannot, therefore, fall within the purview of S. 27 of the Act. Consequently, the statement made by the accused cannot be used under S. 27 of the Act: 1969 M.L.J. (Cr.) 575: (1969) 2 Mys.L.J. 395: 1969 Cr.L.J. 1299.

If a Police Officer states that the accused had already told him that he would recover the stolen ornaments from his house and that he told so in the presence of witnesses for a second time who were not present when the disclosure for the first time was made to him, the evidence of the witnesses about the accused having shown his readiness to recover the property is not admissible. It cannot be said that the ornaments in question were discovered on the information given to the Police Officer in the presence of witnesses. The only information that can be said to have led to the discovery is the information given to the Police Officer when he was alone: 1951 Raj.L.W. 74: A.I.R. 1952 Raj. 20. (This case was doubted in A.I.R. 1955 Hyd. 200, cited *supra*).

A fact known to the Police cannot be rediscovered on the statement of an accused person so as to make such statement or such incriminating conduct admissible under S. 27: A.I.R. 1929 Sind 250. *See* also A.I.R. 1929 Nag. 350; 50 Mys. H.C.R. 106; (1947) 49 Punj.L.R. 16: A.I.R. 1948 Lah. 69.

The recovery of a *kassi*, weapon of offence with which the offence is alleged to have been committed, is not very material when the Police had already known that that was the weapon, as it was mentioned in the F.I.R., and there was no concealment of the weapon, as the accused had thrown it while running away and the witnesses examined had seen where it was thrown: (1972) 2 Sim.L.J. 118.

Weapon thrown in 'khud' discovered at instance of accused—Evidentiary value explained: (1972) 2 Sim.L.J. 349.

Where the evidence of the photographer, engaged and taken by the Police at the spot to take photograph of a skeleton, clearly indicated that the Police already knew that the dead body was a skeleton and nothing in the accused's disclosure statement before the recovery showed that he then knew that the dead body had become a skeleton, *held*, the irresistible conclusion was that the Police had already seen the dead body as a skeleton; the photographer's subsequent statement that the accused had taken them to the place where the dead body was lying, was *prima facie* of no consequence and, could not be relied on for proving the accused's guilt: 1990 Cr.L.J. 77 (All.) (D.B.).

The effect of recovery of incriminating articles in pursuance to the accused's disclosure statement is not destroyed because the

complaint made to the Police has a mention of the place where the stolen property might have been kept; the complaint is not a prior information, but the basis for initiation of investigations. Where the evidence clearly showed that recovery was effected pursuant to the accused's disclosure statement as witnessed by an independent person, *held*, the recovery was neither illegal nor in contravention of S. 27: 1985 M.L.J. (Cr.) 410.

Where the accused first told the Police that he would show them the place where the knife used in the offence could be recovered and then took them to the place where the said knife was hidden, which ultimately led to the recovery of the said knife, *held*, it could not be said that this evidence was not admissible under S. 27 as the Police already knew about the place where the knife could be found: A.I.R. 1973 S.C. 1385: (1973) 3 S.C.C. 662: 1973 Cr.L.J. 1136.

Where the knowledge gained by the Police from a witness was a vague idea of the fact that the accused had thrown something at a particular place and that knowledge was acted upon and the result was in the negative, *held*, that knowledge would have no bearing on what happened subsequently, *i.e.*, the accused leading the Police to a place and producing a part of the weapon of offence, because the accused alone obviously knew the exact spot where it had been thrown and, therefore, this discovery was of extreme importance in establishing the prosecution case: (1994) 1 Bom.C.R. 617 (D.B.).

23. Statement under section 162, Cr.P.Code.—Even though it is clearly wrong to use the statements made by witnesses in the course of investigation under S. 162 of the Code of the Criminal Procedure as substantive evidence but the same are permitted to be proved under S. 27, as an exception to the rule: A.I.R. 1980 S.C. 873: 1980 Cr.L.J. 564: (1980) 2 S.C.C. 390.

S. 162 of the Code of Criminal Procedure provides a wholesome safeguard to the accused; its denial to him is justified only under exceptional circumstances as set out in Ss. 27 and 32(1): (1992) 1 An.W.R. 16.

Any statement which did not partake the character of a confessional statement envisaged by S. 27, Evidence Act, would not be admissible in view of the bar of S. 162, Cr.P.Code: 1992 Cr.L.J. 1755 (All.) (D.B.).

24. Place of recovery.—Where the recovery was made on the basis of disclosure made by the accused from a place which was open and accessible to all and sundry but the Police could not have recovered the articles unless disclosed by the accused himself, *held*, such disclosure could be taken into account: A.I.R. 1977 S.C. 1066: 1977 Cr.L.J. 642: (1977) 2 S.C.C. 131.

The circumstance that the recovery is made from an open place like a quarry which is accessible to all and sundry minimises the evidentiary value of the recovery: 1963 Ker. L.J. 487: 1963 Ker.L.T. 992: (1963) 2 Cr.L.J. 454. *See* also 1995 Cr.L.J. 792 (Bom.) (D.B.).

It is quite true that exclusive possession cannot be brought home to an accused if properties are discovered in open places equally accessible to members of the public as a result of the information given by him. But at the same time if the property is found to be so hidden away that no ordinary member of the public could know of its existence there, the fact that it is on that particular person's information and pointing out unaccompanied by any explanation of innocent knowledge, the incriminating article was discovered and recovered would lead to the presumption that he is the person who had secreted it there. It unmistakably shows that the accused was proceeding to the felony: 1957 M.L.J. (Cr.) 829: 1958 Cr.L.J. 1196: A.I.R. 1958 Mad. 451.

In the case of property which is concealed, the property is in the same position as if it were kept under lock and key. Being concealed it is not accessible to other persons. It is true that as it is concealed in an open place it is possible that the accused person who pointed it out or delivered it, may be only knowing that it was there while somebody else have concealed it. It would, therefore, be necessary for the prosecution to prove that the accused not only knew where the property was and pointed it out or delivered it but had also concealed the property. Even when the property is delivered by the accused the statement made to the Police that he had concealed it is admissible under S. 27: 1956 Cr.L.J. 1134: A.I.R. 1956 Ajmer 57.

Where the stolen articles (drums) were recovered at the accused's instance from the compound of a Musafirkhana and it was not the prosecution's case that same were lying concealed or that the compound was under

the lock and key of the accused, *held*, as it was possible that either it was the accused who had himself deposited those articles there or he only knew that they were lying there, the accused was entitled to benefit of doubt: A.I.R. 1976 S.C. 483: (1976) 1 S.C.C. 828: 1976 Cr.L.J. 481: (1976) 1 S.C.R. 715. *See* also (1993) 3 All Cr.L.R. 118: 1994 Cr.L.J. (N.O.C.) 20 (P.&H.) (D.B.); (1985) 59 Cut.L.T. 488; 1982 Jab.L.J. 744.

The fact discovered as a result of a statement to the Police Officer would become relevant only if such a statement leads to the discovery of the fact that the property is concealed in the place mentioned to the knowledge of the person making the confession and if the property is proved to have been connected with the offence. So where the confession leads to the discovery of certain jewels but there is no evidence to establish that the accused had anything to do with the house in which they were discovered, assuming it is stolen property, it is not sufficient even with the aid of the presumption under S. 114 of the Evidence Act to establish that the accused was guilty of an offence under Ss. 454 and 380 of the Penal Code or even alternatively under S. 411 of the I.P.Code: (1947) 2 M.L.J. 356.

When an accused person points out a place where property shown to be stolen property was kept concealed it shows his knowledge of the place where the property was so kept concealed. If the place where the property was kept concealed was in the exclusive possession of the accused, it may further show that the accused was in possession of the property which he had kept concealed. If, however, the place where the property was kept concealed was accessible to others, pointing out of the place would merely show knowledge of the accused of the place where the property was kept concealed unless he made a statement in consequence of which property was discovered: 1954 Cr.L.J. 801: A.I.R. 1954 Kutch 22.

Discovery of stolen property from places which are open and accessible to all at instance of accused persons—Words used by accused leading to discovery neither recorded at the time nor proved—Evidence of discovery discarded: 1958 M.P.L.J. 752: A.I.R. 1959 Madh. Pra. 125.

Where the accused confessed having stolen railway property and which was, upon his disclosure statement, dug out next day from the place, indicated by the accused, in the Railway Sports Ground surrounded by walls and just behind his own house, and there was evidence that the accused had himself concealed the property at that spot and his confession was not involuntary, *held*, the accused was not merely in the knowledge of the property concealed but also in its exclusive possession; his guilt stood proved: 1980 M.P.L.J. 483: 1980 Jab.L.J. 344.

Unless it is shown that the recovery at the accused's instance was made from a place in his exclusive possession, the possibility of some one else concealing the incriminating article there cannot be excluded beyond reasonable doubt; thus, where discovery was made from a *bari* adjacent to a road but belonging to his brother, a co-accused, and there was no evidence of the two brothers living together, *held*, the factum of recovery could not be used against the accused. [A.I.R. 1979 S.C. 1949; A.I.R. 1981 S.C. 911, Foll.]: (1982) 53 Cut.L.T. 121: 1982 Cr.L.J. 487. *See* also 1983 M.P.W.N. 166; 1982 M.P.W.N. 524.

Where the recovery of watch of the deceased was from a house not in the exclusive possession of the accused, who did not point out the specific place where the watch was kept, but on the mere asking, the accused's brother brought the watch and handed over it to Investigating Officer, *held*, such a recovery could not be attributed to the accused. [1982 M.P.W.N. 524, Rel. on]: 1992 Cr.L.J. 1150 (Madh. Pra.).

Where the recovery of weapon of offence was made at the instance of the accused from the bushes in a public park, *held*, exclusive knowledge of the accused regarding presence of that weapon had to be inferred: 1990 Cr.L.J. (N.O.C.) 53 (Del.).

Weapon kept concealed in a bush by the side of a road—*Held*, even if accessible to all and sundary, so long as the concealment was known only to the accused, it could not be said to be an open place: (1990) 2 Ker.L.J. 534: I.L.R. (1990) 1 Ker. 619.

Where the articles recovered at the instance of the accused were not found lying on the surface but after unearthing dumping ground under the hillock, and they were not visible or accessible but were hidden under the ground, *held*, discovery of such articles was clearly admissible in evidence: A.I.R. 1994 S.C. 2420.

The gandasa with which the accused was

leged to have killed the deceased was re-overed from an accessible place in the com-ound. This place was jointly owned by the usbands of the convict and the deceased. efore the actual recovery, a large number of ersons had an occasion to visit that place nd several of them including Police officials emained present there before actual recov-ry. There was therefore, ample opportunity plant the weapon. The weapon might have een already detected by the persons present the compound for such a long time. *Held*, iat even if it were assumed that the gandasa as recovered from that place and it was lood-stained, it did not lead to any definite onclusion in connecting the accused with ie crime, when the ownership of the andasa was not traced to the prisoner and as not identified to be the weapon of of-nce and the prosecution was unable to say iat the blood of this weapon belonged to the me group as that of the deceased: I.L.R. 954) Patiala 316: A.I.R. 1955 Pepsu 33.

The fact that a disclosure statement made the accused led to the recovery of the nife shows that it was within the exclusive nowledge of the accused that he had buried ie knife: 1969 Cr.L.J. 94 (Punj.).

Where the accused had made an extra-dicial confession to a person who in turn ld the Investigating Officer as to where the odies and other incriminating articles were ept buried and concealed by the accused, but ie Investigating Officer still could not know ie exact place where-from the dead bodies nd articles could be found as it was an open eld, *held*, as the knowledge of the burial place uld not be attributed only to the accused nd none else, the recovery could not be a rcumstance against the accused: A.I.R. 1988 C. 1705: (1988) 2 Crimes 942.

Corpse discovered by Police in open field here Police went on information given by cused—It cannot be said that the Police scovered the corpse as a result of the state-ent of the accused: (1964) 1 Cr.L.J. 198: I.R. 1964 Madh. Pra. 30.

Where the accused had stated that he had ept the weapon (*wakas*) in a village which as recovered from an open place in a anger's house, *held*, it could not be con-nded that the information given by the ac-sed was distinctly related to, and led to, the covery; S. 27 was not attracted: 1982 Cr.L.J. 56 (D.B.).

Where the accused had merely taken out the axe from beneath his cot and there was nothing to show that it was concealed at a place known to him alone and none else nor had the accused made a statement under S. 27 relating to its recovery, *held*, the production of the weapon is not admissible either under S. 8 or S. 27: A.I.R. 1979 S.C. 1262: 1979 All.W.C. 55.

Where a stone used in the murder, had no identifying mark, *held*, no conclusive finding could be drawn when its recovery was from a place accessible to all; merely because the stone was smeared with human blood cannot conclusively establish that it was the weapon of offence used by the accused; in ordinary course of life, children, and even grown ups, get hurt with stones lying in their way; those stones are likely to be smeared with the blood oozed out of such human injuries: (1993) 3 All Cr.L.R. 118 (P.&H.) (D.B.).

Scope—Recovery of ornaments from fields accessible to all—If can form basis of conviction: 1959 M.P.L.J. (Notes) 11.

Where ornaments were recovered at the instance of the accused from underneath the grain in one of the bins in the house of the accused where his father and his elder brothers also lived and the accused did not explain or state that the ornaments had been hidden inside by somebody else and that he had found them there and gave no explanation of this recovery, but on the other hand, denied the recovery altogether:

Held, that in the circumstances, it was reasonable to infer that the accused himself had hidden the ornaments and that the recovery was from his possession inasmuch as he had knowledge of the place where they were concealed and control over those ornaments: 1965 All.L.J. 344.

Where the place from where the clothes of the deceased were recovered was a public place and accessible to people of the locality, *held*, it was difficult to believe that they had been so concealed that they were not noticed and were available to be collected from the very place a long time after; this evidence of recovery was of no value: A.I.R. 1986 S.C. 1438: 1986 Cr.L.J. 1072: 1985 (Supp.) S.C.C. 599.

Where the *shishi* was recovered from beside a path where all and sundry could move about and that too a day after the disclosure

statement when convenient witnesses could be procured by the Police, *held*, the recovery was only a farce: 1973 Sim.L.J. 103.

Where the blood-stained *chhuri* was recovered by the Police on information furnished by the accused from an open space, *held*, the recovery by itself did not connect the accused with the offence: 1973 Cr.L.J. 955 (J.&K.) (D.B.).

Recovery of shirt of deceased from house of accused on his own information—Evidence is admissible under S. 27: I.L.R. (1969) Cut. 119.

25. Absence or presence of human blood on articles recovered—Effect of.—Mere recoveries of alleged weapon of crime, without being stained with human blood, *held*, is of no effect: (1987) 1 Crimes 329 (Ori.); 1983 M.P.W.N. 92; (1978) 2 M.P.W.N. 35 [When no blood stains were found by the Serologist on the weapon of offence allegedly recovered at the accused's instance, *held*, no reliance could be placed on such recovery]; 1994 Cr.L.R. 230 (Raj.) [When the lathi recovered at the accused's instance was not found to be stained with blood, what to say about the human blood and further its recovery was not made from the accused's exclusive possession, *held*, no reliance could be placed on such recovery].

Where the weapons recovered at the accused's instance had no blood-stains, particularly of human origin, *held*, the offence is not proved; the prosecution fails: (1981) 1 Karn.L.J. 498: 1981 Cr.L.J. 1157 (D.B.); 1982 All.L.J. 140 (D.B.); (1978) 2 M.P.W.N. 106.

Where two knives were recovered at the instance of the accused but one of the knives did not contain any blood while blood on the other knife was disintegrated and the witnesses examined to prove the recoveries were interested in the prosecution, *held*, recovery was not of much significance: 1995 Cr.L.J. 248 (P.&H.) (D.B.).

That human blood found on the dress worn by the accused is an incriminating circumstance, particularly when the dress is recovered at the accused's instance: (1994) 1 Ker.L.J. 136 (D.B.). *See* also 1983 Jab.L.J. (Notes) 45. But when there is no positive evidence to show that the accused was wearing those clothes which were recovered with blood-stains on them, *held*, presence of blood on those clothes could not be said to be an incriminating evidence against the accused: (1990) 42 Del.L.T. 211 (D.B.).

Where in a murder case all other important circumstances were proved by witnesses shown on record to be stock Police witnesses upon whom no reliance could be placed, *held*, the mere circumstance that the accused's blood-stained clothes were recovered upon his disclosure is not sufficient to convict the accused for murder: 1995 Cr.L.J. 470: A.I.R. 1994 S.C. 2585.

Where the knife recovered had neither any blood-stains nor was it shown to the Doctor conducting the autopsy, *held*, it could not be contended that the knife was used in the offence; the knife had no evidentiary weight: 1976 Cr.L.J. 1409 (D.B.).

Where it was the accused who had pinpointed the place of occurrence and the blood stained dagger was recovered at his instance—The blood being of the same group as of the deceased, *held*, his conviction was justified: 1989 Cr.L.J. 1106 (Del.). *See* also (1978) 2 M.P.W.N. 25; Where evidence of recovery of blood-stained knife was held to be not conclusive. *See* 1982 Jab.L.J. 744.

Scope—Murder case—Discoveries of incriminating articles containing human blood given by accused—They are very strong incriminating circumstances to arouse suspicion that accused might have been author of murder, but suspicion however grave, cannot take place of legal proof: (1969) 35 Cut.L.T. 301.

Recovery of blood stained sword and dhoti from exclusive possession of the accused, *held*, is very important incriminating circumstance against him: 1982 M.P.W.N. 503. Where a blood-stained chopper was recovered, pursuant to the accused's disclosure statement, concealed at a place in his possession, *held*, it was an incriminating circumstance against the accused: 1985 Cr.L.J. 114; 1983 M.P.W.N. 142.

The discovery of the blood-stained weapon made on the basis of the information given by the accused, arouses grave suspicion against him but in the absence of other circumstances the mere existence of the motive would not be enough to justify the conclusion that the accused murdered the deceased. The information leading to the discovery is merely a link in the chain of circumstance. When other links are missing, even if motive is taken into consideration, the entire chain is not complete. The accused in such a case is entitled to benefit of doubt: (1969) 35 Cut.L.T. 351.

Though the fact that the article recovered had blood-stains of the same group as that of the deceased renders the information proving an incriminating circumstance, but that is not enough to implicate accused for the offence of abetting the crime involving criminal assault; unless other evidence is satisfactory about

abetment, it will be risky to uphold the conviction of the accused for abetment of the principal offence: 1979 Bom.C.R. 680 (D.B.).

Where the weapon of offence discovered had no human blood-stains, *held*, it could not be discarded as of no substance if the eye witness's evidence is reliable; for recovery of the weapon is only a corroborative piece of evidence and its mere absence cannot negate the substantive evidence: 1973 Cr.L.J. 1443 (D.B.). *See* also (1988) 35 Del.L.T. 427 (D.B.).

In the trial of a case for murder the information given by the accused which leads to the discovery of a weapon with which the accused is alleged to have struck his wife is a circumstance which can be taken as incriminating the accused. The absence of blood stains on the weapon does not make the discovery inadmissible under S. 27 of the Evidence Act, as the corroborative piece of evidence relating to blood-stains falls to be considered thereafter by the Court: 1961 M.L.J. (Cr.) 311: (1961) 1 An.W.R. 406.

Where a constable confessed having murdered his wife and led the Police to his house where his wife's dead body, a knife, his blood-stained jersey and a brass pot containing mixed water and blood were recovered, *held*, as the Police was earlier not aware of the whereabouts of the discovered articles, their discovery was certainly in pursuance of the accused's disclosure statement; though other articles incriminated the accused but not the knife, for there were no blood-stains on it: 1984 Cr.L.J. 209 (Bom.) (D.B.).

26. Delayed recovery—Effect of.—Merely because the accused's disclosure statement which led to the recovery of the murder weapon was recorded 10 days after his arrest, *held*, does not render the discovery any the less useful; quite possibly, the accused might have agreed to give the statement after having been interrogated by the Police for several days: 1982 Cr.L.J. 1087: 1982 Kash.L.J. 194.

Where though the deceased was in Police custody, there was a delay of four to five days in effecting the impugned discoveries at the instance of the accused, *held*, the totality of the evidentiary value of the evidence of discovery got considerably weakened because of the delay factor: 1994 Cr.L.J. 274 (Bom.) (D.B.). Where recovery after 3 months was held to be not sufficient for convicting the accused: 1982 M.P.W.N. 559.

The mere fact that the accused took three days in making up his mind to give information to the Police cannot possibly afford a valid reason for rejecting the information, in consequence of which ornaments of the deceased and other articles connected with the crime have been discovered: 1977 Raj.L.W. 241: I.L.R. (1977) 27 Raj. 342: 1977 W.L.N. 227.

Where disclosure statement was made by accused after a lapse of 22 days of continuous interrogation and further Police was already in possession of the information before the statement of the accused was recorded in the presence of witnesses, *held*, it was inadmissible in evidence: 1994 Cr.L.J. 894 (Him. Pra.) (D.B.).

Recovery of Khukri in a murder case—Occurrence taking place on 21st November, 1963—Accused arrested on 5th December, 1963—Khukri recovered on 6th December, 1963 from possession of P.W. 4 at the instance of P.W. 5—Recovery is not within the mischief of S. 27—Delay in arrest of accused and recovery of incriminating articles, deprecated — Cr.P.Code (1898), S. 156: 1966 Cr.L.J. 772: A.I.R. 1966 Manipur 8.

27. Articles recovered must have some connection with the crime.—Under S. 27, a statement of an accused person made to a Police Officer leading to the discovery of certain ornaments belonging to a murdered person is admissible in evidence only if it is shown that those ornaments were connected with the crime of murder of the deceased, the connection being shown by some such circumstances as presence of blood on the ornaments. Mere proof that the ornaments discovered had been on the person of the deceased before death would not necessarily mean that they were connected with the crime of murder: I.L.R. (1949) Nag. 200: 50 Cr.L.J. 713: A.I.R. 1949 Nag. 277: 1949 Nag.L.J. 216.

Unless a thing discovered has some relevance to the accused's involvement in the offence, *held*, the discovery would be wholly irrelevant: (1984) 2 Bom.C.R. 615 (D.B.). *See* also 1983 M.P.W.N. 256; 1981 M.P.W.N. (I) 288.

Discovery evidence, by itself, is subsidiary and cannot sustain a conviction, but where there is plenty of other evidence to sustain the prosecution case, discovery evidence is a valuable piece of corroborative evidence: (1970) 72 Bom.L.R. 405: 1970 Mah.L.J. 634: A.I.R. 1970 Bom. 438.

The principles concerning discovery by accused are no more in doubt. Not only the article and the place from where the article is taken out should not be within possible knowledge of the Police and, in other words, should be within the exclusive knowledge of the accused but also such article must be and should be shown to have some relevance or

some connection with the crime in issue: (1985) 2 Bom.C.R. 518 (D.B.).

Statement made under S. 27 leading to the recovery of a pair of blood-stained shoes and dupatta, *held*, is inconclusive when they were in no way connected with the commission of the offence, *i.e.*, there being nothing to show that those articles belonged to the deceased: A.I.R. 1987 S.C. 1572: (1987-2) 7 Guj.L.H. 389.

Where the accused had stated that the sword he was handing over to the Police was used by him in a different dacoity, *held*, his statement was not admissible under S. 27; though the sword did have human blood stains, the sword could be of no avail as there was no evidence connecting it with the offence in question: 1971 All.W.R. 163 (D.B.). Where the knife seized was not proved to be the weapon of attack, *held*, its recovery was of no use: 1982 M.P.W.N. 86.

Where there was no evidence to show that the shots were fired from the recovered pistols and the test shots fired from those pistols did not match with the factual shots, *held*, in such a case, the recovery of pistols was inconsequential: 1995 Cr.L.J. 3165 (Raj.) (D.B.).

Where it was not proved that the recovered clothes belonged to the accused, *held*, the recovery thereof as well as of knife at the accused's instance from an open place, accessible to all and made after about two months after the date of occurrence, did not connect the accused with the crime: 1992 Cr.L.J. 435 (Raj.) *See* also 1993 Cr.L.J. 1723 (Raj.) (D.B.). Where there was no positive evidence that the accused was wearing the clothes recovered at the time of the occurrence and when it could not be ascertained as to whether the human blood found on them was of the deceased or the accused himself, *held*, presence of blood on those clothes could not be an incriminating evidence against him: (1990) 42 Del.L.T. 211 (D.B.).

Where in a murder case, clothes recovered pursuant to the accused's disclosure statement were not shown to be those of the deceased, *held*, no case of murder was made out against the accused: 1985 Cr.L.J. 1416 (Raj.).

Prosecution must establish connection between fact discovered and the crime—*Held*, that there was total absence of evidence, direct or circumstantial, to connect the recovered objects with the crime. [A.I.R. 1962 S.C. 1788, Rel. on]: 1970 Cr.L.J. 603 (All.).

Piece of skin and some bones recovered at the instance of the accused—No proof connecting them with the deceased—Value in evidence. *See* 1952 Raj.L.W. 239: I.L.R. (1952) Raj. 137.

It is permissible to connect the accused and the object with each other through the information but not either of them with the crime. In the course of such a strict construction of the section by precisely limiting the information admissible to so much of it as distinctly serves to connect the accused with the object alone, it sometimes happens that the admissible portion amounts to a confession, which it does in cases where the gist of the offence is possession of concealment. The law is not that S. 27 prohibits the same, except in such a special case the connection between the object and the crime must always be exclusively established by evidence aliunde. The connection between the crime and the accused however though it has to be established always by evidence aliunde is permissible on the facts of the given case to be inferred to some extent from the very connection established between the accused and the object itself by the admissible information; but it is not permissible to directly connect the accused with the crime through his own mouth: 55 Cr.L.J. 583: A.I.R. 1954 Mad. 433.

Where in a murder trial, the deceased's gold ear-rings, were recovered but it was itself doubtful whether the deceased was wearing any ear-rings and there were also infirmities in the parade held by the Municipal Commissioner for identifying the ear-rings, *held*, the accused could not be convicted on the basis of recovery of the ear-rings: 1988 Cr.L.J. 39 (P.&H.) (D.B.). *See* also 1982 M.P.W.N. 504.

Where the deceased's *chadar* at the instance of the accused was recovered from the river and the deceased's dead body was lying close to its bank of river with other scattered things but the *chadar's* connection with the crime was not shown, *held*, any one would have expected the *chadar* to be in the river at some distance from the body and it had in fact taken about half an hour for about 8 to 10 persons to find out the *chadar*; the accused's information did not specifically indicate the exact place where the *chadar* could be found; the evidence of its recovery at the instance of the accused could not inspire confidence: 1990 Cr.L.J. 1676 (Ori.) (D.B.).

28. Common use article—Recovery of—Effect.—Where the 'Rakhady' allegedly recovered at the accused's instance was found to be a common ornament worn by ladies in general and there was nothing to show that it was the same which was snatched away by the dacoits and no specific description had been given about it, *held*, no reliance could be placed on such recovery: 1984 Raj.L.W. 286 (D.B.). Common article seized from the accused—Effect. *See* (1979) 1 M.P.W.N. 273.

Where articles recovered pursuant to a disclosure statement were not found stained with human blood and those articles were such as are found in every house-hold, *held*, the recovery of those articles from within the house of the accused would not constitute any incriminating circumstance: A.I.R. 1971 Tripura 8.

Where the weapon of offence (an agricultural implement), which was commonly available article, was discovered from an open place and was not found concealed and further there was evidence to show that the Police already knew about it before it was discovered at the instance of the accused, *held*, it could not be said to be a discovery under S. 27: 1993 Cr.L.J. 3364 (Bom.) (D.B.).

Where a wrist watch of common pattern was recovered after disclosure statement of accused but the F.I.R. was silent regarding the fact that a wrist watch was missing, *held*, recovery of wrist watch was not such a valuable piece of evidence so as to lead to a conclusion that the accused were the only persons who were guilty of the offence: 1995 Cr.L.J. 248 (P.&H.) (D.B.). *See* also (1995-1) 43 B.L.J.R. 706.

29. Effect of seizure or non-seizure of weapon of offence when direct evidence available.—Where direct evidence is sufficient to convict, *held*, seizure or non-seizure of the weapon used in the offence is of no material importance: A.I.R. 1992 S.C. 881: 1992 Cr.L.J. 1111: (1992) 2 S.C.C. 62.

The fact that the firearms recovered at the instance of the accused were not proved to have been used in the commission of offence, *held*, is of no consequence when there was sufficient evidence of eye-witnesses against the accused: A.I.R. 1988 S.C. 2249: 1989 Cr.L.J. 299; 1985 Cr.L.J. 1589: 59 Cut.L.T. 246.

Where the prosecution evidence is wholly insufficient to establish the offence, *held*, recovery of the weapon at the instance of the accused would be of not much consequence: A.I.R. 1979 S.C. 1042; A.I.R. 1992 S.C. 1131: 1992 Cr.L.J. 1426: 1992 All.L.J. 395.

30. Witnesses to recovery.—In the matter of search, S. 27 of the Evidence Act and S. 103 of the Code of Criminal Procedure stand on different footings; recovery under S. 27of the Evidence Act, can be proved by a solitary testimony, if otherwise unimpeachable, of the Investigating Officer; it is not a legal requirement that public witnesses should always be associated in recovery proceedings pursuant to disclosure statements. [1972 Cr.L.J. 606 (S.C.), Rel. on]: 1985 Cr.L.J. 1700 (Del.).

Whether the evidence of the Investigating Officer alone is sufficient to prove the recovery depends upon the circumstances of each case. In a case where the investigation inspires confidence and no criticism can be levelled against the conduct of the investigating agency and good reasons are given for not producing the other witnesses, it is open to a Court to accept the uncorroborated testimony of a Police Officer after a strict scrutiny: 1957 Cr.L.J. 113 (All.).

The law has trusted a Police Officer to record the information given to him under S. 27 by an accused in custody because truth of that information ultimately finds guarantee from the discovery of the fact: I.L.R. (1977) 27 Raj. 342: 1977 Raj.L.W. 241: 1977 W.L.N. 227.

There is no harm in the Police Officer who makes the search being called as a witness at the trial but where the investigation of the case appears to be unfair and suspicious, it is neither safe nor desirable to act upon his uncorroborated testimony in respect of the search or recovery: I.L.R. (1962) 2 Ker. 492: (1962) 2 Ker. L.R. 499: 1963 Ker. L.J. 86: (1963) 1 Cr.L.J. 669.

Where the Police Officer testified that the accused had made the disclosure statement in the presence of the Panch which the Panch expressly denied, *held*, the Courts should be slow in preferring the Police Officer's testimony over that of the Panch; and all the more so, as in the present case, where the Panch was not sought to be declared a hostile witness: 1982 Cr.L.J. 2189 (Bom.).

The Investigating Officer should not associate any eye-witness with the recovery memos, because that partakes of an attempt to make the witness omnibus: A.I.R. 1977 S.C. 1066: 1977 Cr.L.J. 642: (1977) 2 S.C.C. 131.

Where the statement leading to the discovery of the incriminating thing was made by the accused to a Police Officer when no independent witness was present, *held*, non-presence of the witness is not fatal if the statement was indeed made voluntarily by the accused: 1981 Cr.L.J. 1244 (Raj.) (D.B.).

Where though no public witness, who had been associated with recovery, was examined, but the Investigating Officer's deposition did not suffer from any infirmity and the incriminating articles found with the dead body had been identified by the other witnesses, *held*, no adverse inference could be drawn: A.I.R. 1994 S.C. 2420.

Where the accused's disclosure statement led to recovery of the murder weapon, found stained with deceased's blood group, *held*, merely because neither the deceased's brother, at whose instance the accused was arrested, nor any public witness was associated with the disclosure statement or the weapon's

recovery, the prosecution's evidence is not thereby rendered unbelievable; it is common experience that people are greatly reluctant to co-operate with the Police for variety of reasons and involving the deceased's brother might have been considered not proper by the Police: 1985 Cr.L.J. 1625: I.L.R. (1984) 2 Del. 388.

When the Investigating Officer has proved the statement of the accused in pursuance of which the weapon was recovered from the place of concealment, the same could be acted upon particularly when the attestors to the respective *mahazars* admitted to their having signed the *mahazar* and also with due regard to the attendant circumstance. In the absence of hostility, a Police Officer's evidence cannot be rejected. [A.I.R. 1973 S.C. 2783, Rel. on]: (1993) 1 Ker.L.J. 76 (D.B.). *See* also I.L.R. (1992) 2 Ker. 516 (D.B.).

Where the Investigating Officer had sworn to the recovery of weapon of offence on the basis of information given by the accused, *held*, his evidence can be acted upon even if not corroborated by other evidence but where recoveries were spoken to by the independent witnesses as well, recovery, on the basis of the information given by the accused, could certainly be accepted: (1992) 2 Ker.L.J. 952 (D.B.). *See* also 1991 Cr.L.J. (N.O.C.) 16 (Ker.) (D.B.).

Merely because the witnesses of disclosure statement and recovery of weapons were not from that locality itself, *held*, is not sufficient to discard their evidence, more so when they had convincing explanations for their presence on the spot: 1989 Cr.L.J. 2486 (J.&K.) (D.B.). But when the witness to recovery was not only a close relation of eye-witness but also resident of a different village and his presence at the time of recovery was not explained, *held*, his evidence was to be discarded: 1992 Cr.L.J. 805 (P.&H.) (D.B.).

Merely because the same set of Panchas had witnessed all the three discoveries as well as the attachment of the accused's clothes, *held*, their evidence could not be discarded if nothing in their cross-examination had detracted from its value; besides, the fact that such a witness was a neighbour and on good terms with the deceased would also make no difference: A.I.R. 1991 S.C. 1853: 1991 Cr.L.J. 2653: (1991) 3 S.C.C. 627; (1985) 28 Del.L.T. (S.N.) 1.

When the evidence of a Panch witness given in a subsequent case is found otherwise acceptable, the same cannot be discarded on the ground that in an earlier case, he had not supported the discovery about which the evidence has been led in the subsequent case: 1992 Cr.L.J. 3298 (Guj.) (D.B.).

Where a person alleged to be a witness to the recovery was not a witness to the production of the incriminating articles, *i.e.*, knife and shirt, in as much as according to him they were already in the hands of the Investigating Officer, and further the accused had produced those articles with the help of his mother and the articles were not sent for forensic examination to ascertain whether they were blood-stained, *held*, the knife and shirt were not incriminating articles; S. 27 was not attracted: 1985 Cr.L.J. 1373.

Where positive evidence was very clear that the accused had led the Police party to the workshop owned by him and his father took out stolen gold and silver articles from a tin kept under a cot which were seized under *mahazar*, *held*, the recovery at the accused's instance stood proved; it could not be doubted merely because the accused had contended that an eye-witness of recovery owned a dry-cleaning shop and the Police were getting their clothes washed or that he was sought to be confused by an irrelevant site plan to show that the workshop was not owned by the accused: (1992) 1 An.L.T. 21 (D.B.).

Where the accused disowned the recoveries and signatures on panchnamas or recovery memos were obtained at the Police Station after the witnesses came back covering a long distance and the respectable persons of the locality were not joined as witnesses, *held*, such panchnamas or recovery memos did not inspire confidence but created a suspicion about the preparation of the documents at the spot. [1977 Cr.L.J. 167 and 1981 Cr.L.J. 410 (S.C.), Rel. on]: 1992 Cr.L.J. 1150 (Madh. Pra.).

Where stolen currency notes and the sten-gun involved in a bank robbery and double murder were recovered from a house pointed out by the accused and mentioned in his statement, *held*, the prosecution was not required to adduce evidence of the house owner or a neighbour to establish that the accused was in occupation of the house: 1978 Cr.L.J. 324: 1978 All.Cr.R. 100 (D.B.).

Where the recoveries of the weapons at the instance of the accused persons had been attested by the Police Officers and some independent persons as search witnesses, *held*, the fact that the other witnesses were not examined, by itself does not effect the evidence regarding recoveries. [A.I.R. 1976 S.C. 951, Disting.]: A.I.R. 1977 S.C. 472: (1976) 4 S.C.C. 158: (1977) 1 S.C.R. 280: 1977 Cr.L.J. 273. *See* also 1983 M.P.W.N. 256.

In a case where the accused charged with the offence of causing disappearance of the evidence of an offence of receiving illegal

gratification by another by concealing the currency notes, had already revealed about the place of concealment to the Police Officers his repeating the same before witnesses in order to incorporate it in a memo. and to give it greater authenticity, would not make such second statement made before witnesses admissible in evidence. It is well settled that it is the first statement made by an accused leading to a recovery which is admissible in evidence. It, however, depends on the circumstances of each case. If the information derived as a result of interrogation was merely vague and the precise information was received as a result of the statement made by the accused before witnesses, the subsequent statement would be admissible in evidence. Likewise, if the previous statement made to the Investigating Officer merely indicated a willingness of the accused to disclose where the incriminating articles were lying and the actual information about that place was given in a subsequent statement, the subsequent statement is admissible if the incriminating articles are recovered in pursuance of the statement: 1968 Cr.L.J. 372: A.I.R. 1968 Punj. 120.

When respectable persons of locality, though available, were not joined before effecting recovery at the accused's instance and even the recoveries were not got identified to the satisfaction of the Court, *held*, it made the recovery doubtful: 1990 Rajdhani L.R. 154: (1990) 41 Del.L.T. 86 (D.B.). Where the recovery was made during day time and there was a rush of traffic at the place of recovery, but no effort was made by the Investigating Officer to join any person from the public and there was no explanation as to why the signatures of even a constable were not obtained though present, *held*, no reliance could be placed on such recovery: (1990) 41 Del.L.T. 560 (D.B.); (1987) 14 Cr.L.T. 206 (P.&H.) (D.B.).

Although as a matter of law the presence of *motbir* witnesses at the time of recording information is not necessary but as a matter of prudence the Police Officer should secure the presence of *motbir* witnesses, if such witnesses are available without much inconvenience or difficulty. The presence of the *motbir* witness at the time of recording the information and the subsequent production of a *motbir* witness are likely to lend considerable support to the testimony of the Police Officer. As regards the proving of such information, ordinarily the Police Officer or a *motbir* witness should state in Court from memory what information was given by the accused and, if such a witness is in a position to give the precise information he should do so without referring to the written memo. containing the information. If the Police Officer or the *motbir* witness on account of lapse of time or otherwise, is not in a position to state with the help of memory what the information was and, thus, makes out a case for referring to the memo. for refreshing his memory, he is entitled to do so. But, even then, he should not merely remain content by proving his signatures on the information memo. but should reproduce in Court the information given: I.L.R. (1964) 14 Raj. 715: 1964 Raj.L.W. 171.

31. Procedural defects.—Where the articles, recovered at the accused's instance were not sealed nor any local witness was taken nor any entry in the General Diary was made before the Police party had left to effect the recovery, and the Investigation Officer admittedly had neither sent the recovered goods nor their list nor any other reference to the Magistrate when his remand was further sought, and the articles mixed with the recovered articles for identification bore no marks as were on the recovered articles, *held*, the prosecution evidence of recovery at the accused's pointing out was highly suspicious and not worthy of credence: 1990 Cr.L.J. 77 (All.) (D.B.).

Where the recovery memos in respect of the blood-stained swords and a chopper recovered at the instance of the accused contained no evidence of sealing of the weapons and the Police Inspector effecting the recovery could give no explanation therefor, *held*, the evidence of recovery could not be taken as a clinching circumstantial evidence fixing the accused's guilt: 1994 Cr.L.J. 3602 (Bom.) (D.B.).

Where the gun was recovered at the accused's instance from the possession of another person, and the cartridges found at the spot were, according to the Ballistic Expert, fired from the gun but that person, who alone could prove the prosecution's version that the accused had borrowed the gun, was not examined, *held*, in absence of such evidence there was no legal evidence to connect the accused with the gun: A.I.R. 1983 S.C. 349.

Where 'Pharsa' recovered alongwith the dead body was not sent for the Doctor's opinion alongwith the dead body but there was evidence of the recovery of 'Pharsa' and the photograph showed the dead body as well as the 'Pharsa', etc., *held*, there could possibly be no doubt about the recovery of 'Pharsa' along with the dead body: (1990) 42 Del.L.T. 211 (D.B.).

Where in a case of rape and murder, there was no mention in the inquest report as to

how the dead body was recovered and even *panchnama* was not prepared and there were discrepancies in the evidence of the witnesses regarding recovery of dead body, *held*, discovery of the dead body at the instance of the accused was not proved: (1991) 3 S.C.C. 27: A.I.R. 1991 S.C. 1388.

Till the guns recovered at the instance of the accused are sent for ballistic examination and a report is obtained that they are in working order, mere recovery of guns cannot connect the accused with the crime. [1984 W.L.N. (U.C.) 15 (Raj.), Foll.]: 1994 Cr.L.J. 2952 (Raj.) (D.B.).

In case of inordinate delay in sending the parcels of empty and live cartridges and the *katta* to the Ballistic Expert who had also opined that the empty cartridges seemed to have been fired by the same *katta*, *held*, in absence of any explanation as to why the seized articles were kept in the Police Station for a long period and as to what steps were taken against tampering, the delay clearly raised suspicion and gave rise to the suggestion on the part of the accused in the cross-examination of the Investigating Officer that the empty cartridges were not fired by the accused from the *katta* and the live cartridges were not recovered from the spot: 1992 Cr.L.J. 1150 (Madh. Pra). Whether mere seizure of a pistol from the accused in itself is sufficient to establish an offence without examination of the Ballistic Expert, *see* (1979) 1 M.P.W.N. 278.

Mere exhibition of relevant seizure lists does not satisfy requirements of law—Discovery must be proved, by producing in Court, the articles discovered pursuant to the information gathered from statement of accused: 1984 Cr.L.J. 217 (Gau.) (D.B.).

Where it could not be shown by the prosecution that the articles sent to the Serologist were the same as were seized from the accused, *held*, the Serologists' report was not admissible in evidence: (1984) 1 Crimes 646 (Raj.).

Non-production of case property, and the weapons alleged to have been used in the crime, *held*, to be an infirmity fatal to the prosecution's case: (1990) 40 Del.L.T. 478 (D.B.); (1979) 1 M.P.W.N. 307. Effect of non-seizing of container of alleged stolen articles: (1979) 1 M.P.W.N. 142. *See* also (1979) 1 M.P.W.N. 15.

The true objection to attestation of a statement under S. 27 of the Evidence Act, 1872, leading to discovery is not so much to the fact of attestation as to the object with which it is sometimes resorted to. The bar against signed statements in S. 162, Cr.P.Code, 1898, has no application, because the statement attested is not that of attestors. Sometimes, it happens that on questioning the accused, he makes a statement which gives information to the Police Officer which ultimately leads to the discovery of a fact, but instead of relying on that statement, the Police Officer proves a later statement of the accused containing the same information, but attested by witnesses and perhaps recorded in a more formal manner. This when done, is often due to a misapprehension on the part of the officer, that his own evidence as to the information, standing by itself, may not be accepted by a Court of law, but that such evidence when fortified by that of attestors might be accepted. In such a case the information, let alone the statement, which leads to discovery is really that contained in the first statement, and it is, therefore, that, which should be proved. But when the first statement is recorded and witnesses are present, nothing in law prevents them from testifying to it and even from attesting it, though such attestation is not necessary and might go against the spontaneity of the statement: 1966 Ker.L.T. 843: 1967 M.L.J. (Cr.) 47: A.I.R. 1967 Ker. 197.

Merely because the accused's signatures were obtained on the recovery memo, *held*, the whole of the said document does not become inadmissible; it is inadmissible to the extent of proof of signature of the accused on it: 1984 Cr.L.R. 577: 1984 W.L.N. 445 (Raj.). Memorandum leading to recovery should be proved with the actual words used by the accused; proof of mere preparation of memorandum is not sufficient: 1982 M.P.W.N. 524.

Where the recovery of the tractor in consequence of the accused's disclosure statement was made from a place within the jurisdiction of a Police Station in another State, and the testimony of the recovery Police Officer that he had got entries made about his arrival before recovery in that Police Station was contradicted by witnesses as well as the daily diary, *held*, the recovery of tractor as alleged was not proved; and the defence version that the tractor was already with the Police becomes more credible: 1995 Cr.L.J. 248 (P.&H.) (D.B.).

32. Presumption as to stolen or robbed property.—(*See* also S. 114). Before any inference can be drawn against the accused under S. 27 two facts have to be proved. Firstly, that the recovery was made from the possession of the accused and secondly, that the property recovered was stolen property: 1957 Cr.L.J. 113 (All.).

Where accused purchased 9 Kg. of Silver for a *paltry* sum deliberately knowing it to be

stolen silver and on his information several recoveries were made by the Investigating Officer of the silver ingots during the course of investigation, *held*, conviction of accused for receiving stolen property was proper: 1995 Cr.L.J. 625 (Raj.).

Information leading to discovery—Accused telling Police that he concealed the ornaments of which he gave discovery—Statement admissible in evidence—Theft detected and accused gave recovery of ornaments next day—Interval being small, the accused to be presumed thief—If interval were to be long, the presumption would be that he received the stolen articles: 32 Cut.L.T. 1083.

What are possible presumptions in case of recovery of stolen property at the instance of the accused. *See* (1979) 2 M.P.W.N. 91; (1979) 1 M.P.W.N. 317. When recovery of deceased's ornaments from the accused's possession or at his instance was made very promptly soon after the occurrence, *held*, an inference of murder and robbery, and not only of being receiver of the stolen or robbed property, has to be drawn: (1983) 2 Crimes 191 (Madh. Pra.). Recovery at the accused's instance—Presumption under S. 114(*a*). *See* (1979) 1 M.P.W.N. 308.

The presumption to be drawn whether the accused were receivers of stolen property or dacoits depends upon the circumstances under which the discovery is made; if the gap of time is too large, the presumption of the accused being concerned with the crime itself gets weakened; the presumption is, however, stronger when the discovery is made soon after the offence. The obvious reason being that disposal of property requires finding a person ready to receive them; the shortness of time, the nature of the stolen property, its quantity and character, determine whether the person having the goods in his possession received them from another or was himself the thief or dacoit. Thus, where the goods stolen were a large quantity of cloth, looted from the cartmen by a score of persons after pelting stones, and immediately afterwards searches were made and the goods were recovered from various persons, *held*, the presumption was rightly drawn that the persons from whom the goods were recovered were dacoits themselves and not merely the receivers of the stolen property: A.I.R. 1971 S.C. 196: 1971 Cr.L.J. 260: (1970) 3 S.C.R. 720. *See* also (1979) 1 M.P.W.N. 299.

Where in a case of bank dacoity, a large quantity of currency notes bearing initials of bank's officers, 2 muskets and a gun were recovered, peculiarly concealed in a place he had mentioned in the disclosure statement and to which place the accused had taken the Police for recovery, *held*, a participator in the dacoity alone could have known the concealment; his conviction was justified: 1985 Cr.L.J. 1807 (Cal.).

Where the valuables alleged to have been taken from the deceased were shown to have been recovered on the basis of the statements given by the accused after the lapse of one month of the disappearance of the deceased, *held*, this delay was fatal to the prosecution; if the recoveries put forth by the prosecution was relied on, it could lead only to the inference that they were either receivers of stolen property or were persons who committed the theft but it could not necessarily indicate that the theft and the murder took place at one and the same time. Even for drawing a presumption under S. 114 the possession of the stolen article by the accused must be soon after the theft: (1994) 2 Karn.L.J. 215 (D.B.).

S. 27 is based on the doctrine of confirmation by subsequent facts; the fact discovered must have a direct link with commission of the crime. In a dacoity case, the accused's statement leading to the discovery of stolen property is a very valuable evidence against him; if the accused has no reasonable explanation therefor, the discovery of the plundered property in consequence of his information furnished would justify the presumption under S. 114 of his having participated in the dacoity: 1984 Cr.L.J. 1135: 1983 W.L.N. 573: 1984 Cr.L.R. 196 (Raj.). *See* also (1985) 28 Del.L.T. (S.N.) 1; (1985) 27 Del.L.T. (S.N.) 3.

33. Illustrative cases—(*a*) Evidence held admissible.—Where an accused person stated to the Police that he had buried an article at a particular place, took the Police to that place and delivered the article to them, the statement of the accused to the Police is admissible under S. 27: 112 I.C. 55: 29 Cr.L.J. 967. So also a statement that he buried the dead body at a particular place: A.I.R. 1930 Lah. 530. The discovery of ornaments at his house by accused is clearly a fact discovered: I.L.R. 45 All. 300: 73 I.C. 62: A.I.R. 1923 All. 352.

If the accused produced the articles himself, the fact that he produced it at a particular place may be proved, but the accompanying statement that he buried it there is inadmissible: 19 I.C. 190: 171 P.L.R. 1913.

Where the accused made a disclosure statement, stating that they committed rape and thereafter inserted a stick in the vagina of the victim and thereafter at the instance of the accused, the said stick and some rags of cloth, which were hidden in the house of the one of the accused, were recovered with blood-stains

on them and the same was corroborated by the report of Chemical Examiner, *held*, the disclosure statement was admissible under S. 27: 1990 Cr.L.J. 1129 (Madh. Pra.) (D.B.).

Where the witness to whom extra-judicial confession has been made described in detail about confession made by accused before him and his testimony was not shaken in the cross-examination and no material was elicited to discredit or impeach his evidence and further on the basis of the information given by the accused, recovery of some articles was made, *held*, S. 27 of Evidence Act was applicable in such a case: 1994 Cr.L.J. 552 (Ori.) (D.B.).

The fact that injuries to the deceased persons as well to the sole eye-witness were caused by the accused with same knife was corroborated by the medical evidence—There was also evidence of Deputy Suprintendant of Police regarding the recovery of knife and bush-shirt stained with human blood, at the instance of the accused—*Held*, conviction was justified. [1973 W.L.N. 330 (Raj.), Affirmed]: A.I.R. 1974 S.C. 1699: 1974 Cr.L.J. 1168: (1974) 4 S.C.C. 781.

Where the convict, proved to have been present at the spot, had himself inflicted no injuries on the deceased who in the opinion of the Doctor-witness had been hit by a branch of a Gulmohar tree standing at a distance and in his disclosure statement the convict stated that he could point out the branch used as the weapon of offence, and accordingly that branch wrapped in the convict's full pant was recovered and as per evidence of the Forest Officer the branch had been broken from that Gulmohar tree and as per the Doctor both the pant and the branch had blood on them which as per the Chemical Anayliser was human blood, *held*, the convict's presence and participation in the offence stood established: 1993 Cr.L.J. 1608 (Bom.) (D.B.).

(*b*) Evidence held not admissible.—A person accused under S. 328, I.P.Code, pointed out during the Police investigation a datura tree and said that he had taken the fruit of it. The statement was inadmissible: 32 I.C. 136: 13 All.L.J. 1077.

In a trial for murder, a witness stated that the accused offered to point out the place where the dead body was and on being questioned as to who had buried the body he said that he (accused) had done so. *Held*, that the accused's statement that he buried the body was not admissible in evidence: 55 I.C. 685: 21 Cr.L.J. 349 (L).

No reliance could be placed on the evidence of recovery of stolen property, in a murder trial when (*i*) there was a long delay between the date of arrest and recovery, (*ii*) there was nothing in the recovery memo to show that recovery was at the instance of the accused, and (*iii*) the accused was not charged for retaining stolen property: A.I.R. 1978 S.C. 315: (1978) 1 S.C.C. 130: (1978) 1 S.C.W.R. 501. *See* also 1995 Cr.L.J. 3113 (Raj.) (D.B.).

Where the accused in his disclosure statement had averred that he had tied the deceased's severed head alongwith bricks in the deceased's *dhoti* and had thrown the same in the river but 20 days after the murder, only bricks and sand were recovered as intact in the *dhoti* bundle and head bones had completely disappeared, *held*, the accused's statement had led only to discovery of the bundle without the head, and not all that was actually claimed to have been dropped by the accused in the river; thus, the fact that the bundle contained the severed head or it was connected with the offence has to be proved by other evidence; S. 27 is of no avail: 1971 All.W.R. 163 (D.B.).

Where the deceased's mother on disappearance of her son, said to have gone to another village for a week, was informed thereafter by '*C*', a concubine of her other son and reportedly having illicit relations with one '*M*' who was maintaining both '*C*' and her husband, that the deceased had been done to death and thrown in a well by her husband and paramour, and the dead body was accordingly recovered, *held*, when the only evidence on record was the testimony of the deceased's mother based on *C*'s information who was, alongwith her husband and paramour put on trial for murder, there is nothing to connect the only accused with the murder, ('*M*' having died during trial and '*C*' having been acquitted); besides, the recovery of the deceased's clothes from the accused's house is of no significance as it was also the accused's house as both were brothers living in the same house: 1995 Cr.L.J. 554 (All.) (D.B.).

Where the recovery of currency notes involved in a bank dacoity was made pursuant to the accused's disclosure statement but neither the recovery nor the accused's statement were proved, *held*, the accused could not be convicted by resort to S. 27: 1985 Cr.L.J. 1807 (Cal.).

34. Miscellaneous.—There is nothing unnatural or improbable on the part of the accused persons in keeping their share of the stolen articles concealed in the residence of one of them: A.I.R. 1994 S.C. 739: 1994 Cr.L.J. 922.

Where discovery of hair from the fist of the deceased was made on the disclosure

28. Confession made after removal of impression caused by inducement, threat or promise, relevant.—If such a confession as is referred to in section 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the Court, been fully removed, it is relevant.

29. Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc.—If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

---

statement by the accused, *held*, when C.F.S.L. report confirmed that said hair were those of the accused, it was an incriminating circumstance against the accused: (1994) 53 Del.L.T. 146.

Where the only circumstance against the accused was of his having been last seen with the deceased and another accused from whom an instrument of offence was recovered, who had a grudge against the deceased, had been let off, *held*, he could not also be convicted: A.I.R. 1987 S.C. 1507: 1987 Cr.L.J. 1852: (1987) 2 S.C.C. 480.

Where in a Court-martial for the offence of theft and conspiracy, there was no record of any disclosure statement and the recovery had already been made by the military authorities at the instance of persons other than the accused, *held*, S. 27 was of no avail; charges not proved: (1983) 1 Crimes 1025.

Section 28—Notes.

When once the existence of improper inducement, threat or promise has been established so as to bring the case within the provisions of S. 24, there is a presumption of its continuance, and the prosecution has to prove that the impression caused by the original inducement, threat or promise was fully removed when the prisoner made the confession. The word 'fully' in S. 28 is significant. It means 'thoroughly', 'completely', 'entirely' so as not to leave any trace of the impression created by the torture of fear; for, a confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape that no credit can be given to it: 1958 M.P.L.J. 745: A.I.R. 1959 Madh. Pra. 17.

Confessions to the Magistrate made soon after inducements held out by certain Zamindars sent by the Police are inadmissible: 12 Cr.L.J. 199: 9 I.C. 718.

A confession by an accused in Police detention as a suspect made in the immediate vicinity of the Police to a zaildar could not be proved unless made to a Magistrate though the accused may not have been handicapped, as to all intents and purposes, he was in Police custody: 26 Punj. Re. 1916 (Cr.): 34 I.C. 642.

A confession recorded under the provision of S. 164, Cr.P.Code becomes voluntary and free when it is made by the accused out of repentance, after due caution with reasonable time for reflection in order to remove completely any threat or torture, inducement or promise by the arresting agency and it precludes the possibility of tutoring: 1989 Cr.L.J. 2058 (Gau.) (D.B.).

Section 29—Notes.

The provisions of S. 164 do not affect the provisions of S. 29, and, therefore, a confession cannot be excluded from evidence as irrelevant merely because all the provisions of S. 164 were not carefully complied with: 10 O.W.N. 937: A.I.R. 1933 Oudh 404. *See* also 1937 Mad.W.N. 1325; (1950) 1 M.L.J. 659. S. 29 of the Evidence Act does not, in its practical application come in conflict with S. 164, Cr.P.Code: I.L.R. (1951) Cut. 65: A.I.R. 1951 Ori. 168 (F.B.).

Non-compliance with S. 164(3), Cr.P. Code—Confession, if otherwise relevant, is still admissible in evidence under S. 29, Evidence Act: A.I.R. 1954 Bom. 285: I.L.R. (1954) Bom. 484.

Sub-S. (3) of S. 164, Cr.P.Code, being a special provision for Magistrate's recording confessions elicited by person in circumstances mentioned in S. 29 and which are otherwise relevant. The provisions of S. 164, Cr.P.Code, therefore, would apply to the particular circumstances contemplated by it. Where a confession cannot be proved under S. 26, the provisions of S. 29 will not apply unless it is recorded is provided for under S. 164(3), Cr.P.Code: A.I.R. 1957 Andh. Pra. 729: 1957 Cr.L.J. 1086.

30. Consideration of proved confession affecting person making it and others jointly under trial for same offence.—When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

Failure to comply with S. 164(3), Cr.P.Code, or with the High Court Circulars containing instructions for the guidance of Magistrates while recording confessional statements, *held*, will not render the confessions inadmissible in evidence: A.I.R. 1977 S.C. 1579: 1977 Cr.L.J. 1206: (1977) 3 S.C.C. 68.

Where the prosecution relies upon a confessional statement of the accused in proof of the charge, strict compliance with the provisions of S. 164, Cr.P.Code, is imperative. Where there is substantial compliance with the requirements of S. 164(3) of the Cr.P.Code, reliance can be placed on the provisions of Ss. 29 and 80 of the Evidence Act and any non-compliance with the provisions of S. 164 of the Cr.P.Code may be regularised by application of S. 533 of that Code. [I.L.R. (1970) Cut. 649, Overruled; Observation of *Mohanti*, J. in I.L.R. (1975) Cut. 1557 held not good law; 1977 Cr.L.J. 1018(Ori.), Approved]: A.I.R. 1978 Ori. 19: 1977 Cr.L.J. 2053: I.L.R. (1977) Cut. 719 (F.B.). *See* also 1991 Cr.L.J 3239 (All.) (D.B.).

Where the Magistrate told the accused that he was free to say whatever he liked that amounted to a sufficient warning and S. 29 made the statement admissible in evidence. Even if the Magistrate had not complied fully with S. 164 the defect was not fatal: 1952 Raj.L.W. 269: I.L.R. (1952) 2 Raj. 93.

Statements made by the accused to a Magistrate when produced by the Police for purposes of remand are admissible: 148 I.C. 1002: A.I.R. 1934 Rang. 78. *See* also I.L.R. (1941) All. 280: A.I.R. 1941 All. 145; (1950) 1 M.L.J. 659.

See under Evidence Act (1872), S. 24: 1966 Mad.L.W. (Cr.) 82.

Confession—Accused not questioned before recording—Confession not admissible—Effect of S. 29: A.I.R. 1957 Raj. 141: 1957 Cr.L.J. 545.

Record of confession—Absence of warnings—Effect on admissibility of recorded confession: A.I.R. 1957 Raj. 141: 1957 Cr.L.J. 545.

Admission of guilt made by accused to Magistrate before investigation of the offence and before his arrest, is admissible: 1963 M.P.L.J. (Notes) 235.

Usually and as a matter of caution Courts require some material corroboration to an extra-judicial confessional statement. Evidence of oral confessions of guilt ought to be received with great caution and more so when the same are said to have been made to lambardars, panchas and sarpanchas, who are interested to give evidence for the Police: (1962) 64 Punj.L.R. 127: 1962 All.Cr.R. 50: 1962 All. W.R. (Supp.) 18: (1962) 2 Cr.L.J. 580.

Non-compliance with S. 164(3), Cr.P. Code—Admissibility and value of confession—Effect of S. 29, Evidence Act: 1961 Jab.L.J. 1313.

Where the accused had made three successive extra-judicial confessions on three different occasions just after the occurrence, *held*, they were voluntary; and corroborated by other evidence, they were also true: (1976) 42 Cut.L.T. 499: I.L.R. (1976) Cut. 518: 1976 Cr.L.J. 2010 (D.B.). *See* also (1984) 3 Crimes 337 (Raj.).

Mukhiya offering inducement to the accused persons and promising to release them if they admitted their guilt—Admissibility of confession made in such circumstances. *See* 1971 B.L.J.R. 641.

Section 30—Synopsis.

1. Scope and applicability.
2. "Affecting himself and some other".
3. "Tried jointly".
4. "Same offence".
5. "Confession".
6. Confession of co-accused—Evidentiary value.
7. Confession—Necessity for corroboration.
8. Sessions trial and Magisterial trial.
9. Confession—Acceptance in part.
10. Retracted confession.

---

[1][*Explanation.*—"Offence" as used in this section, includes the abetment of, or attempt to commit, the offence.]

Illustrations

(*a*) *A* and *B* are jointly tried for the murder of *C*. It is proved that *A* said—"*B* and *I* murdered *C*". The Court may consider the effect of this confession as against *B*.

(*b*) *A* is on his trial for the murder of *C*. There is evidence to show that *C* was murdered by *A* and *B*, and that *B* said—"*A* and *I* murdered *C*".

This statement may not be taken into consideration by the Court against *A*, as *B* is not being jointly tried.

---

1. Inserted by Act 3 of 1891, S. 4.

---

1. Scope and applicability.—The section introduces a departure from the ordinary rule relating to the admissibility of evidence and must be strictly construed. Before any statement made by one of the accused persons, tried jointly with the others can be taken into consideration against such others, it must fulfil two conditions: (*a*) it must be a confession of guilt affecting himself equally with the others; and (*b*) it must be proved against those persons who are jointly tried with him. The word 'proved' means proved before the prosecution case comes to an end, either proved in the course of the prosecution case or proved in some proceedings previous to the trial: A.I.R. 1935 Lah. 35. Whether the confession of an accused can be used against his co-accused should be determined on seeing whether the accused can be convicted on that confession of the crime with which he and the co-accused were charged: 60 I.C. 660: 22 Cal.L.J. 260 (L.). *See* also (1910-11) 15 Cal.W.N. 592: I.L.R. 38 Cal. 559; I.L.R. 50 Bom. 683: A.I.R. 1926 Bom. 513; 9 Nag.L.J. 80: A.I.R. 1926 Nag. 229; A.I.R. 1939 Pat. 35: I.L.R. 18 Pat. 82; A.I.R. 1938 Sind 94.

A confession of an accused which may be used against his co-accused and acted upon must be confession for the offence for which they are jointly tried; (2) the confession need not be recorded in the presence of the co-accused but it must be offered against the co-accused as well as the confessing accused; (3) such confession is evidence as whatever is considered by the Court including probabilities is evidence in generic sense but as it cannot be considered as independent evidence it does not fall under S. 3; it merely corroborates or lends support to independent evidence on record; (4) such confession where its maker is not under oath nor subjected to cross-examination and the other accused were not present is a weak evidence, weaker than the approver's evidence; (5) it is an evidence created by the confessing accused; it only supplements the substantive evidence against the confessing as well as the other accused; its purpose is merely to tilt the scales where other evidence tends to establish the offence; (6) though not required to be corroborated in minutest detail, it must nevertheless find corroboration in other evidence; (7) to be used against the other accused, the corroboration must be not only *qua* the factum of the offence but also the identity of the accused involved in it; (8) it cannot be used against an accused if other evidence against him is uncertain and not sufficient to convict; the confession is not meant to fill up the lacunae in requisite evidence; and (9) the Court has to consider whether the confessing accused has understated his own guilt and has endeavoured to assign to the other accused higher culpability: (1988) 36 B.L.J.R. 720.

S. 30 is an exception to the rule of English law that an accused's confession is evidence only against him, and not others tried jointly with him; the section is, therefore, to be interpreted strictly and with due care; a confession under S. 30 is not evidence under S. 3; it merely clothes the Court with a discretion to consider the confession alongwith other evidence when evidence against the other co-accused tending to his conviction; the confession may be used to clinch the conviction; the confession of the accused by itself is not sufficient to proceed against the other co-accused involved therein also as an offender. [A.I.R. 1949 P.C. 257, Foll.]: (1988) 1 Bom.C.R. 159.

A statement of an accused must amount to a confession before it can be considered against a co-accused under S. 30: I.L.R. 35 Mad. 247: 22 M.L.J. 490; 40 Cal.L.J. 551: A.I.R. 1925 Cal. 406: I.L.R. 46 Cal. 710. *See* also 9 P.R.

1911 (Cr.): 10 I.C. 340; A.I.R. 1925 Sind 116; A.I.R. 1924 Bom. 445: (1924) 26 Bom.L.R. 614; A.I.R. 1924 Nag. 27; A.I.R. 1924 All. 511; A.I.R. 1924 Mad. 805; A.I.R. 1929 Sind 250; 42 P.L.R. 378; 11 O.W.N. 1012: A.I.R. 1934 Oudh 418; 176 I.C. 530: A.I.R. 1938 Pat. 352.

Confession of co-accused can be used against other co-accused of the case only when they are being tried jointly for the same offence: (1992-1) 40 B.L.J.R. 293 (D.B.).

S. 30 is the only provision permitting the reception of the statement of a co-accused person which is not a substantive piece of evidence and cannot sustain a charge against another accused, but can only be pressed into service to lend assurance to the conclusion of guilt which can be rested on the other evidence against him. S. 30 relates to a confessional statement of an accused person implicating himself and the co-accused made prior to and proved at the trial: (1985) 60 Cut.L.T. 91; 1987 Mah.L.J. 683: (1988) 1 Bom.C.R. 428; A.I.R. 1988 S.C. 1883.

So far as the confessional statement of one accused is concerned, it may be taken into consideration against the other accused if it fulfils the conditions laid down in S. 30 of the Evidence Act. One of the conditions is that the confession must implicate the maker substantially to the same extent as the other accused person against whom it is sought to be taken into consideration. Where on reading the confession as a whole it appears that he was really trying to throw the main blame on the other accused and make out that he was an unwilling spectator of the crime committed by the other accused, the utmost that can be stated is that the confession cannot be used at all against the other accused. But because there are differences between his confession and the confessional statement of the other accused, the confessional statements cannot be condemned out of hand or *in limine* as untrue where some of the differences are immaterial, some others are due to the desire of the accused to throw the blame on the other and the rest stand clearly resolved by other evidence in the case: 1957 Cr.L.J. 431: A.I.R. 1957 S.C. 216.

Scope—*See* 1966 Cr.L.J. 323 (2) (Cal.).

Confessional statement of the co-accused cannot be the foundation even for the purpose of framing of the charge against the accused: (1985) 2 Bom.C.R. 499.

The confession of a co-accused is not technically "evidence" and it cannot be treated as substantive evidence. The words "may take into consideration" show that if there is other relevant evidence tending to prove the guilt of the accused, the confession of a co-accused may then be used only in support of other evidence. The confession of a co-accused cannot be made the foundation of a conviction. If there is no other evidence or if the other evidence is insufficient, the confession of a co-accused is to be excluded and cannot be taken into consideration against a co-accused. Such a confession cannot be added to supplement the evidence otherwise insufficient nor can it be used to fill a gap in the prosecution evidence. The evidentiary value of the confession of a co-accused is extremely weak and a conviction solely on its basis is bad and is unsustainable in law: 1984 Cr.L.J. 1126: 57 Cut.L.T. 429; 1986 Cr.L.R. 567 (Raj.); 1984 Cr.L.J. 1055; 1982 Cr.L.J. 2162 (Ori.); 1982 Cr.L.J. 269: 53 Cut.L.T. 12; 1981 All.L.J. 991 (D.B.); 1977 Cr.L.J. 1243 (Pat.) (D.B.); 1977 Cr.L.J. 1309 (Gau.) (D.B.); (1971) 37 Cut.L.T. 1223 (D.B.); (1994) 54 Del.L.T. 20.

Confession of a co-accused is very weak type of evidence: 1992 Cr.L.J. 2190: (1992) 2 Crimes 735 (Pat.) (D.B.).

It is well settled that so far as the confessional statement of accused is concerned it may be taken into consideration against the other accused under S. 30 if it fulfils the conditions laid down therein. Confession of co-accused is not an evidence as defined under S. 3.

Where there are confessions of several accused and the confessions are retracted subsequently, the proper approach is to consider his confession as a whole on its merits and use it against the maker thereof, provided the Court is in a position to come to a unhesitating conclusion that the confession was voluntary and true: 1981 Cr.L.J. 430 (D.B.).

Joint trial of several accused—Confession by one of them can be used against co-accused: 1967 Cr.L.J. 1023: A.I.R. 1967 Manipur 11.

Statement under S. 342, Cr.P.Code made by one accused is not binding on co-accused—Cr.P.Code, 1898, S. 342: 1966 Raj. L.W. 460.

Statement of accused—Use of—Though not evidence under S. 3, Evidence Act, can be

used against accused—If it is confessional statement, it cannot be so used: 1968 Cr.L.J. 992 (Goa).

Statement of an accused made at the Police Station against the co-accused is inadmissible and cannot be used as evidence as against the co-accused: (1932) 34 Punj.L.R. 259: A.I.R. 1933 Lah. 167; 1959 All.L.J. 340 (statement by accused in F.I.R.).

S. 30 applies to a proceeding under S. 110, Cr.P.Code, against a number of persons, one of whom has made a confession implicating other persons whose conduct is also the subject of an enquiry: I.L.R. 57 All. 312: A.I.R. 1934 All. 927. *See* also A.I.R. 1936 Sind 236; I.L.R. 17 Lah. 547: (1936) 38 Punj.L.R. 1018; A.I.R. 1937 Nag. 17 (F.B.); A.I.R. 1937 Bom. 31; A.I.R. 1937 Mad. 321: (1937) 1 M.L.J. 750; A.I.R. 1937 Cal. 39; 1936 O.W.N. 671; 1949 All.L.J. 413. But *see infra*.

Persons, against whom proceedings are being jointly taken under S. 117, Cr.P.Code in one and the same enquiry cannot be said to be on their joint trial for the same offence within S. 30: I.L.R. 41 All. 231: 49 I.C. 654.

A confession by an accused implicating himself and two others in a charge of dacoity is inadmissible against the others in a proceeding under S. 110 of the Cr.P.Code: (1917-18) 22 Cal.W.N. 408: 49 I.C. 649; (1920-21) 25 Cal.W.N. 239: 61 I.C. 793. *See* also 167 I.C. 162: A.I.R. 1937 Cal. 39.

Discovery statement made by one accused cannot be used against the non-maker accused persons but can be used only against the maker thereof and he only can be fastened with the knowledge of the concealment of the dead bodies: (1990-2) 38 B.L.J.R. 1242: 1991 Cr.L.J. 1030 (D.B.).

What is permitted to be proved having the information received from the accused pursuant to which discovery is made, is intended to be proved against such accused and not against non-informant co-accused. The statements containing information leading to discoveries under S. 27 may or may not, depending upon the facts and circumstances, be confessional. Those may be simply incriminating. To attract the provisions of S. 30, it should for all purposes be a confession, that is a statement containing an admission of guilt and not merely a statement raising the inference with regard to such a guilt: 1979 Bom.C.R. 680 (Bom.) (D.B.).

S. 10 is more effective than S. 30 in the matter of considering evidence pertaining to one accused as against the others; but S. 10 can be invoked only where "there is reasonable ground to believe that two or more persons have conspired together to commit an offence"; a conspiracy is always hatched in secret; it is normally impossible to adduce its direct evidence; it can be proved largely from inferences drawn from acts committed by other conspirators in pursuance of a common desire: A.I.R. 1988 Ker. 1: 1988 Cr.L.J. 107: (1987) 1 Ker.L.T. 928 (F.B.).

Confession of a deceased co-accused, *held*, is relevant both under Ss. 30 and 32(3) as it is a confession which, if true, would have exposed him to criminal prosecution: I.L.R. (1979) Bom. 380 (D.B.).

Where the Court decided to proceed against the accused only after ordering that the charge against the co-accused be ignored and examined him as a witness, *held*, the statement of co-accused, not incriminating himself, could not be considered under S. 30: 1978 M.P.L.J. 547(D.B.).

Whether S. 30 applies to a domestic enquiry under the Industrial Disputes Act, 1947. *See* (1974) 45 F.J.R. 329 (Mad.).

The statement by the accused in the first information report regarding the fight over property that the co-accused was also present when the fight took place is not admissible against the latter. The mere fact that the co-accused is the son of the accused makes no difference in the matter: 1959 All. Cr.R. 267: 1959 All.W.R. (H.C.) 321: 1959 All.L.J. 340.

Where a person was put up for trial alongwith accused to begin with but he turned approver and was granted permission, under these circumstances, in the absence of corroboration, it is unsafe to act upon his statement alone: 1956 Cr.L.J. 233: A.I.R. 1956 Madh. Bh. 86.

Approver's evidence—Corroboration in material particulars, if needed for relying on: 1982 Cr.L.J. 1305 (Cal.).

Extra-judicial confession—Corroboration by approver—Sufficiency: A.I.R. 1957 Him. Pra. 52: 1957 Cr.L.J. 1254.

Approver—Retracting the confession at the committal stage—Approver's evidence not corroborated on material particulars

considering the evidence of prosecution witnesses (P.W. 16 and P.W. 59), as a whole, it must be stated that far from affording corroboration to the evidence of the approver on material particulars, it contradicts the evidence of the approver. A confession cannot be regarded as a piece of satisfactory evidence, because, it is not made in the presence of the person whom it incriminates and consequently cannot be tested by cross-examination. A confession, therefore, is a much weaker type of evidence than the evidence of the approver which is not subject to such an infirmity. Though by virtue of S. 30, of the Evidence Act (I of 1872) the confession may be taken into consideration by the Court and treated as evidence upon which the Court may act, S. 30 of the Act does not say that the confession amounts to proof. As observed by the Privy Council in L.R. 76 I.A. 147: (1949) 2 M.L.J. 194, 'the danger of acting on accomplice evidence is not merely that the accomplice is on his own admission a man of bad character, who took part in that offence and afterwards to save himself betrayed his former associates, and who has placed himself in a position in which he can hardly fail to have strong bias in form of the prosecution; the real danger is that he is telling a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue'.

So far as the confessions of the approver and accused No. 3 are concerned, there is nothing to guarantee that the accounts which they have given of the incident in their confessions were independent and without previous concert as there is no proof that they were kept separate while in Police custody. As regards the confession of accused No. 4, the record does not show that when he was produced before a Magistrate and remanded to Judicial custody he was given due warning by the Magistrate and told that he should reflect whether he should make any confession at all and that any confession made by him is likely to be used against him. Finally, the evidence of the approver suffers from two infirmities. On his own showing he is a man of bad character and further at the committal stage he went back upon his confession. Thus his evidence, standing by itself cannot carry conviction: (1963) 2 S.C.R. 517: 1965 M.L.J. (Cr.) 742.

Where besides the evidence of the approver and the confessional statement of a co-accused and the evidence of recovery of a stolen property from the house of the accused there is no other evidence to show that the accused was a party to the conspiracy or that he had abetted the other accused in the commission of robbery, the conviction of the accused on that evidence under S. 392 read with S. 120-B (1), Penal Code is bad. What S. 30 of the Evidence Act says: 'may take into consideration', which presupposes there being other evidence on record to which the statement can lend assurance. In other words, there must be a basis of substantive evidence to which the confessional statement may be added. If there is substantive evidence against the accused and there is some lingering doubt the confession of the co-accused may be taken into consideration to set that doubt at rest. Corroboration of an approver's evidence by the confessional statement of another co-accused amounts to one tainted piece of evidence being corroborated by another tainted piece of evidence and the conviction thereon is bad. The mere recovery of a stolen chain from the house of the accused would not by itself be a sufficient corroboration to the evidence of the approver to make the accused guilty of the offence of conspiracy and abetment of robbery: (1965) 2 Cr.L.J. 557 (Ker.).

The general rule is that the evidence of an accomplice should not be accepted unless there is adequate corroboration in material particulars not only in respect of the commission of the crime but also in respect of the participation of each of the accused in the commission of that crime. It is also well-settled that the corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. As to what would be a material particular would obviously depend on the facts of each case: I.L.R. (1956) Cut. 195: 1956 Cr.L.J. 1208: A.I.R. 1956 Ori. 177.

Where only evidence against the accused charged under the Customs Act for attempting to export foreign exchange was the confessional statement of his co-accused stating that they had procured the foreign exchange at the instance of the accused, *held*, the confessions at best showed material contravention of the Foreign Exchange Regulations Act; the offence charged under the Customs Act is not made out: 1988 Cr.L.J. 963 (Bom.).

As statements made in answer to a notice under S. 171-A of the Sea Customs Act are not made subject to the safeguards under which confessions are recorded by Magistrates they must be specially scrutinised to find out if they were made under threat or promise from some one in authority. If after such scrutiny they are considered to be voluntary, they may be received against the maker in the same way as confessions are received and also against a co-accused jointly tried with him. S. 30 of the Evidence Act does not limit itself to confessions made to Magistrates nor do the earlier sections do so and hence there is no bar to its proper application to statements under S. 171-A of the Sea Customs Act.

When an accused is tried jointly with others right to the end, and he dies when all that remains to be done is to pronounce judgment, a confession made by him in the trial becomes relevant under S. 30 read with S. 32(3) of the Evidence Act.

Confessions of co-accused are not evidence but if there is other evidence on which a conviction can be based, they can be referred to as lending some assurance to the verdict.

A retracted confession must be looked upon with greater concern unless the reasons given for having made it in the first instance (not for retraction as erroneously stated in some cases) are on the face of them false. Once the confession is proved satisfactorily any admission made therein must be satisfactorily withdrawn or the making of it explained as having proceeded from fear, duress, promise or the like from some one in authority. A retracted confession is a weak link against the maker and more so against a co-accused.

In the instant case, there is corroboration to the evidence of the accomplice connecting the accused with the crime, from the retracted confession of the co-accused given independently and in circumstances which exclude any collusion or mal-practice. Regard being had to the principles stated above and to S. 133 of the Evidence Act there is no scope for interference with the conviction of the accused: 1968 Mad.L.W. (Cr.) 116: 1968 M.L.J. (Cr.) 591: (1968) 2 S.C.R. 641; A.I.R. 1968 S.C. 832.

2. "Affecting himself and some other".— All that is necessary for a confession to be admissible against a co-accused is that the maker should inculpate himself in all the offences in which he implicates the other co-accused, and it is not necessary that he should ascribe to himself as major a part in the commission of the crime as he ascribes to the other co-accused. The *Explanation* to S. 30 makes it clear that an attempt to commit the offence and an abetment of the offence are included in the term offence. So, even if the maker of the confession implicates himself only in an attempt to commit, or, in the abetment of, the offence, or a minor part in the commission of the offence, the admissibility of the confession against the other accused is not affected. But where the confession implicates the maker in one out of the several offences and implicates the other co-accused in the other offences as well, it cannot be said that the confession "affects himself and some other of such persons" within the meaning of S. 30, because *ex hypothesis* the confession does not affect himself, and some other persons with respect to some of the offences. The words "affecting himself and some other of such persons" in S. 30 suggest that before the confession made by one person can be taken into consideration as against other persons, who are being tried jointly with him for the same offence, it must affect the maker as well as others. If the statement does not affect the maker thereof or only ascribes to him a part not sufficient by itself to justify his conviction for the offence for which he is being jointly tried with others, it will not be a confession of the nature contemplated by the section: A.I.R. 1949 All. 132: 50 Cr.L.J. 144.

Under S. 30, in order that a confession may be used against a co-accused, it is necessary that the admission or confession implicates the maker of the confession to the same extent as it implicates the co-accused, in the commission of the offence for which they are both being jointly tried: I.L.R. (1941) Bom. 27: A.I.R. 1941 Bom. 50; A.I.R. 1941 Mad. 267.

There is nothing in the terms of S. 30 to suggest that a confession is not admissible in evidence against a person who is being jointly tried for the same offence with a man who has made the confession, if the confession minimises the guilt of him who makes it and exaggerates the guilt of the other. The

section only requires that it must affect both equally: A.I.R. 1938 All. 91: 1937 All.L.J. 1253.

In order that a confession may be used against a co-accused under S. 30, it is not necessary that it should implicate the maker substantially to the same extent as it implicates the co-accused. A confession is a statement which either admits in terms the offence or at any rate substantially all the facts which constitute the offence, and it is admissible in evidence under the section, whether the confessing accused ascribes to himself a major or minor part in the crime. Whether it has any value or not is a different matter: I.L.R. (1944) 2 Cal. 312.

It is not the law that unless a confessing prisoner implicates himself as fully as his co-accused, the statement will not be admissible, the principles being that there is no guarantee that the maker of the confession is speaking the truth. All that is required is that the confession shall substantially implicate its maker in regard to the crime with which he and his co-accused are charged: 19 W.R. 67 (Cr.); I.L.R. 2 All. 444; 4 Pat.L.T. 505: 75 I.C. 705: A.I.R. 1924 Pat. 347; 72 I.C. 497: 24 Cr.L.J. 385; 2 Pat.L.T. 125.

Where more persons than one are being tried jointly for offences, one of which is a major and the other is a minor offence, and those offences are inter-connected, if the person making the confession does not incriminate himself so far as the major offence is concerned, it cannot be said that the confession affects him as well as others: 1949 All.L.J. 60: A.I.R. 1949 All. 391. *See* also (1949) 2 M.L.J. 428.

A statement by an accused which, read as a whole is self exculpatory, cannot be relied upon for convicting the maker thereof. Even a part of it which is inculpatory cannot be relied upon by the prosecution even against him. That being so it cannot at all be used against a co-accused. [(1939) 40 Cr.L.J. 364 (P.C.) and 1960 Cr.L.J. 514 (S.C.), Rel. on]: 1977 Cr.L.J. 1516 (Gau.) (D.B.). *See* also 1984 Cr.L.J. 520 (D.B.); 1974 Raj.L.W. 459; 1977 Cr.L.R. 334 (Raj.); (1991) 3 Crimes 404 (Pat.) [A self-inculpatory confession implicating a co-accused may be relied on to convict the co-accused when it is corroborated by other evidence].

Self-implication is guarantee for truth of accusation against co-accused: A.I.R. 1930 All. 29.

The Court has discretion to use one accused's confession against the other accused as corroborative evidence; but such confession must implicate both the confessing as well as the other accused; that is the guarantee for the confession being true; but a self-exculpatory confession cannot be used against any other accused: 1974 Ker.L.T. 328 (D.B.).

The confession of an accused implicating the other accused has very little evidentiary value by itself: 6 Sau.L.R. 473: A.I.R. 1954 Sau. 129.

The confessional statement of one of the several accused may be taken into consideration against the other accused, if it fulfils the condition laid down under S. 30 of the Evidence Act, one of the conditions being that confession must implicate the maker substantially to the same extent as the other accused persons against whom it is sought to be taken into consideration. Where on a plain reading of the confession as a whole it appears that the maker was really trying to throw the blame on the other accused, the confession is not one admissible under S. 30. That statement is not substantive piece of evidence in its real sense: A.I.R. 1965 Ori. 31: (1964) 6 Ori.J.D. 184: 30 Cut.L.T. 517: (1965) 1 Cr.L.J. 315; (1962) 64 Punj.L.R. 127: 1962 All.Cr.R. 50: 1962 All.W.R. (Supp.) 18: (1962) 2 Cr.L.J. 580. Where in written statement filed by two of the four accused persons in prosecution for offences under Ss. 323, 341, they absolved themselves of the offences and put the whole blame on other accused by saying that it was the latter who assaulted the complainant and kept him under confinement, *held*, the evidentiary value of the said written statement against other accused is practically nothing: (1963) 5 Ori.J.D. 65.

Statements by accused—Admissibility—Self-exculpatory statements of an accused cannot be admitted as evidence against his co-accused, jointly tried for the same offence—Statement of an accused, though not evidence, can be used against him if it is proved—Statement of an accused under S. 342, Cr.P.Code cannot be used under this section against the co-accused: 1967 Cr.L.J. 357: A.I.R. 1967 Goa 21 (F.B.).

Per *Guha Ray, J.*—A self-exculpatory statement of accused could not be treated as a confession and could be used only as an admission as against the accused himself and it could not be used as evidence at all against

the other accused: 1960 Cr.L.J. 338: A.I.R. 1960 Cal. 183.

Applicability—Accused making confession exculpating himself and throwing blame on co-accused—Confession is not admissible against co-accused: 1969 Ker.L.T. 566.

Confession—Self-exculpatory statements —Statement of maker implicating other co-accused excluding himself—Confession of co-accused uncorroborated by other evidence cannot alone be sufficient to sustain conviction—Unless a statement unequivocally implicates the maker in the crime, as substantially as he implicates the co-accused, such a statement cannot be called a confession and is no guidance of guilt of co-accused—Cr.P.Code, 1898, S. 164: I.L.R. (1966) 16 Raj. 252: 1966 Raj.L.W. 382.

A statement before the Court, of the co-accused where it is deprecating his own guilt, is a statement seeking to clear himself at the expense of the accused and as such is inadmissible under S. 30: 152 I.C. 924: A.I.R. 1934 Cal. 724.

Where a statement is volunteered by a co-accused to the effect that when he arrived on the scene of offence after hearing the cry of the complainant he noticed another accused in the act of assaulting the complainant, such a self-exculpatory statement is inadmissible in evidence: A.I.R. 1929 Nag. 350. *See* also 7 O.W.N. 980: A.I.R. 1930 Oudh 502.

A confession by each of co-accused implicating self and co-accused as regards robbery but throwing entire burden for murder on the other is admissible as regards former but inadmissible as regards the latter: A.I.R. 1923 Lah. 293; 12 Cr.L.J. 562: 12 I.C. 650.

A confession wherein the maker does not incriminate himself suggesting himself to be a simple spectator cannot be used against another co-accused as it does not give rise to a conclusion of guilt beyond reasonable doubt and, thus, cannot be trusted. Where accused while making the confession implicated another co-accused as one of the participants in the dacoity, *held*, that confession could not be relied upon for convicting the other accused for two reasons; (*i*) there was no independent evidence to connect the other accused with the crime, and (*ii*) the confession so made was exculpatory, it did not implicate the maker to the same extent as the other accused person against whom the confession was sought to be used as maker of confession had confessed that he was standing outside. [A.I.R. 1988 S.C. 599: 1988 Cr.L.J. 842 and 1972 Jab.L.J. (Notes) 67, Rel. on]: 1992 Cr.L.J. 1150 (Madh. Pra.). Opportunity of cross-examining the co-accused, who implicated others, was not given—Whether it can be said to be an evidence in strict sense. *See* (1981) 1 M.P.W.N. 288.

Where an accused does not implicate himself in his statement, in respect of the offence of murder, but implicates himself in respect of the disposal of the dead body, such a statement is not admissible against the co-accused in respect of the offence under S. 300, I.P.Code, but is only admissible in respect of the offence under S. 201, I.P.Code: 1937 Mad.W.N. 1233. *See* also I.L.R. (1944) 2 Cal. 312.

Charge under Ss. 302, 149 and 120-B, I.P. Code—Statement by accused under S. 164, Cr.P.Code—Accused exculpating himself but only admitting his presence at the place of occurrence—Statement does not amount to confession and what is stated by accused against co-accused cannot be used as evidence against other co-accused: A.I.R. 1970 Ori. 100.

Where an accused in a case of forgery admitted that the document was innocently written by him in obedience to the other accused and without knowing that a forgery was being committed, *held*, it is not a confessional statement; the accused exculpates himself but inculpates the other accused; it cannot be used against the co-accused. [(1939) 40 Cr.L.J. 364 (P.C.) and 1957 Cr.L.J. 481 (S.C.), Foll.]: 1975 Cr.L.J. 923: 1974 Raj.L.W. 459.

3. "Tried jointly".—A statement made by one accused can only be used against another if the provisions of S. 30 of the Act are applicable: 20 All.L.J. 178: A.I.R. 1922 All. 24. Confessions recorded in the manner provided by the Criminal Procedure Code, even though made to Magistrates outside British India, if proved against the persons who made them, may be taken into consideration against others who are being tried jointly for the same offence: 69 I.C. 257: 17 Nag.L.R. 113. As to joint trial, *see* also I.L.R. 45 All. 323: A.I.R. 1923 All. 322; 2 Pat.L.T. 125.

When two persons are jointly tried, one for the offence of rape of a girl and the other for the abduction of that girl, they are not

tried for the same offence. Consequently, a confession made by one of them affecting himself and the other is not admissible in evidence against the other under S. 30: (1937-38) 42 Cal.W.N. 814: A.I.R. 1938 Cal. 479.

Accused pleading guilty.—Where the confessing accused was immediately convicted and his confession was later on used against the other accused but without asking the latter in his statement under S. 342 of the Code of Criminal Procedure, 1898 about the confession, *held*, the confession could not be used against the second accused; conviction set aside: 1981 All.W.C. 29: 1981 All.Cr.R. 13: 1981 All.L.J. 70.

A statement made by a co-accused admitting his guilt wholly or partially while being examined by the Court cannot be taken into consideration under S. 30 against other accused: (1985) 60 Cut.L.T. 91.

Where both the accused persons were not jointly tried, the statement made by one accused under S. 67 of the Narcotic Drugs and Pyschotropic Substances Act, 1985, *held*, cannot be read against another accused: 1994 Cr.L.J. (N.O.C.) 281 (Raj.).

Where one of the accused pleaded guilty and was examined at the end of the prosecution case, and declined to call any witnesses, the trial was a joint trial, so that his confession could be taken into consideration against the other accused. A conviction under S. 456, I.P.Code, based on the confessions of a co-accused who was being tried alongwith the prisoner under S. 411, I.P. Code, is wrong: 20 I.C. 136: 14 Cr.L.J. 376.

The plea of guilty of one co-accused who is removed from the dock while the other alone is tried cannot be taken into consideration against that other: I.L.R. 38 Cal. 446: (1911-12) 16 Cal.W.N. 49; 15 Punj. Re. (Cr.) 1911: 12 I.C. 981. *See* also 1965 M.L.J. (Cr.) 143, cited under Note 6, *infra*.

Death of co-accused.—Joint trial—Death of co-accused before pronouncement of judgment—*Held*, confession of deceased co-accused was relevant under S. 30 read with S. 32(3) of Evidence Act: 1968 M.L.J. (Cr.) 591: (1968) 2 S.C.R. 641: A.I.R. 1968 S.C. 832. But where the co-accused making confession implicating himself and other died immediately after confession, *held*, such confession did not fall within the purview of S. 30: (1987) 3 Crimes 540 (Cal.).

Accused absconded.—One of the requisites for admissibility of the confession of one accused against the other is that there should be a joint trial. Where a joint trial did start but could not last long as one of the accused absconded and, the case of that accused was separated under S. 512 of the Criminal Procedure Code, 1898, S. 30 of the Evidence Act was not attracted and the statement of the other accused was not usable against the absconded accused: 1980 Cr.L.J. 618 (Del.) (D.B.).

S. 30 which makes confession of an accused admissible against a co-accused applies only to cases in which the confession is made by a person tried at the time with the accused persons against whom the confession is used. Therefore, a confession of an absconding co-conspirator who is not tried jointly with other conspirators cannot be used against the latter: 1979 Cr.L.J. (N.O.C.) 95 (Goa).

Where the confessing accused at the feg end of his trial together with the other accused had absconded and his trial was separated, *held*, his confession could be used to corroborate other evidence which was by itself worthy of reliance in every detail; however, the confession could not be relied upon if its maker's separate trial had been directed at earlier stages of the trial: 1989 Cr.L.J. 336 (Pat.) (D.B.).

4. "Same offence".—'Same offence' means the identical offence and not an offence of the same kind: (1927-28) 32 Cal.W.N. 1004: A.I.R. 1929 Cal. 14. *See* also A.I.R. 1937 Sind 218. S. 30 requires that the persons concerned must be tried jointly for the same offences, which expression means an offence coming under the same legal definition, that is, under the same section of the law: A.I.R. 1950 Him. Pra. 35: 51 Cr.L.J. 1004; A.I.R. 1951 Kutch 74: 52 Cr.L.J. 473.

The words "same offence" in S. 30, mean "identical offence" and cannot mean "offence of the same kind". Where two persons are jointly tried one for an offence under S. 457/380, I.P.Code, and another under S. 411, I.P.Code, a confession made by one of them cannot be taken into consideration against the other who has been implicated in the confession of the former: 49 Cr.L.J. 207: A.I.R. 1948 Sind 65.

Before S. 30 can be applied it must be proved that a confession has been made by one of the persons who are being tried jointly

for the same offence and that the confession affects the person making it as well as some other persons so jointly being tried. The section is new to the Indian Evidence Act as contrasted with the English Law and must be construed strictly. When there is no such confession as affect, the person making it, any statement made by one accused cannot be treated as evidence against the co-accused or be taken as affording corroboration of the evidence of the approver: 1929 Mad.W.N. 698.

Where out of seven accused only two were convicted but under different charges under Indian Penal Code, *held*, the retracted judicial confession of one accused could not be relied upon against the other accused: A.I.R. 1984 S.C. 1793: (1984) 2 Crimes 914.

5. "Confession".—"Confession" means confession of the very offence for which the accused are being tried, not a confession of any offence connected with that offence nor of any other offence which may be disclosed by the evidence: I.L.R. 54 Mad. 75: A.I.R. 1931 Mad. 177: 59 M.L.J. 471; 1939 Nag.L.J. 469: A.I.R. 1939 Nag. 309.

Confession of a co-accused must be of the very offence for which they are being tried. In a case of murder the confession of one accused that the co-accused committed the murder but that he helped him in throwing the body in a pit cannot be taken into consideration: A.I.R. 1946 Mad. 124.

The word "confession" in S. 30 of the Evidence Act cannot reasonably be interpreted to mean a confession of any offence for which the accused persons are being tried but only of the very offence for which they are being tried, offence always including abetments and attempts. When a number of accused are tried for an offence under S. 302, I.P.Code, and one of them confesses to an offence under S. 201, I.P.Code, such confession cannot be used in evidence against the other co-accused: A.I.R. 1946 Mad. 124: (1945) 2 M.L.J. 479.

The language of S. 30 does not justify any distinction being made between a confession made before the trial and one made in the course of the trial; a confession made by an accused person in the course of trial, implicating himself and another accused, is admissible in evidence against the co-accused under S. 30. [(1936) 37 Cr.L.J. 508 (Lah.) and (1930) 31 Cr.L.J. 1137 (Bom.) and (1931) 32 Cr.L.J. 1222 (Nag.), Rel. on; (1924) 25 Cr.L.J. 305 (All.) and (1931) 32 Cr.L.J. 1099 (Mad.), Dissent. from]: 1976 Cr.L.J. 1947 (J.&K.) (D.B.).

A confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence. The admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession. A statement which contains self-exculpatory matter cannot amount to a confession if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. In a murder case, a statement by an accused *A* to the effect that *B* and *C* killed *D* with the help of a chord does not amount to a confession of *A* of an offence under S. 302, Penal Code and under S. 30, Evidence Act, it cannot be taken into consideration as against *B* under S. 302, Penal Code and cannot be taken into consideration as against *B* and *C* to import the knowledge of the factum of murder: I.L.R. (1962) Cut. 582: 28 Cut.L.T. 398: (1963) 1 Cr.L.J. 377.

A statement by an accused person which suggests an inference of guilt may amount to a confession though the person making the statement may directly repudiate his participation in the crime. Such a statement may be taken into consideration against the person making the statement, but it may be unsafe to use it against a co-accused: 53 I.C. 691: 20 Cr.L.J. 787.

An accused's statement which does not incriminate him is not a confession and cannot be used against his co-accused: 16 Cr.L.J. 25: 26 I.C. 329. *See* also 46 I.C. 842: 19 Cr.L.J. 826; I.L.R. 45 All. 323: A.I.R. 1923 All. 322; 59 I.C. 913; 14 Cr.L.J. 570: 21 I.C. 171; 109 I.C. 351: A.I.R. 1928 Cal. 416 (2); A.I.R. 1929 Sind 250.

A self-exculpatory statement of accused could not be treated as a confession: 1960 Cr.L.J. 338: A.I.R. 1960 Cal. 183.

The word "confession" used in S. 30 clearly means such a confession as is required to be proved at the trial as a part of the prosecution evidence it cannot, therefore, signify any matter which comes on the record at the end of the prosecution evidence, namely, answers to questions put under S. 342, Cr.P.Code. Hence, the statement made by a co-accused confessing partially or wholly, his guilt when examined under

S. 342, Cr.P.Code, cannot be taken into consideration under S. 30, against the other accused: 190 I.C. 273: 41 Cr.L.J. 886: A.I.R. 1940 Nag. 287; A.I.R. 1952 J.&K. 49: 1953 Cr.L.J. 150. S. 30 does not refer to statements made at the trial but the statements made before and proved at the trial: A.I.R. 1929 Mad. 285.

Where an accused admitted the fact of selling adulterated milk but imputed liability to his master—the co-accused, *held*, it did not amount to a confession of guilt falling under S. 30: 1976 All.L.J. 321: 1976 Cr.L.J. 503: 1976 All.W.C. 128.

Whether a statement by an accused is a confession can be sure-tested by finding out if, on its own and without other evidence, it is sufficient to enter conviction for the confessor; thus, where an accused admitted that he and his companions were marching to the Police Station at night, *held*, it amounted to a confession of being members of an unlawful assembly: 1974 Ker.L.T. 328 (D.B.).

Self-exculpatory statement of the wife to the effect that a white substance was administered on the assurance by her paramour that it would bring about good feeling did not amount to a confession and could not be used against the paramour as criminal conspiracy was not proved: 21 I.C. 378: 18 Cal.L.J. 590; 9 Nag.L.J. 80: A.I.R. 1926 Nag. 229. *See* also 1941 O.W.N. 722: 1941 O.A. 483: A.I.R. 1941 Oudh 359.

6. Confession of co-accused—Evidentiary value.—"May take into consideration" points to necessity of there being other evidence on record to which the statement can lend assurance: A.I.R. 1928 Nag. 213: 29 Cr.L.J. 609. *See* also 47 Mad.L.W. 139: A.I.R. 1938 Mad. 678.

It is not the law that the confession of one accused must be corroborated by other evidence before it can be accepted against a co-accused, the correct position is that there must be a basis of substantive evidence to which the confessional statement may be added. If there is substantive evidence against the accused and there is some lingering doubt, the confession of a co-accused may be taken into account to set that doubt at rest: A.I.R. 1942 Mad. 444: (1942) 1 M.L.J. 517. *See* also I.L.R. (1945) Kar. 419: A.I.R. 1946 Sind 43; I.L.R. (1946) All. 111: A.I.R. 1946 All. 15 (Reference to antecedent circumstances, nature of).

A confession by a co-accused may be taken into consideration against another accused; confessional statements under S. 27 come within the terms of S. 30. But there must be admissible evidence to point to the co-accused's guilt. In assessing the probative value of the evidence, a co-accused's confession may be taken into consideration. But where the evidence against the co-accused is only that he was in the company of the other accused before the crime and after the crime, there is no sufficient basis to convict him: 52 Mad.L.W. 420 (2): A.I.R. 1941 Mad. 238. *See* also A.I.R. 1942 Mad. 444: (1942) 1 M.L.J. 517.

Where a statement by an accused person implicates the other accused, it would require the strongest independent evidence if any reliance is to be placed upon it at all. Under S. 30 such a statement can only be taken into consideration; it is not evidence against the other accused: 52 Mad.L.W. 898: A.I.R. 1941 Mad. 306.

A statement of co-accused is not evidence and a conviction cannot, therefore, be based on such statement. If the prosecution wishes to rely upon such statement, it should ask for a separate trial and examine the co-accused as a witness: 43 Cr.L.J. 556: A.I.R. 1942 Cal. 426.

It would be far too dangerous to consider that a confession of a co-accused amounts to evidence against a person. It is not stated under S. 30 and it had long been settled law that a conviction cannot be based on the confession of a co-accused: 35 Cr.L.J. 1180: A.I.R. 1935 Lah. 230.

The confession of a co-accused uncorroborated by any other evidence cannot be alone sufficient to sustain a conviction, and although this is not a rule of law but of practice, it has acquired all the reverence of law. This should be all the more so in a case where the confessing accused does not implicate himself as fully and substantially as he does his co-accused: 1958 Raj.L.W. 353: 1958 Cr.L.J. 1540: A.I.R. 1958 Raj. 338.

Evidence and statement of co-accused in another case—Not a legal evidence against other accused. *See* Ss. 421, 479-A, Cr.P.Code, 1898: A.I.R. 1968 S.C. 609.

Confession of co-accused—Admissibility in evidence: 1968 Cr.L.J. 347: A.I.R. 1968 Ker. 66.

Confessional statement of co-accused—Evidentiary value of—Not a substantive evidence under S. 3 of the Evidence Act—Can be treated as evidence in general way under S. 30: 1970 Cr.L.J. 1206 (Raj.).

A confession of an accused not being declared relevant by the Evidence Act as against a co-accused cannot be treated as substantive evidence and a judgment cannot be based upon it so far as he is concerned: 65 I.C. 561: A.I.R. 1922 Nag. 146.

Under S. 30 confession of a co-accused can only be taken into consideration but it is not in itself substantive evidence: 1957 Cr.L.J. 559: A.I.R. 1957 S.C. 381.

Confession of co-accused—Not a substantive evidence: I.L.R. (1965) Bom. 648: (1965) 2 Cr.L.J. 616: A.I.R. 1965 Bom. 195.

The evidential value of a confession made by a co-accused is not very high. But the confession receives confirmation when it leads to the arrest and identification of the other accused: I.L.R. (1939) Lah. 67.

Where however, there is apart from the confessions a body of evidence and circumstances enough to support a conviction, if the evidence is accepted as free from untruth or exaggeration or serious mistake or distortion, the Court can take the confessions into consideration and consider together, the evidence, the circumstances and the confessions: I.L.R. 43 Bom. 739: 51 I.C. 657. *See* also I.L.R. 4 Rang. 45: A.I.R. 1926 Rang. 127.

Where there is no independent evidence establishing reasonably the guilt of an accused he cannot be convicted on the basis of a statement in the confession made by his co-accused. A confession of a co-accused can only be used to lend assurance to other independent evidence sufficient for sustaining a conviction: (1965) 1 Cr.L.J. 35: A.I.R. 1965 Him. Pra. 1.

The confession made by an accused can be used against his co-accused only in support of other evidence and cannot be made the foundation of conviction against him: A.I.R. 1971 Tripura 8.

The accepted position of law in regard to confession made by a co-accused is that it must be kept aside and if there is other evidence which needs strength by way of corroboration then the confession of a co-accused could be imported to lend strength: 1974 Raj.L.W. 213; (1987) 1 Crimes 844 (Ori.).

When only circumstantial evidence is available and when other features are broadly proved by trust-worthy evidence, then confessional statements lending assurance to the same conclusions can be deemed as relevant material. [1964 S.C.D. 956; 1952 S.C.R. 1091, Disting.]: 1971 S.C.D. 347.

Regarding the worth of the confession of the co-accused and its impact against the other accused the point is well settled. If it is a mere statement it has no relevance and it becomes confession of a co-accused only if it inculpates the said co-accused: (1988) 2 Bom.C.R. 42.

Before a confession of co-accused can be taken into consideration under S. 30 of the Evidence Act, that co-accused must have been tried jointly for the same offence with the other accused. Where a co-accused pleads guilty and the Court has accepted his plea and directed his removal from the dock and the trial proceeds against the remaining prisoner alone, the confession by the former is not admissible under S. 30 of the Indian Evidence Act, 1872, against the latter: 1965 M.L.J. (Cr.) 143.

A confession cannot be treated as evidence which is substantive evidence against a co-accused person; or dealing with a criminal case where the prosecution relies upon the confession of one accused person against another accused person the proper approach to adopt is to consider the other evidence against such an accused person and if the said evidence appears to be satisfactory, and the Court is inclined to hold that the said evidence may sustain the charge framed against the said accused person, the Court turns to the confession with a view to assure himself that the conclusion which it is inclined to draw from the other evidence is right. Thus, where there is evidence against the co-accused sufficient, if believed, to support his conviction then the kind of confession described in S. 30 may be thrown into the scale as an additional reason for believing that evidence: (1965) 1 Cr.L.J. 458: A.I.R. 1965 Ori. 66.

It is not as if an extra-judicial confession or confession of a co-accused has only to be rejected as of no value. It has to be considered in the facts and circumstances of the case as brought out in the other evidence adduced in the case. A confession can be acted upon even in a case where the only other evidence available is circumstantial evidence. Confession of a co-accused, if sufficiently corroborated in

material particulars can be treated as conclusive against the maker thereof and it can be taken into consideration alongwith other evidence against co-accused as well: (1994) 1 An.L.T. (Cr.) 405: (1994) 1 An.L.T. (N.R.C.) 47 (D.B.).

Criminal trial—Confession of co-accused —Evidentiary value of—Not substantive evidence and can only be referred to as lending assurance to conclusions of guilt based on independent evidence: 31 Cut.L.T. 401: (1965) 2 Cr.L.J. 385: A.I.R. 1965 Ori. 170.

Confession of co-accused—Cannot be used as substantive piece of evidence: (1964) 2 An.W.R. 43: 1964 M.L.J. (Cr.) 415: (1964) 2 Cr.L.J. 636: A.I.R. 1964 Andh. Pra. 548.

The confession of a co-accused is a very weak type of evidence because it is not taken in the presence of the other accused against whom it is sought to be used and the latter has not even the right or opportunity of testing the truth of the confession of co-accused by cross-examining him. The evidence of confession of a co-accused being by its very nature and effect tainted, the Courts have been reluctant to look to that evidence in order to seek corroboration of the tainted evidence of an accomplice. The consensus of authorities shows that the confession of a co-accused can be used to lend assurance to the other evidence on record. Confession of a co-accused cannot form the basis of a conviction but if there is other evidence, it can also be put into the scale and weighed with that evidence: (1965) 1 Cr.L.J. 393 (Punj.).

As a result of the provisions contained in S. 30, Evidence Act, the confession of a co-accused has to be regarded as amounting to evidence in a general way, because whatever is considered by the Court is evidence, circumstances which are considered by the Court as well as probabilities do amount to evidence in that generic sense. Thus, though confession may be regarded as evidence in that generic sense because of the provisions of S. 30, the fact remains that it is not evidence as defined by S. 3 of the Act. The result, therefore, is that in dealing with a case against an accused person, the Court cannot start with the confession of a co-accused person, it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. Thus, the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence. In criminal trials, there is no scope for applying the principle of moral conviction or grave suspicion. In criminal cases when the other evidence adduced against an accused person is wholly unsatisfactory and the prosecution seeks to rely on the confession of a co-accused person, the presumption of innocence which is the basis of criminal jurisprudence assists the accused person and compels the Court to render the verdict that the charge is not proved against him, and so, he is entitled to the benefit of doubt: I.L.R. 43 Pat. 554: 1964 6 S.C.R. 623: 1964 M.L.J. (Cr.) 535: A.I.R. 1964 S.C. 1184; (1965) 2 Cr.L.J. 566 (Mad.).

The confession under S. 30 cannot take the place of evidence against the co-accused or supplement evidence otherwise insufficient. The section only means where there is evidence against the co-accused sufficient, if believed, to support his conviction then the kind of confession described in S. 30 may be thrown into the scale as an additional reason for believing that evidence. It is only if there is substantive evidence against the accused and there is some lingering doubt that the confession of a co-accused may be taken into account to set the doubt at rest: (1963) 2 Cr.L.J. 92 (Ker.).

The confession of a co-accused is no evidence at all within the meaning of the Evidence Act and no conviction can be based thereon. But if there is other evidence on which a conviction can be based such confession may be referred to as lending assurance to that confession and for fortifying it: 25 Cut.L.T. 531: I.L.R. (1959) Cut. 581.

A confession intended to be used against a co-accused stands on a lower level than accomplice evidence because the latter is at least tested by cross-examination whilst the former is not. The confessions of co-accused are not evidence but if there is other evidence on which a conviction can be based, they can be referred to as lending some assurance to the verdict: (1968) 2 S.C.R. 641: A.I.R. 1968 S.C. 832.

The confession of an accused should not carry the same weight as the evidence of the same person if he was examined as a witness: 21 I.C. 166: 14 Cr.L.J. 566.

The Court must, after the most careful consideration, decide whether the degree of proof prescribed by S. 30 has been reached or not: 21 I.C. 166: 14 Cr.L.J. 566.

A confession made by a co-accused must be regarded with suspicion: 65 I.C. 561: A.I.R. 1922 Nag. 146. *See* also 72 I.C. 497: 24 Cr.L.J. 385; 1939 Mar. L.R. 19 (Cr.).

A confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of "evidence" contained in S. 3 of the Evidence Act. It can be used only in support of other evidence and cannot be made the foundation of a conviction: A.I.R. 1949 P.C. 257: (1948-49) 53 Cal.W.N. 609: (1949) 2 M.L.J. 194 (P.C.), followed in 1956 An.W.R. 926.

The confessions of a co-accused implicating his co-accused in the crime are of less evidentiary value than the testimony of an accomplice because the man in the dock cannot be cross-examined. They can only be taken into consideration under S. 30 alongwith such other evidence as there may be. While such a confession may help the Court to decide whether the other evidence is or is not credible, it cannot supply the place of positive evidence regarding the commission of the crime: (1939) 52 Mad.L.W. 258: A.I.R. 1941 Mad. 267. *See* also 1940 Rang.L.R. 104: A.I.R. 1939 Rang. 402.

When the substantive evidence is not sufficient to establish a *prima facie* case against the accused it is not permissible to use the confession of a co-accused under S. 30 as if it were itself substantive evidence, which it is not. It may only be taken to lend assurance to any relevant evidence bearing on the accused's complicity in the crime. It can in no case be used to fill up the gaps in the prosecution evidence: 188 I.C. 146: 41 Cr.L.J. 553: A.I.R. 1940 Nag. 230; A.I.R. 1929 All. 928.

The confession made by a person can be taken into consideration as against persons who are being tried alongwith him; such a statement however is always regarded as tainted and cannot be used to corroborate the testimony of the accomplice witnesses: I.L.R. 3 Lah. 144: A.I.R. 1922 Lah. 1. *See* also 13 All.L.J. 337: I.L.R. 37 All. 247; I.L.R. 9 Luck. 22: A.I.R. 1933 Oudh 355; I.L.R. 11 Rang. 4: A.I.R. 1933 Rang. 57; I.L.R. (1937) Mad. 695: A.I.R. 1937 Mad. 616: (1937) 2 M.L.J. 60 (F.B.); I.L.R. (1941) Bom. 27: A.I.R. 1941 Bom. 50; (1939) 52 Mad.L.W. 898: A.I.R. 1941 Mad. 267; 185 I.C. 205: A.I.R. 1939 Rang. 202; 1939 Nag.L.J. 442: A.I.R. 1939 Nag. 295.

A conviction based solely on the evidence of a co-prisoner is bad in law. No doubt the confession is admissible under S. 30 of the Evidence Act, but the evidence is of a very weak type. Where the confession does not appear to have been voluntarily made, it cannot be the basis for convicting the co-accused: 1956 An.W.R. 926: 1957 Cr.L.J. 623: A.I.R. 1957 Andh. Pra. 81.

The confessions of the co-accused cannot be used as evidence at all but they can be used only for the limited purpose of "lending assurance" if there is other evidence which, if believed, would support the conviction of an accused: I.L.R. (1956) Cut. 195: 1956 Cr.L.J. 1208: 22 Cut.L.T. 317: A.I.R. 1956 Ori. 177.

Confession of co-accused—Such confession can be only taken into consideration to lend support to any other evidence on which the guilt of accused can be inferred—Such confession however cannot be treated as evidence against another accused—Two persons found in a rickshaw with stolen property—One of the accused making confession implicating the other—Implicated co-accused convicted under S. 411, Penal Code, after drawing an inference on the strength of the confession that he was in joint possession of the property with knowledge that it was stolen—Presence of such co-accused with the other in the rickshaw with some stolen goods is no doubt highly suspicious against him but this circumstance by itself is not incompatible with his innocence—As the confession cannot by itself be treated as evidence against him, he must be given benefit of doubt—His conviction, therefore, is not correct—1967 Cr.L.J. 1179: A.I.R. 1967 Pat. 283.

Confession of co-accused, can only be used to strengthen evidence against accused —It does not supplement evidence against accused, which is otherwise insufficient—Other evidence should not only be worthy of reliance but must also be, by itself and unaided by confession, sufficient for finding of guilt of accused: 1970 Cr.L.J. 603 (All.).

Confession of co-accused—It is not substantive evidence—Court must begin with

other evidence and then turn to the confession to confirm its view formed on the prosecution evidence—Retracted confession against co-accused has no value—While recording confession Magistrate must not subject the accused to cross-examination—He should be allowed to narrate his own story without interference: 1970 M.P.L.J. (Notes) 37.

The confession of a co-accused can be used only to lend assurance to the other evidence. Any little doubt that might be in the mind of the Judge as regards the acceptability of the evidence may be dispelled by the confession. It is an element as it were that tilts the balance against the accused. A Court may be inclined to believe a particular witness but may not be prepared to act upon it or accept it. The confession fortifies him in accepting the evidence. In whatever way it is put, a co-accused's confession can be used not as any substantive evidence but only as an aid to make up the Judge's mind after the other evidence is scrutinised by him. [1952 S.C.J. 201, Foll.]: 1955 An.W.R. 239: 1955 An.L.T. (Cr.) 99; 1955 An.W.R. 854; (1957) 2 An.W.R. 156: 1957 M.L.J. (Cr.) 421: A.I.R. 1957 Andh. Pra. 758.

S. 30 is a very exceptional indeed an extraordinary provision by which something which is not evidence may be used against an accused person at his trial. Such a provision must be used with the greatest caution and with care to make sure that it is not stretched one line beyond its necessary intention. Where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in S. 30 may be thrown into the scale as an additional reason for believing that evidence: A.I.R. 1955 Mys. 27: 1955 Cr.L.J. 372.

A confessional statement is good evidence as against the accused making it but as against other accused that statement cannot be considered as substantive evidence. In their case the law requires the Court first to consider the evidence in the case and it is only to bring assurance as regards the guilt of the accused that the Court may look to the confessional statement of the accused making it in the case of the non-confessing accused: (1957) 59 Bom.L.R. 244: A.I.R. 1957 Bom. 226.

A confession of a co-accused cannot be used to corroborate other evidence. It might assist the Court in coming to the conclusion that the other evidence is true and therefore that an accused is guilty. But the other evidence cannot be used to corroborate the confession of the accused. In short, the conviction must be based on the other evidence: 1952 Cr.L.J. 1343: A.I.R. 1952 Cal. 618. *See* also A.I.R. 1951 Mad. 787: 52 Cr.L.J. 514; A.I.R. 1951 Kutch 12.

A co-accused's confession can only lend assurance to other evidence against a co-accused or be thrown into the scale as an additional reason for believing other evidence. It is wrong to use it to corroborate other evidence on record to seek corroboration for the co-accused's confession in the other evidence. A Court cannot make use of the co-accused's unsworn statement given behind the back of the accused and which has not been tested by cross-examination, to fill up the gap in the prosecution evidence: I.L.R. (1952) Trav.-Co. 937: A.I.R. 1953 Trav.-Co. 466.

The confession of co-accused do not furnish corroborative evidence. They are to be taken into account only after the Court is satisfied that other evidence is sufficient and credible to bring the charge home to the accused: 1954 Cr.L.J. 801: A.I.R. 1954 Kutch 22.

The confession of an accused is undoubtedly a very strong piece of evidence against the accused himself, provided it is voluntary and the Court is satisfied that it is true. But it is a weak piece of evidence as against the co-accused. There must be sufficient evidence independently of the confession which would warrant a conviction of the accused. It is only when there is such evidence that the Court may proceed further and look at the confession of the co-accused and consider it as additional evidence that would further weigh the balance against the accused: I.L.R. (1953) Bom. 670: A.I.R. 1953 Bom. 297. *See* however the undermentioned decision. The confession of a co-accused cannot be used as the basis for conviction on account of the position that it is not strictly evidence and further on account of the reason that the confession was not tested by cross-examination and the co-accused persons were not examined as witnesses. Other independent evidence must be weighed first. If it is rejected the confession of a co-accused is of no avail at

all. If the Court accepts it but nevertheless it is still hovering and is in search of its view being strengthened and assured it is to take into consideration the confession of a co-accused only for the purpose of lending assurance to its view regarding the other independent evidence on record implicating the accused with the guilt. If in spite of this confession there is other sufficient evidence on which the conviction can safely be based and the Judge is in a position to make up his conclusion then it is not necessary to refer to the confession of the co-accused: A.I.R. 1957 Ori. 172: I.L.R. (1957) Cut. 200.

Where there is no independent evidence of the offence against the accused, the confession of his co-accused cannot be considered at all. It can only serve as corroborative material of other evidence if it exists; but standing alone it must be rejected altogether: A.I.R. 1951 Kutch 74: 52 Cr.L.J. 1473.

Where an accused person after he is arrested makes a confession implicating the other accused and the confession is sought to be used against them, the prosecution must disclose the name of the officer who made the arrest and produce him, or any other person, who could speak to the circumstances under which the confession was made so as to enable the defence to ascertain by cross-examination what inducements were offered to the accused to make it: I.L.R. 36 Mad. 501: 25 M.L.J. 518: 40 I.A. 193 (P.C.).

Although a conviction founded upon the evidence of an accomplice supported only by the confession of a co-accused is justified in law under S. 133 and although the coincidence of a number of confessions of co-accused all implicating a particular accused, given independently, and without an opportunity of previous concert, might be entitled to great weight, *held*, the courts should be slow to depart from the rule of prudence, based on long experience, which requires some independent evidence implicating the particular accused: A.I.R. 1949 P.C. 257: (1948-49) 53 Cal.W.N. 609: (1949) 2 M.L.J. 194 (P.C.).

A confession of an accused person implicating a co-accused under S. 30 cannot be considered as the same thing as "testimony of an accomplice" under S. 133. S. 133 contemplates that the accomplice shall be examined as a witness. The provision that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, has no application to the case of an uncorroborated confession taken into consideration as against a co-accused jointly tried with the confessing accused under S. 30. Therefore, an accused person cannot be convicted solely on such a confession made by a co-accused: A.I.R. 1923 Nag. 213: 109 I.C. 801. *See* also A.I.R. 1929 Lah. 338; (1936) 38 Bom.L.R. 1122: A.I.R. 1937 Bom. 31; I.L.R. (1941) Nag. 506: A.I.R. 1939 Nag. 295.

The statement made by one accomplice is not strengthened by concurrent statements of any number of accomplices: 1977 M.P.L.J. 523.

Where the complainant, a Minister, who was offered a large bribe for a favour, gives impression of being interested and upon his complaint the conversation between the Minister and the accused is tape recorded, *held*, this not being a case wherein the demand emanated from the public servant, the Minister was not in the position of an accomplice; the accused could be convicted on the Minister's uncorroborated statement; on facts, the Minister's statement was amply corroborated: 1993 Cr.L.J. 2863 (Bom.).

Where the principal accused had judicially confessed that he had committed the murder on instigation by the co-accused but thereafter when he went to the co-accused for the promised help, the co-accused declined to do so, *held*, the case against the co-accused was also made out. [A.I.R. 1964 S.C. 1184, Rel. on]: 1978 Cr.L.J. 276 (Ori.) (D.B.).

Scope—Person arrested by Police making confession before Magistrate—Such person not made co-accused—As such, his confession is not admissible in evidence against the other accused: 1968 Cr.L.J. 514: A.I.R. 1968 Manipur 34.

Where the accused was neither named in the F.I.R. nor named by any witness nor any property was recovered from his possession, *held*, he could not be proceeded against merely on the basis of statement of co-accused made to Police; that being a confession made to Police will not be admissible under Ss. 25 and 26: 1993 Cr.L.J. 1499 (Madh. Pra.).

Where a person was put up for trial alongwith accused to begin with but he turned approver and was granted pardon, under these circumstances, in the absence of corroboration it is unsafe to act upon his statement alone: 1956 Cr.L.J. 233: A.I.R. 1956 Madh. Bh. 86.

Where the evidence of the approver is eliminated as against one of the accused whose name has been falsely substituted by the approver, it should not be accepted even against the other accused though to some extent it is corroborated by independent testimony: (1932) 34 Punj.L.R. 1010: A.I.R. 1933 Lah. 871. *See* also 19 Pat.L.T. 801: I.L.R. 18 Pat. 82: A.I.R. 1939 Pat. 35.

Confessional statement of accused cannot be used in corroboration of the evidence of the approver inasmuch as tainted evidence is not made better by being corroborated by other tainted evidence: A.I.R. 1930 Nag. 97. *See* also 144 I.C. 829: A.I.R. 1933 Rang. 134. But *see* I.L.R. 11 Rang. 4: A.I.R. 1933 Rang. 57.

Confession of co-accused as against another accused stands on a lower footing than the evidence of an accomplice: 146 I.C. 1061: A.I.R. 1933 Lah. 956; and it is still worse where not only did the confessing accused retract their confession but pardons are offered to two of them with a view to their giving evidence as accomplice, they refused to accept such pardon: 146 I.C. 303 (2): A.I.R. 1933 Rang. 320.

It is not quite clear whether "tainted evidence" means that the person giving the evidence is tainted morally; or that he is a person on whose word reliance cannot be placed. As regards an approver, there is the fear that he is giving evidence in order to save his skin and therefore, that he is liable to make statements which are not true if he thinks they will be for his benefit. But as regards the confession of a co-accused one cannot call this, tainted evidence, for the same reason. A person making a confession does so deliberately and after having been warned solemnly by the Magistrate of the consequences of making a confession and knowledge that he may be convicted thereon, if he still persists in his purpose and makes a confession, the statements that he makes cannot be considered to be tainted statements unless it be that they are tainted because he is an immoral person who has committed a criminal offence. But all immoral persons are not necessarily and always liars. But it is not to be supposed that because the confession is admissible, it must be believed. In such a case it has to be considered whether there are any circumstances which suggest that it is false or that some of the statements made therein are also false. The Court may take the confession of a co-accused person into consideration against the other co-accused, that is to say, the Court can only treat a confession as lending assurance to other evidence against a co-accused: 1938 Rang.L.R. 30: A.I.R. 1938 Rang. 92. *See* also A.I.R. 1939 Rang. 402.

Where apart from the approver, two accused in their confession had implicated other accused in the commission of the offence, *held*, the confessions of the two accused can be used to lend corroboration to the approver's testimony about the involvement of other accused: 1988 Cr.L.J. (N.O.C.) 50 (Cal.) (D.B.).

7. Confession—Necessity for corroboration.—A conviction based entirely on statements contained in confessions of co-accused persons is not sustainable: 11 I.C. 1001: 12 Cr.L.J. 465; 1956 An.W.R. 926. *See* also 17 Cr.L.J. 156: 33 I.C. 636; 73 I.C. 262: A.I.R. 1923 Nag. 248; A.I.R. 1928 Nag. 213.

A conviction founded solely on the confession of co-accused cannot be sustained. It must be corroborated in material particulars by independent evidence: 21 I.C. 673: I.L.R. 38 Bom. 156; 170 I.C. 201: A.I.R. 1937 Cal. 433 (S.B.).

The Indian Statute differs from the English Law and the effect of the former should not be whittled down. The question of what corroborative evidence is sufficient must depend on the circumstances of each particular case: 119 I.C. 474: A.I.R. 1929 Mad. 498. *See* also A.I.R. 1949 Assam 60.

Corroboration of the confessing accused's statement on particulars affecting a co-accused is necessary before acting upon his testimony against the co-accused—Where there is no corroboration and the only evidence is that of the confession of the co-accused in which he persists to the last, the accused cannot be convicted: A.I.R. 1950 Kutch 28; I.L.R. (1974) 2 Del. 706. *See* also (1984) 26 Del.L.T. 109.

The confession of the co-accused is not evidence against any person other than himself. It may be used as evidence against a co-accused provided it is corroborated in material particulars: 1956 Cr.L.J. 392: A.I.R. 1956 Bom. 186.

Where the corroboration consisted of statements of witnesses which though giving rise to suspicion were consistent with the innocence of the accused, *held*, that the corroboration fell far short of what is required to

support a conviction: I.L.R. 42 Cal. 789: (1914-15) 19 Cal.W.N. 584. As to what amounts to corroboration, *see* 95 I.C. 938: A.I.R. 1926 All. 603.

Where the confessional statements before the Customs Officers were fully corroborated by the witnesses, *held*, same could certainly be relied on: A.I.R. 1980 S.C. 1224: (1980) 2 S.C.C. 259: 1980 Cr.L.J. 923.

Confessions of accused tried jointly implicating others have to be taken account against the other accused as well. But by themselves they cannot be made use of to convict other accused. When alongwith such confessions there is, however, a strong evidence, the confessions go further in corroboration of such evidence.

Held, that there was sufficient corroboration: (1963) 2 Cr.L.J. 562 (Manipur).

The confession spoken of by S. 30 has the limited value of being an addition to pre-existing evidence indicating the guilt of the person being tried alongwith the maker of the confession. By itself the confession *vis-a-vis* the person not making it is not of much assistance. Where two accused persons alleged that third accused was assisted in smuggling operation in a foreign country by the fourth accused and they also identified a photograph of fourth accused as the person who had assisted third accused in loading of smuggled goods but there was no independent corroboration to their such statements, *held*, fourth accused could not be convicted: 1992 Cr.L.J. 4014: 1993 Mah.L.J. 1020.

8. Sessions trial and Magisterial trial.—In a warrant case, although the statement of a co-accused amounts to an unqualified confession, he need not be forthwith convicted and removed from the dock. The co-accused is still to be deemed to be jointly tried with the others and this confession can be used as against the others. A summons case is to be distinguished from a warrant case for the purpose: A.I.R. 1928 Lah. 880. *See* also A.I.R. 1937 Nag. 17: I.L.R. (1937) Nag. 315 (F.B.).

In considering the question whether the confession of the co-accused who pleaded guilty can be used against the other co-accused under S. 30, a distinction must be made between summons and warrant cases on the one hand and sessions cases on the other. In sessions cases if the accused pleads guilty, the Court cannot try him but has forthwith to convict him. His conviction cannot be deferred so as to enable the Court to use his confession against his co-accused. But in warrant cases, it is discretionary with the Magistrate to defer conviction of the accused who pleads guilty and use his confession against the other co-accused under S. 30: I.L.R. (1937) Nag. 315: A.I.R. 1937 Nag. 17 (F.B.). It is the duty of the Judge to warn the jury that it would be dangerous in the extreme to act on a confession put into the mouth of the accused by a witness who has a strong motive for implicating some one else in the offence or crime. The jury must further be warned that confessions are not always true and that they must be checked more particularly in a murder case, in the light of the whole evidence on the record in order to see if they carry conviction: 58 Mad.L.W. 523: 1945 All.L.J. 511: A.I.R. 1945 P.C. 181 (P.C.).

9. Confession—Acceptance in part.—It cannot be said that a confession must be accepted as a whole. A confession must be accepted in its entirety so far as it affects the person making it. That is to say, anything which he puts forward in his confession by way of mitigation must be accepted, however, improbable it may appear: I.L.R. (1946) All. 111: A.I.R. 1946 All. 15.

Where the accused makes a confessional statement part of which is inculpatory and part exculpatory, and there is evidence to show that the exculpatory portion is false, the Court can ignore that portion of the confession and use the rest of it against him: (1945) 47 Punj.L.R. 11: A.I.R. 1945 Lah. 91.

Where both the accused in a case have made confessions severally, agreeing in material particulars and the differences easily explained, their credibility is not affected nor their admissibility. Where part of the confession is found to be false and the rest true and corroborated by other evidence, the confession can be admitted as to the part found to be true and the other part rejected: A.I.R. 1952 Him. Pra. 81: 1952 Cr.L.J. 1720.

A confession can be accepted by Court in part, after rejecting portions which are false: 6 O.W.N. 1017: A.I.R. 1930 Oudh 113: I.L.R. 5 Luck. 255. *See* also 1930 Mad.W.N. 785.

But *see* A.I.R. 1930 All. 192: 121 I.C. 550 [In cases where the sole evidence against the accused is that of a retracted confession, such confession, if it is relied on, must be relied on as a whole and not only in part].

Where a confession or an admission is separable there can be no objection to taking inculpatory part into consideration which appears to be true and reject the exculpatory part which is false: A.I.R. 1978 S.C. 1096.

Criminal trial—Voluntary confession by accused and circumstantial evidence proving guilt of accused—Court can reject the part of confession proved to be false by prosecution evidence and accept rest of confession: 31 Cut.L.T. 401: (1965) 2 Cr.L.J. 385: A.I.R. 1965 Ori. 170.

10. Retracted confession.—I.L.R. 43 Bom. 739: 51 I.C. 657. *See* also A.I.R. 1938 Lah. 252; A.I.R. 1938 Pat. 108: I.L.R. 16 Pat. 612: 173 I.C. 507: 17 Mys.L.J. 238, retracted confession cannot be used against the maker and the co-accused: A.I.R. 1927 Lah. 765.

The provisions of the Evidence Act do not prevent the Court from taking into consideration a retracted confession against the confessing accused and his co-accused. The amount of credibility to be attached to a retracted confession, however, would depend upon the circumstances of each particular case. As a matter of prudence and practice a Court would not ordinarily act upon it to convict a co-accused without the strongest and fullest corroboration on material particulars. The corroboration in the full sense implies corroboration not only to the factum of the crime but also as to the connection of the co-accused with that crime: A.I.R. 1959 S.C. 1; 1978 Ker.L.T. 963 (D.B.).

The rule of prudence does not require that each and every circumstance mentioned in the confession with regard to the participation of the accused persons in the crime must be separately and independently corroborated. It is well-settled by authorities that a general corroboration of retracted confession so as to lend assurance to the Court of the truth of the facts stated therein is sufficient: (1964) 6 Ori.J.D. 184: 30 Cut.L.T. 517: (1965) 1 Cr.L.J. 315: A.I.R. 1965 Ori. 31.

Retracted confession—Admissibility against co-accused—A retracted confession can be used against a co-accused provided it gets material corroboration: (1962) 4 Ori.J.D. 156: I.L.R. (1962) Cut. 366: (1964) 2 Cr.L.J. 487.

A retracted confession receiving some general corroboration tallying with the confession may justify conviction: A.I.R. 1988 Ker. 1: 1988 Cr.L.J. 107: (1987) 1 Ker.L.T. 928 (F.B.); 1982 Cr.L.J. 2040: 22 Del.L.T. 139 (Retracted confession can be used to indicate *prima facie* involvement of other accused); 1975 Cr.L.J. 354 (Gau.) (D.B.) (Retracted confession may be taken into consideration against co-accused also).

An accused cannot be convicted on the basis of a confession of a co-accused alone, which does not implicate the author of it in the offence and which has also been retracted by the maker. A confession may subject to certain limitations be proved against the maker of it but it is not 'evidence' against the co-accused in the strict sense within the contemplation of S. 3, Evidence Act. It can only be taken into consideration against the co-accused under S. 30 which requires that the confession must implicate the maker substantially to the same extent as the other accused person against whom it is sought to be taken into consideration. S. 30 appears to be based on the view that an admission by an accused person of his or her guilt provides some kind of sanction in support of the truth of the confession against the person making it as well as against others. Since a confession is neither required to be given on oath nor is it required to be made in the presence of the other accused persons whom it also implicates and also it cannot be tested by cross-examination, it is not wrong to describe it as an extremely weak type of evidence which should not be permitted to form the foundation of a conviction but only be used in support of other evidence. On this view, the confession of a co-accused would not be in itself substantive evidence and can only be taken into consideration as provided by S. 30. The position of a retracted confession of an accused would *a fortiori* be still worse. In any case, even when the Court takes such a confession into consideration against a co-accused it requires, as a matter of practice and prudence, strongest and fullest corroboration on material particulars as to the connection of the co-accused with the crime: 1963 Cur. L.J. 542: (1964) 66 Punj.L.R. 530: (1964) 2 Cr.L.J. 335: A.I.R. 1964 Punj. 397.

Ss. 30 and 133—Retracted confession of co-accused corroborated in material particulars can be taken into consideration against non-confessing accused: I.L.R. (1962) Cut. 582: 28 Cut.L.T. 398: (1963) 1 Cr.L.J. 377 (Ori.).

A retracted confession must be looked upon with greater concern unless the reasons given for having made it in the first instance (not for retraction as erroneously stated in some cases) are on the face of them false. Once the confession is proved satisfactorily any admission made therein must be satisfactorily withdrawn or the making of it explained as having proceeded from fear, duress, promise or the like from some one in authority. A retracted confession is a weak link against the maker and more so against a co-accused: (1968) 2 S.C.R. 641: A.I.R. 1968 S.C. 832.

Retracted confession by one of co-accused—Use of, against other co-accused—It has very weak evidentiary value—Great extent of corroboration is necessary for conviction. Case-law discussed: (1968-69) 73 Cal.W.N. 467: 1970 Cr.L.J. 403.

Confession is not evidence as defined by S. 3—It may be regarded as evidence in generic sense—The value of a retracted confession as against a co-accused is practically nil and it cannot form the basis of conviction without substantial and independent corroboration: 1970 M.P.L.J. 16.

The very existence of S. 30 postulates that a confession of a co-accused may be used in cases where the evidence afforded lacks the requisite volume and certainty to insure conviction. The retraction of a confession may throw doubt either on the truth of it or on the fact that it was voluntarily made, but it certainly does not follow because a confession is retracted that it was either untrue or involuntary and the truth or voluntariness of a confession operates equally—where a confession is self-inculpatory—in respect of the person who made it and the person implicated therein. The motive for making a self-inculpatory confession is the very simple one of an expectation of leniency in the matter of sentence and where a number of people are jointly tried and some have made confessions to a Magistrate before the trial and some have not, it is again not unnatural that persons who have made confessions should retract them under pressure and persuasion by their fellows who have not confessed. Retracted confessions must no doubt be used with caution but when it is possible to come to the conclusion that the confessions cannot be otherwise than true, they may be taken into consideration in connection with the evidence appearing in the case, whether they are retracted or not: I.L.R. (1941) Nag. 169: A.I.R. 1941 Nag. 115. *See* also I.L.R. (1944) Mad. 308: (1943) 2 M.L.J. 634 (F.B.).

A retracted confession by an accused may form the basis of a conviction of that accused if it receives some general corroboration from other independent sources. It cannot, however, be the basis for convicting co-accused though it may be taken into consideration against co-accused also. It is entirely wrong to think that a confession can lead nowhere: A.I.R. 1985 S.C. 866: 1985 Guj.L.H. 559: 1985 Cr.L.J. 1173: (1985) 2 S.C.C. 341; 1988 B.B.C.J. (H.C.) 434; 1989 Cr.L.J. (N.O.C.) 4 (Cal.) (D.B.).

The confession referred to in S. 30 cannot be restricted to an unretracted confession and there is nothing to prevent a Court from convicting after considering the confession but the rules of practice of the High Courts in India are to be observed while exercising the discretion: (1913) 15 Bom.L.R. 975: I.L.R. 38 Bom. 156.

Though a retracted confession, if believed to be true and voluntarily made, may form the basis of a conviction, the rule of practice and prudence require that it should be corroborated by independent evidence: A.I.R. 1957 S.C. 216: 1957 Cr.L.J. 481.

Where there is no real corroboration of the retracted confession, the accused are entitled to the benefit of the doubt and must be acquitted: 16 Cr.L.J. 469: 29 I.C. 101. *See* also 41 I.C. 155; 26 P.R. 1916 (Cr.): 34 I.C. 642; 5 P.L.R. 1915; 16 Cr.L.J. 157: 27 I.C. 221; 5 P.R. 1911 (Cr.): 10 I.C. 857; A.I.R. 1938 Lah. 252.

An accused can be convicted solely upon his own confession, even if retracted, if the Court finds it to be true and voluntary but not merely on the confession of his co-accused; that would require the strongest and fullest corroboration. [1952 Cr.L.J. 839 (S.C.), Disting.]: 1982 Cr.L.J. 2346 (Ori.) (D.B.).

Extra-judicial confession by boys cajoled or frightened but retracted before the committing Magistrate does not prove a case against persons jointly accused with the boys: 14 P.R. 1911 (Cr.): 12 I.C. 973.

As to value to be attached to a retracted confession of a co-accused, *see* 15 Pat.L.T. 711: A.I.R. 1934 Pat. 586; 148 I.C. 8: A.I.R. 1934 Pesh. 11; 148 I.C. 1064: A.I.R. 1934 Rang. 30; A.I.R. 1955 Assam 51: 56 Cr.L.J. 437.

31. Admissions not conclusive proof, but may estop.—Admissions are not conclusive proof of the matters admitted but they may operate as estoppels under the provisions hereinafter contained.

A retracted confession requires strong corroboration in all material particulars: 72 I.C. 497: 14 Mad.L.W. 474; A.I.R. 1937 Mad. 321: (1937) 1 M.L.J. 750; A.I.R. 1937 Mad. 755; A.I.R. 1955 Him. Pra. 15: 1955 Cr.L.J. 679.

Confession—Retracted—Corroboration by another retracted confession. *See* 55 Cr.L.J. 1329: A.I.R. 1954 Manipur 6.

The weight to be given to a retracted confession depends upon the circumstances under which it is made and on the intrinsic value of the confession: 18 Cr.L.J. 774: 41 I.C. 150; 19 I.C. 179: 14 Cr.L.J. 179.

Retracted confession—Voluntary confessions of accused recorded complying with provisions of S. 164, Cr.P.Code—Confessions detracted but retraction unbelievable—Such confessions materially corroborating one another and also evidence of approver—Such confessions can be relied upon not only to prove their own guilt, but also the guilt of their co-accused: 1968 Cr.L.J. 514: A.I.R. 1968 Manipur 34.

Where a confession is made 14 days after arrest by the Police but is retracted at the earliest opportunity before the trial Magistrate, its evidentiary value is negligible as against the co-accused: A.I.R. 1934 Lah. 718. The confession of one was admissible against the other because it was not self-exculpatory and the fact that the confession was subsequently retracted did not render it inadmissible but it merely diminished the weight to be attached to it: (1927-28) 32 Cal.W.N. 1004: A.I.R. 1929 Cal. 14.

A retracted confession of a co-accused cannot alone be sufficient evidence to justify a conviction, but if that confession is unrebutted it is admissible as a very strong piece of evidence: 114 I.C. 711; A.I.R. 1929 Oudh 167. *See* also A.I.R. 1930 Lah. 667; A.I.R. 1930 Oudh 412; A.I.R. 1930 Oudh 353.

A retracted confession does not come within the definition of evidence contained in S. 3. But, where there is evidence against the co-accused sufficient, if believed to support his conviction, then the kind of confession described in S. 30 may be thrown into the scale as an additional reason for believing that evidence: A.I.R. 1955 Punj. 110: 1955 Cr.L.J. 737.

Retracted confession of co-accused—Though it can be taken into consideration against the other accused it can be used only in support of other evidence—It cannot be made the foundation of a conviction: 1970 Cr.L.J. 9: A.I.R. 1970 S.C. 45.

The retracted confession of an accused can have very little weight as evidence against a co-accused; being untested by the cross-examination, it necessarily has even less value than the evidence of another accomplice which is not corroboration of the evidence of an approver: 230 I.C. 431: 48 Cr.L.J. 651.

It has been the well settled practice of the Courts in India not to convict on the evidence of an approver, unless it has been corroborated in material particulars. Similarly, it would be unsafe to take into consideration the retracted confessions of a co-accused against the other accused unless it is corroborated by reliable evidence in material particulars. An approver's evidence has always been regarded as tainted evidence and one piece of tainted evidence should not be taken as corroborated another piece of tainted evidence: I.L.R. 25 Pat. 347: A.I.R. 1947 Pat. 90: 27 Pat.L.T. 298.

Where the retracted confession is to be considered against the accused who makes it, it is not necessarily corroboration in the full sense that is required. It may be corroboration by circumstances which satisfy the Court that when the accused confessed, though the confession was retracted, the confession is true and voluntary and may be made the basis of conviction of the accused who makes it: I.L.R. (1945) Kar. 419: A.I.R. 1946 Sind 43.

Section 31—Synopsis.

[*See* also Ss. 17 to 23].

1. Scope.

2. Admission—Evidentiary value of.

3. Admission in previous suit.

4. Admission in pleadings/written statement.

5. Admission in evidence before Court.

6. Admission in criminal case—Use of in compensation case.

7. Admission in ignorance of legal rights.

8. Admission/concession by Counsel.
9. Admission to be read as a whole.
10. Admission shifts the onus of proof.
11. Miscellaneous.

---

1. Scope.—*See* 103 I.C. 34: A.I.R. 1927 All. 659; I.L.R. 8 Pat. 776: A.I.R. 1929 Pat. 245. What S. 31 means is that an admission, unless it amounts to an estoppel is not conclusive as against the maker, as it is open to him to prove that it was made under a mistake of law or fact or that it was made under threat or inducement: 1939 Rang.L.R. 97: A.I.R. 1939 Rang. 219. Admissions are not conclusive proof and though they may operate as estoppel, it is open to a party to correct an admission made by him if it is shown to have been made under a *bona fide* mistake and has not caused any prejudice to the other side: 1937 A.M.L.J. 86. *See* also 1942 O.W.N. (B.R.) 535: 1942 O.A. (Supp.) 430.

Admissions are relevant against the maker thereof and as laid down in S. 31, they are not conclusive proof of the matters admitted, but they may operate as estoppel: (1988) 2 Hindu L.R. 359 (P.&H.) (D.B.); (1973) 2 S.C.J. 518; 1979 All.L.J. (N.O.C.) 54. *See* also 1982 Lab.I.C. 1902 (All.) (D.B.).

S. 31 lays down that an admission, unless it operates as an estoppel, is not conclusive proof but only raises a presumption of its truth unless the contrary is shown; in every estoppel there is representation which tantamounts to the admission of the existence of a fact; if that admission is acted upon by the person to whom it is made, the maker of the admission cannot subsequently be permitted to show that it was a false admission. Thus, a person taking a tenancy as a sole proprietor of a firm, cannot later on raise an inconsistent contention: A.I.R. 1983 Del. 555: (1983) 1 Ren.C.R. 33: (1983) 1 Ren.L.R. 27.

Where a suit was instituted by a partner of a registered firm claiming to be a tenant as proprietor of the firm but later on he sought an amendment in the plaint so as to substitute the firm as the plaintiff-tenant, which application was dismissed, the admission fell under S. 11(2) and was relevant for making probable or improbable the existence or non-existence of the fact in the issue, that is the plaintiff's tenancy; whether the admission amounts to an estoppel or not, but it certainly is evidence but not 'conclusive proof'. [A.I.R. 1956 S.C. 593, Rel. on]: A.I.R. 1972 Del. 221.

Admission of fact.—Effect: (1957-58) 62 Cal.W.N. 589.

Admissions under S. 31 may become foundations of rights coupled with other facts, by themselves admissions are nothing more than items of evidence which are not in any sense final. They have no quality of conclusiveness. The essence of a waiver is estoppel and where there is no estoppel, there is no waiver. The fact that the lessee of property mortgaged who has been given a right to redeem the property by lessor, fails to redeem the property does not estop him from claiming to pre-empt the same, from the person to whom the property is subsequently sold by the lessor, and who has redeemed the property: (1953) 55 Punj.L.R. 377: A.I.R. 1953 Punj. 171.

Before the right of a party can be considered to have been defeated on the basis of an alleged admission, the implication of the statement made by him must be clear and conclusive; there should be no doubt or ambiguity about the alleged admission: A.I.R. 1971 S.C. 1542.

In order to bind a party by his admission the admission must be clear, precise and unambiguous. An admission is only a piece of evidence and the weight to be attached to it depends upon the circumstances under which it has been made. Thus, before the right of a party can be considered to have been defeated on the basis of an alleged admission made by him in a prior litigation, the implication of the statement must be clear and conclusive. There should be no doubt or ambiguity about the alleged admission: A.I.R. 1973 Raj. 208: 1972 Raj.L.W. 522: 1972 W.L.N. 784.

Admission—What is—Kinds of admission—Judicial and extra-judicial admission—Distinction: (S.) A.I.R. 1957 All. 1.

Ignoring the provisions of S. 31 of the Evidence Act the Court cannot assume that whatever is written down in the form of admissions is conclusive proof of the words and happenings mentioned therein: (1969) 71 Bom.L.R. 569: I.L.R. (1969) Bom. 1024: A.I.R. 1970 Bom. 312.

A compromise is tantamount to an admission, and although an admission is not conclusive it can still operate as an estoppel under S. 31: 1942 O.W.N. (B.R.) 308: 1942 All.W.R. (Rev.) 188.

Where an admission was made in a compromise effected between parties to the suit but not incorporated in any decree as the suit itself was dismissed in default, *held*, being a gratuitous admission, it did not amount to an estoppel; it could be withdrawn or shown to be untrue and erroneous as and when it was sought to be relied upon against its maker; it can, however, be considered as a piece of evidence alongwith other evidence but not as a binding admission; of course, the position would have been different if an executable decree based on it had been passed: (1985) 11 All.L.R. 172.

A compromise entered into between parties in a criminal case for offences under S. 277 and the later part of S. 506 of the Indian Penal Code is illegal and void *ab initio* as the offences are not compoundable; they are not admissible even as admissions. On facts, *held*, there was no admission in the compromise even otherwise: A.I.R. 1979 All. 71.

The word 'statement' has been used in its primary meaning, namely, something that is stated. Under S. 17 read with S. 21 statements made by persons may be used as admissions against them even though they may not have been communicated to any other person: A.I.R. 1973 Mys. 280 (D.B.).

Use of statement recorded under S. 131 of the Income-tax Act, 1961 as an admission. *See* (1986) 99 Mad.L.W. (S.N.) 61.

2. Admission—Evidentiary value of.— The provision that 'admission is not conclusive proof' is to be considered in regard to two features of evidence; (*i*) the weight to be attached to an admission, would depend upon whether the admission is clear, unambiguous and relevant evidence; and (*ii*) even a proved admission sought to be used against its maker who as a witness is under cross-examination, he should be given an opportunity, if the admission is to be used against him to offer his explanation and to clear up the point of ambiguity or dispute which is a general salutary and intelligible rule. A mere proof of admission, if its maker has concluded his evidence, will be of no avail; it cannot be utilised against him: A.I.R. 1977 S.C. 1712: (1977) 2 S.C.C. 49: (1977) 2 S.C.R. 671.

A party's admission as defined in Ss. 17 to 20 fulfilling the requirements of S. 21, is substantive evidence *proprio vigore*. An admission, if clearly and unequivocally made, is the best evidence against the party making it and though not conclusive, shifts the onus on to the maker on the principle that "what a party himself admits to be true may reasonably be presumed to be so and until the presumption was rebutted, the fact admitted must be taken to be established": A.I.R. 1977 S.C. 1724: (1977) 3 S.C.C. 540: (1977) 3 S.C.R. 538.

The statements in the nature of admissions in a petition under S. 488, Cr.P.Code, when duly proved, may be admissible in evidence but such admissions are not conclusive proof of the matters admitted: (1971) 1 Cut.W.R. 325.

An admission is the best evidence of a point in issue, and though not conclusive, is decisive of the matter unless successfully withdrawn or proved erroneous: (1969) 35 Cut.L.T. 1039; A.I.R. 1974 All. 46: 1973 All.L.J. 473 (D.B.); A.I.R. 1960 S.C. 100: (1960) 1 S.C.R. 773. *See* also (1988-2) 94 Punj.L.R. 412.

Though the admission is a very material piece of evidence against a party making the same, yet the maker of it can always prove it to be wrong and even withdraw the same: (1984) 86 Punj.L.R. 96; (1994 -2) 107 Punj.L.R. 277.

Admission—Person making it can lead evidence to prove it to be erroneous: 1967 Cr.L.J. 1036: A.I.R. 1967 Ori. 110.

Though admissions are not conclusive evidence of the matter admitted, where there is no rebutting evidence at all, the admissions are enough to establish the facts contained in them: 1941 O.A. (Supp.). 420: 1941 All.L.J. (Supp.) 89.

Admission—Evidentiary value: A.I.R. 1968 Ori. 99.

An admission made by a party is a very strong proof against him and the fact admitted must be taken to be true unless the person making the admission explains that it was made under circumstances which do not make the admission binding on him. Inference as to partition drawn from admission of parties: 134 I.C. 888: 53 Cal.L.J. 222. *See* also 8 O.W.N. 306: A.I.R. 1931 Oudh 246; 1939 R.D. 299.

An admission need not be treated as conclusively binding on the person right to be bound by it. For, it is open to him to show that it has been made by mistake or it is untrue or that it was made fraudulently. Unless

the party bound by the admission is precluded by the operation of the doctrine of estoppel from showing that the admission is not binding, an admission is not conclusive proof of the matters admitted: A.I.R. 1955 Cal. 594.

Admission made under misapprehension—Binding, nature of: A.I.R. 1967 Pat. 287.

An admission is not conclusive evidence against any party. If from the facts it could be shown that the admission was wrong it would fail to have any effect. It is only *prima facie* evidence against the party making the admission and shifts the burden of proof: A.I.R. 1947 All. 281; I.L.R. (1956) Hyd. 69: A.I.R. 1956 Hyd. 43; (1957-58) 62 Cal.W.N. 589.

An admission does not conclude the party making it. He is entitled to explain it unless the person to whom it is made has acted on its faith which would preclude the author from going back on it and speaking the truth on the principle of estoppel: A.I.R. 1955 Trav.-Co. 199.

The proposition of law that admissions can be explained by the party concerned, *held*, cannot be applied where it was not contended that the statement made by the plaintiff were either inadvertently made or that there was a wrong recording by the trial Court: (1994) 1 M.L.J. 205 (D.B.).

A party can show that either the admission by him was made under a mistake or under different circumstances. And unless there has been a prejudice to the opposite party on account of the admission having been acted upon or on account of any representation made by the admitting party, it would not bind the party unless it amounted to an estoppel. Further, where each party makes admissions detrimental to itself, the mutual admissions cancel each other, with the result that the question for consideration may have to be decided on the material on record irrespective of such alleged admissions: 1961 M.P.L.J. 1251: 1961 Jab.L.J. 1489: A.I.R. 1962 Madh. Pra. 141.

Admissions are substantive evidence by themselves, though they are not conclusive proof of the matters admitted. The admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether such party when appearing as witness was confronted with those statements in case it has made a statement contrary to its previous admissions: A.I.R. 1971 Pat. 215 (D.B.).

Ss. 31, 21—Admissions though not conclusive proof of matters admitted, are relevant under S. 21: I.L.R. (1964) 1 Mad. 1012: A.I.R. 1965 Mad. 266.

An admission is the best evidence that an opposite party can rely upon, and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous. The value of an admission contained in a registered deed of adoption formally executed by a party with an endorsement showing that the executant was fully aware of the contents of the deed executed with due deliberation and full understanding, is considerable unless it is explained satisfactorily. The admission of an adoption in a deed amounts to an admission both of the fact and of the validity of the adoption which shifts the burden of proving the contrary to the party which made that admission: 1964 All.L.J. 749: A.I.R. 1965 All. 258.

An admission can be explained by direct or circumstantial evidence but it is not necessary that the explanation must come in the pleading or in the evidence of the person making it: A.I.R. 1971 Pat. 363 (D.B.).

It is well-settled law that an admission is a substantive evidence of the fact admitted. In order to prove it the attention of the person admitting it need not be drawn to it before it becomes substantive evidence. The weight to be attached to an admission made by a party is a matter different from its use as admissible evidence. [A.I.R. 1966 S.C. 405, Foll.]: A.I.R. 1974 Ori. 120: (1973) 1 Cut.W.R. 809(D.B.).

An admission, it is well settled, is the best evidence that an opposite party can rely upon; though not conclusive, it is nevertheless decisive on the point unless proved erroneous or is validly allowed to be withdrawn. [A.I.R. 1954 S.C. 355; A.I.R. 1977 S.C. 1724; I.L.R. 11 Cal. 588; A.I.R. 1946 Pat. 278 and A.I.R. 1976 Raj. 249, Foll.]: 1985 R.D. 135; A.I.R. 1971 Pat. 363(D.B.); A.I.R. 1982 Madh. Pra. 17: 1983 M.P.L.J. 679 (D.B.).

The law by no means regards admissions as conclusive proof of the matters admitted; for admissions are but statements which do no more than suggest an inference as to some fact or facts in issue. The Court should

examine admissions to see if they suggest a clear inference on a fact in issue against the party making it; the admission must be unequivocal, comprehensive and must go the whole-hog, as it were, on the point at issue; an admission falling short of the totality of the requisite legal proof of the fact in issue would be only a truncated admission, and cannot support a valid judicial determination, unless there is other evidence to make up deficiencies in the admission: A.I.R. 1980 Mad. 212: (1979) 2 M.L.J. 466: (1979) 92 Mad.L.W. 736.

An admission is not conclusive, but unless it is explained suitably by a party who has made such an admission or who is bound by such an admission, it will have to be used against him: A.I.R. 1973 Mys. 280 (D.B.).

The evidentiary value of admissions depends upon the circumstances of the case, but ordinarily an admission is a valuable piece of evidence and it cannot be easily rejected: A.I.R. 1973 Mys. 280 (D.B.).

As an abstract proposition of law, the prosecution may be allowed in a given case not to be bound by stray admissions of its witnesses if it is shown that those admissions have been made either on account of mistake of fact or law, or on account of the witnesses being interested in the accused or if it is proved that he had any motive to give a false statement and the statement given, was not correct: 1979 Raj.L.W. 37.

Under Ss. 17 and 31, an admission is not a conclusive proof of the matter admitted; to arrive at its own conclusion the Court is duty bound to thoroughly scrutinise the entire evidence; it should not base its judgment on truncated or extracted portions of an 'admission' unless the same is both unequivocal and comprehensive; merely because the plaintiff admitted that 15 or 16 years back, the defendant had in his presence stated that the plaintiff had no share in the property, *held*, did not amount to an admission, much less a clear, certain and definite admission which law requires it to be. Case remanded to the Board of Revenue for consideration of other materials on record for making up its mind: 1985 R.D. 444.

A duly proved admission, even if its maker appears as a witness or not or has been confronted with it or not, is admissible in evidence. The purpose of contradicting the witness under S. 145 is quite different from the purpose of proving the admission; an admission is substantive evidence of the fact admitted while a previous statement used to contradict the witness is not; the latter only throws doubt on the veracity of the witness; but the weight to be attached to an admission as evidence is an altogether a different thing: (1972) 38 Cut.L.T. 161.

A.I.R. 1946 Lah. 65 (F.B.) does not give due weight to the difference between the language of Ss. 17 and 32 on the one hand and S. 145 on the other. S. 145 specifically requires the use of his previous statement, written or reduced into writing, in cross-examination of the witness to contradict him by drawing his attention to its relevant portions; there is no similar provision as to the statements admissible under Ss. 17 to 21 and 32. It was observed in A.I.R. 1957 All. 1 (F.B.) that for proving the parties' admissions, they need not be shown to them in their cross-examination provided the admissions were clear and unambiguous and that the party producing them could use them as substantive evidence as well without drawing the opposite party's attention to them in cross-examination: A.I.R. 1973 Mys. 280 (D.B.).

3. Admission in previous suit.—The statement of a person in a previous suit in respect of a particular property may be used as his admission in a subsequent suit in respect of the same property; he may be confronted with the same: A.I.R. 1982 Cal. 294: (1982) 1 Cal.L.J. 256: (1982) 1 Cal.H.N. 206 (D.B.).

The admission contained in a pleading of a former litigation, is indeed an admission in the true sense and is certainly available to be used for all purposes. It cannot be kept out by saying that it was an admission in a former litigation and was meant for that proceeding alone and, thus, cannot be taken to be an admission binding in any other suit or for all times to come. Such a distinction is not open in law to be made. If it is an admission, it is so and is certainly an admission for all times to come. Unless explained away properly, an admission is the best available support for the adversary: A.I.R. 1971 Ori. 267: (1971) 1 Cut.W.R. 253.

Admission by plaintiff in previous suit—Binding on him in fresh suit, unless rebutted: A.I.R. 1968 Cal. 550.

Admissions—Adverse admissions made in a prior suit, is not conclusive — Such

admissions are, however, strong pieces of evidence against the maker—It can be proved wrong or untrue and the burden of proof is on the party making it—Such admissions made in a prior suit, though not binding on the party making it, have great evidentiary value: A.I.R. 1968 Raj. 51.

The Court is entitled to consider the admission solemnly made by a party in the course of a proceeding, in the other suit if it concerns the subject-matter in dispute. However, such an admission cannot be regarded as conclusive and the party can show that it was not true: A.I.R. 1984 Pat. 191: 1984 Pat.L.J.R. 407.

It is well known that an admission by the adverse party is decisive, though not conclusive proof of the facts admitted; an admission in the written statement in another litigation is a substantive evidence in a subsequent litigation even if its maker is not confronted with it; but the maker of the admission may explain it away by showing that it was not true and was made to serve an ulterior purpose. [A.I.R. 1967 S.C. 341 and A.I.R. 1966 S.C. 405, Foll.]: (1972) 38 Cut.L.T. 110. *See* also S. 18, Note 18, *supra*.

4. Admission in pleadings/written statement.—Though parties' averments in pleadings may become admissions and may be used against their maker but their value and the rule of admissions are controlled by Ss. 18 to 23 and S. 31; that is why S. 31 cautions that admissions are not conclusive proof but may operate as estoppel. The law is settled that admissions of a party bind the other if they have a common interest but not their status as parties arrayed in the proceedings. Case law discussed: (1994) 2 An.L.T. 445.

An admission by a party in his pleading can be considered against him. What a party admits to be true may reasonably be presumed to be so, unless that presumption is satisfactorily rebutted by other evidence: 1958 M.P.C. 351: 1958 Jab.L.J. 512: 1958 M.P.L.J. 513: A.I.R. 1958 Madh. Pra. 261.

Admissions in pleadings or judicial admissions by themselves can be made the foundation of the rights of the parties. [A.I.R. 1974 S.C. 471, Rel. on]: A.I.R. 1986 All. 126: (1985) 11 All.L.R. 566: 1985 All.C.J. 507.

It is well established that admissions made in pleadings by a party against his own interest are conclusive; there can be no better evidence; no further evidence is required. But evidentiary admissions are not conclusive; they may be explained or shown to be wrong; they also shift the burden of proof. Admissions, if not shown to be wrong or not binding, they are best and substantive evidence of the facts admitted. But they must be clear and unequivocal: (1989) 1 Rev.L.R. 145: (1989) 1 Hindu L.R. 125 (P.&H.).

Where the defendant in his written statement had admitted the execution of a sale-deed in favour of the plaintiff in respect of half-share in the suit property, *held*, non-production by the plaintiff of the said sale-deed in the Court was of no effect: A.I.R. 1980 Ori. 54: 49 Cut.L.T. 215: I.L.R. (1979) 2 Cut. 542. *See* also S. 18, Note 16, *supra*.

5. Admission in evidence before Court.—Where in a suit for possession, the plaintiff in his evidence before the Court admitted that there was an agreement between him and his father, whereby the father was in sole cultivating possession of that part of the land which was mortgaged under the unregistered document to the defendant, though there was no plea to this effect in the written statement of the defendant, *held*, an admission made in Court regarding the true state of affairs will not dis-entitle the defendants from succeeding merely because of the absence of a plea; the admission made in the evidence was equally effective to defeat the suit of the plaintiff: A.I.R. 1971 Del. 316.

6. Admission in criminal case—Use of in compensation case.—An admission by the accused in a criminal case that he was driving the truck at the time of accident, *held*, is not in itself a substantive piece of evidence in compensation case but can be pressed into service against him to lend support to the testimony of witnesses that he was the driver of the truck involved in the accident: A.I.R. 1976 Raj. 71: 1975 Raj.L.W. 399: 1975 W.L.N. 442. *See* also (1963) 1 Cr.L.J. 596: A.I.R. 1963 Guj. 111; (1981) 1 Karn.L.J. 178 (D.B.), cited under S. 21, Note 6, *supra*.

7. Admission in ignorance of legal rights.—An admission made in ignorance of legal rights or under duress is not binding. Thus, where a candidate, very anxious to take an examination, gave an undertaking to the University to submit his employer's written permission and to abide by any other University order because the University would not otherwise permit him to take the examination, *held*, the undertaking was given by him

in terrorem and in complete ignorance of his legal rights; he did not then know that the University Statute did not require him to obtain his employer's permission; his undertaking could not, thus, preclude him from challenging the cancellation of his candidature by the University: A.I.R. 1976 S.C. 376: (1976) 1 S.C.C. 311: 1976 U.J. (S.C.) 15: (1976) 2 S.C.R. 722; 1973 Punj.L.J. 214.

8. Admission/concession by Counsel.—Where in a suit by a contractor for damages for breach of contract, the contractor (plaintiff) contended that the Counsel of the defendant conceded at the time of argument before the Special Referee that on termination of contract, the plaintiff would have been paid certain amount as one months remuneration in lieu of one month's notice, *held*, the lawyer's concession could not be treated as an admission of fact binding on the defendant as there was no occasion for adducing any secondary evidence as the original contract was before the Special Referee: (1988) 2 Cal.L.T. (H.C.) 136 (D.B.).

9. Admission to be read as a whole.—An admission must be read as a whole. The law does not permit an admission to be truncated and taken piecemeal. One must take the whole of it or none of it: A.I.R. 1957 Cal. 372: 1957 Cr.L.J. 707.

The Court is duty bound to (*i*) construe an admission as a whole to ascertain its true meaning and effect, and (*ii*) determine its probative value by considering the circumstances wherein the admission was made and the possible motives of interested persons to make incorrect statements: (1981) 2 Ren.C.J. 813. *See* also S. 18, Note 4; S. 21, Note 3, *supra*.

10. Admission shifts the onus of proof.—An admission shifts the onus on the person admitting the fact on the principle that what a party himself admits to be true may reasonably be presumed to be so and until the presumption is rebutted the fact admitted must be taken to be established. This principle is stated in 34 Ind. App. 27 (P.C.).

However, the question of onus loses its efficacy when it is never objected to in the lower Courts and evidence having been led by the parties, at the appellate stage the Court has to adjudicate on the material before it. Further, admissions are not conclusive, and unless they constitute estoppel, the maker is at liberty to prove that they are mistaken or are untrue. Admissions are mere pieces of evidence and if the truth of the matter is known to both parties the principle stated in the case above would be inapplicable. Admissions made by a Hindu widow, aged about 25 years, surrounded by the members of the family whose interest it was to foist an adoption on her, her own relations not seeming to have taken much interest in her or her affairs—a widow lonely and dependent upon her husband's relations—will necessarily carry very little weight: A.I.R. 1959 S.C. 504.

Admission—Evidentiary value—Onus, shifting of: A.I.R. 1968 Mys. 309.

An admission does not conclude the party making it unless the person to whom it is made has acted on its faith. It is open to a party against whom the admission is sought to be proved to show that the facts alleged to be admitted are not correct or that the same were made as a result of mistake or ignorance.

Held, on facts, that the admission by plaintiff was not conclusive proof that the property belonged to the family: 1962 Ker.L.J. 929.

True, evidentiary admissions are not conclusive proof of the facts admitted or may be explained or shown to be wrong but they do raise an estoppel and shift the burden of proof on to their maker or his representative-in-interest; they are, if not explained away or shown to be wrong are an efficacious proof of the facts admitted: A.I.R. 1979 S.C. 861.

The effect of the admission is that it shifts the onus on the person admitting the fact on the principle that what a party himself admits to be true may reasonably be presumed to be so, and until the presumption is rebutted, the fact admitted must be taken to be established. The question of onus loses its efficacy when objection is not taken in the trial Court and evidence has been led by both parties: 33 Cut.L.T. 876: A.I.R. 1967 Ori. 103.

Admission can be used against the party making it. The party making the admission has a right to rebut the same and can plead and prove that admission so made is not true. Burden shall be on the party who wants to show that the admission so made is untrue: A.I.R. 1988 Raj. 188: 1987 Raj.L.W. 210: (1987) 1 Raj.L.R. 548.

Admissions made by plaintiff—Burden is on him to show that they are erroneous: I.L.R. (1963) Bom. 158: A.I.R. 1963 Bom. 110.

11. Miscellaneous.—Admission contained in document—Document secured at late stage—Admission can still be employed against its maker: (1965) 1 Mys.L.J. 442: A.I.R. 1966 Mys. 154.

Suit for partition by mother against her sons *A* and *B*—*A* pleading partition of property between him and *B* by registered deed—*A* admitting that disputed properties were joint family properties — Partition deed showing that partition was of joint family properties including properties purchased in *A*'s name—*Held*, plaintiff was entitled to reopen partition and properties were liable to partition—Admission is best evidence that opposite party can rely upon: A.I.R. 1966 Ori. 98.

Recital as to delivery of possession by donor in gift deed — Admission is not irrebuttable or conclusive on the question of delivery of possession—Further enquiry as to the factum of delivery of possession pursuant to the gift is admissible notwithstanding the recital in the deed: I.L.R. (1964) 2 Mad. 540: (1964) 77 Mad.L.W. 212: (1964) 2 M.L.J. 237: A.I.R. 1964 Mad. 373.

Applicability—Admission in writ petition before Supreme Court that certain lands in possession of petitioner were pasture lands and that they were used by him for grazing his cattle—It is not open to petitioner in subsequent writ petition before High Court to turn round and say that admission is not correct—He has to abide by that admission: A.I.R. 1970 Goa 59.

Oral admission by operator as to contents of stage-carriage permit—Inadmissible unless he is entitled to give secondary evidence of contents of the permit—Admission not conclusive proof: A.I.R. 1967 Del. 22.

Wrong statement made by party in mutation proceedings—Not binding on him in suit subsequently filed by him—*Held*, further, as it was not the defendant's case that they had made any change in their position *qua* the suit land on account of the said admission of the plaintiff, it could not act even as an estoppel: 1968 Cur.L.J. 213: (1968) 70 Punj.L.R. 510.

Writing admitting payment of money by mortgagor—Mortgagee can under Ss. 31, 95 to 97 contend that the admission is not conclusive and that some money had been paid towards any other deed than the mortgage deed in suit: A.I.R. 1954 Manipur 11.

An admission of a father is not binding on the son because he did not claim through the father. It cannot bind third persons: (1929-30) 34 Cal.W.N. 944: A.I.R. 1931 Cal. 105; 12 L.L.J. 187.

In a suit brought by a son, *A* challenging the alienation by his father of the joint family property on the ground of legal necessity, a statement made by his elder brother, *B*, in a previous suit admitting the genuineness of the sale-deed executed by the father is not binding on *A* when the admission is made by *B* in his individual capacity and prior to the receipt of the power of attorney executed by *A* in favour of *B*: A.I.R. 1953 Bilaspur 18.

Where an election petitioner had admitted that he had filed only one copy of the petition signed by him as required by law, *held*, the well known principle of law being that what is admitted by the party as true must be presumed to be true unless contrary is shown; such admission, though not conclusive, is nevertheless decisive of the matter admitted; it is, however, open to that party to explain or prove that the admission is wrong: A.I.R. 1975 Ori. 184: I.L.R. (1974) Cut. 64.

The admission made by a party to a marriage might be actuated by an ulterior motive; it cannot by itself be used as evidence; it has to be considered on facts of each case whether the admission is so actuated or not; in the absence of any occasion for any such ulterior motive, the admission would bind its maker unless it is explained away by the maker himself. Thus, where in a suit for declaration of title the plaintiffs produced a 33 years' old sale deed wherein their father had admitted their mother to be his wife and there could then be no motive for him to make a false statement in the deed, the admission conclusively proved that the plaintiffs' mother was indeed the legally wedded wife of their father: A.I.R. 1989 Mad. 252: (1988-2) 102 Mad.L.W. 348: (1989) 1 Hindu L.R. 29: (1989) 1 Hindu L.R. 656.

Where a wife in a divorce case for adultery explained that her confessional letter relied upon by her husband was got written by the husband under threat to obtain false evidence and that she being not well educated, she was incapable of herself writing that letter, *held*, the letter could not be taken as 'confession' of a matrimonial offence as it was neither voluntary nor true: A.I.R. 1974 Cal. 61: (1972-73) 77 Cal.W.N. 994 (S.B.).

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES

32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.—Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured, without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:—

(1) When it relates to cause of death.—When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever

---

Where a widow of the deceased alongwith his brothers were described in a sale deed as vendors of the property, and the admission so made was sought to be explained away by the male vendors that the widow was joined as a co-vendor at the instance of the vendee to dispel any cloud on the title being conveyed though she was a mere maintenance holder in the property, *held*, the explanation is *ex facie* not acceptable; that purpose could be served even by describing her as a maintenance owner consenting to the sale at the desire of the maintenance owner; the admission, thus, is determinative of the widow's ownership as admitted: A.I.R. 1974 Ori. 74: 39 Cut.L.T. 774 (D.B.).

Where an accused obtained acquittal in a criminal revision in the High Court by admitting that he would not interfere with the defendants' rights, *held*, it did not amount to an unqualified admission; it only amounted to an undertaking not to take law into his own hands; besides, it was an admission made *in terrorem*; he was, therefore, not precluded from suing the defendants under S. 92 of the Code of Civil Procedure for framing of a Scheme: A.I.R. 1976 S.C. 1569: (1976) 4 S.C.C. 780: (1976) 3 S.C.R. 721.

Where in an election petition, the issue involved was regarding the age of the elected candidate on the date of the scrutiny of his nomination and there were a number of clear admissions in prior declarations precisely and deliberately made in solemn documents by him which admissions were made *ante litem motam* during the decade preceding the election in question, *held*, these admissions were entitled to great weight and had shifted the burden on to the candidate to show that they were incorrect: A.I.R. 1977 S.C. 1724: (1977) 3 S.C.C. 540: (1977) 3 S.C.R. 538.

Section 32—Synopsis.

1. Scope and applicability of section 32.
2. Relative scope of section 32 and section 33.
3. Scope of clause (1).
4. Constitutional validity of clause (1).
5. Dying declaration—When admissible.
6. "Statement as to cause of death or as to any circumstances of transaction which resulted in his death".
7. Dying declaration—Evidentiary value.
8. Dying declaration—Whether requires corroboration.
9. Dying declaration—Whether can be accepted in part.
10. Dying declaration—Whether necessarily to be made under expectation of death.
11. When declarant survived.
12. Statement recorded during investigation.
13. First Information Report lodged by deceased.
14. Recording of dying declaration—By whom.
15. Form of recording.
16. Dying declaration—Proof of.
17. Dying declaration—Oral or through signs and gestures.
18. Satisfaction as to state of mind of declarant.
19. Capacity of victim to make declaration.
20. More than one dying declaration.
21. Details/Particulars in declaration.
22. Signatures/Thumb mark of declarant on dying declaration.

may be the nature of the proceeding in which the cause of his death comes into question.

(2) Or is made in course of business.—When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him; or of the date of a letter or other document usually dated, written or signed by him.

(3) Or against interest of maker.—When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him, to a criminal prosecution or to a suit for damages.

(4) Or gives opinion as to public right or custom, or matters of general interests.—When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.

---

23. Non-examination of scribe of dying declaration—Effect.

24. Inconsistency between ocular/medical evidence and dying declaration.

25. Delay in recording/giving/disclosing about dying declaration.

26. Illustrative cases.

27. Clause (2).

28. Clause (2) and section 34.

29. Clause (3)—Statement against interest.

30. Clause (4).

31. Clause (5).

32. Clauses (5) and (6)—Pedigrees.

33. Clause (7).

---

1. Scope and applicability of section 32.—Ill. (*a*) to S. 6, Ills. (*j*) and (*k*) to S. 8 and Ill. (*i*) to S. 14 show that S. 32 is not a complete code relating to the admissibility of statement made by persons who are dead: (1986-87) 91 Cal.W.N. 561 (D.B.).

S. 32 is not exhaustive: 1960 Cr.L.J. 894: A.I.R. 1960 Bom. 290.

The provisions of S. 32 are in the nature of exceptions, and the onus of establishing circumstances that would bring a statement within any of the exceptions contemplated by the section lies clearly upon that party which wishes to avail itself of the statement: I.L.R. (1943) 1 Cal. 423: A.I.R. 1943 Cal. 465.

S. 32 speaks of statements both written and verbal, and a Court cannot refuse to admit oral evidence of a verbal statement which fulfils the requirements of the section, merely because the evidence offered is the testimony of a witness who is interested in the result of the litigation: (1937-38) 42 Cal.W.N. 359.

A statement made by a person that deceased had acquired certain property in *benami, held*, as that person had admitted that it was only his hearsay, same is not covered by any of the sub-Ss. (1) to (3) of S. 32 and, hence, such hearsay evidence could not be accepted: A.I.R. 1982 Cal. 342: (1981-82) 86 Cal.W.N. 516: (1982) 1 Cal.L.J. 279 (D.B.).

There is a difference between the existence of a fact and a statement as to its existence. S. 11 makes the existence of facts admissible, and not statements as to such existence unless the fact of making that statement is itself a matter in issue. Hence, if a statement does not fall within S. 32, it cannot be admissible even under S. 11: I.L.R. 56 All. 766: 1934 All.L.J. 318: A.I.R. 1934 All. 406 (F.B.).

There may be statements which are inadmissible under S. 32 but admissible under S. 6; at any rate, S. 6 is not controlled by S. 32; if the scope of S. 6 cannot be whittled down like that, the scope of S. 11 cannot be curtailed either by dragging it under S. 31. Nothing in S. 11 suggests that it is controlled by any other section (including S. 32); rather its language indicates that the provision is an exception to the other general provisions. Thus, if a fact is relevant under S. 32, S. 11 is not attracted; S. 11 operates only when other

(5) Or relates to existence of relationship.—When the statement relates to the existence of any relationship [1][by blood, marriage or adoption] between persons as to whose relationship [1][by blood, marriage or adoption] the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

(6) Or is made in will or deed relating to family affairs.—When the statement relates to the existence of any relationship [1][by blood, marriage or adoption] between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

(7) Or in document relating to transaction mentioned in section 13, clause (*a*).—When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (*a*).

(8) Or is made by several persons and expresses feelings relevant to matter in question.—When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

---

1. Inserted by Act 18 of 1872, S. 2.

---

sections, including S. 32, are not attracted: (1992) 1 Ker.L.J. 491 (F.B.).

Where the witnesses deposed that the plaintiff's deceased father had told them that the defendant had under the guise of executing a partition deed got a sale deed executed from him by practising fraud, *held*, evidence of the deceased's statement was not admissible to establish its truth as it was hit by the hearsay rule and did not fall within any exception set out in S. 32; it was, however, admissible to establish the fact that such a statement had been made which may reflect upon the mental state and the subsequent conduct of those witnesses: A.I.R. 1981 Cal. 444: (1981-82) 86 Cal.W.N. 76.

Section should be very liberally construed. *See* 104 I.C. 209: A.I.R. 1927 Oudh 278. Whether this section overrides S. 10-A of the Dec. Agri. Rel. Act, *see* (1950) 52 Bom.L.R. 288.

Statements of living persons who had not been examined as witnesses are inadmissible: 5 O.W.N. 1111: A.I.R. 1929 Oudh 113.

Before statements can be admitted under S. 32 it must be proved that the makers of these statements are either dead or for any other reason are not available as witnesses: A.I.R. 1933 Rang. 212.

A person may be said to have been not found when we know who he was and if in spite of search he was not found or was found to have been dead. But he may equally be said not to have been found if his identity cannot be traced or found and who, therefore, on account of the absence of his identity cannot be found: (1943) 45 Punj.L.R. 441: A.I.R. 1944 Lah. 58.

The discretion vested in the Court under the section has to be exercised with great care and caution in the special circumstances mentioned in the section. The caution indeed must be greater where it is likely to be used against a party, who did not have the advantage of testing the correctness of the statements, by cross-examination of the persons who made those statements. Where it cannot be said that the attendance of the witnesses could not be procured without an amount of delay or expense which, under the circumstances would have been unreasonable and the error, if any, was on the part of the Tribunal in not enforcing the attendance of these witnesses, whose names were mentioned in the election petition at the earliest stage, the statements of the witnesses made before the presiding officer should not be taken in evidence under the section: A.I.R. 1959 Assam 200.

Rent receipt by landlord in favour of plaintiff—Landlord though alive not examined as witness—Statement in receipt describing plaintiff as daughter of deceased tenant—Not admissible: A.I.R. 1963 Pat. 450.

Illustrations

(*a*) The question is, whether *A* was murdered by *B*; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is whether she was ravished by *B*; or

The question is, whether *A* was killed by *B* under such circumstances that a suit would lie against *B* by *A*'s widow.

Statements made by *A* as to the cause of his or her death, referring respectively to the murder, the rape and the actionable wrong under consideration are relevant facts.

(*b*) The question is as to the date of *A*'s birth.

An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day he attended *A*'s mother and delivered her of a son, is a relevant fact.

(*c*) The question is, whether *A* was in Calcutta on a given day.

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that on a given day the solicitor attended *A* at a place mentioned, in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(*d*) The question is, whether a ship sailed from Bombay harbour on a given day.

A letter written by a deceased member of a merchant's firm by which she was chartered, to their correspondents in London to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(*e*) The question is, whether rent was paid to *A* for certain land.

A letter from *A*'s deceased agent to *A*, saying that he had received the rent on *A*'s account and held it at *A*'s orders, is a relevant fact.

(*f*) The question is, whether *A* and *B* were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

The incapacity to give evidence contemplated by S. 32 need not be a permanent incapacity. Incapacity, however, must be proved. The onus of establishing the circumstances that would bring a statement within any of the exceptions in S. 32 lies on the party wishing to avail itself of the statement. Where a person has become very old and blind and cannot move, he must be held to have become incapable of giving evidence: A.I.R. 1961 Pat. 21.

Ss. 32, 18, 13, 21—Mortgage executed by *A* and *B*—In it *A* admitting that *B* was adopted son of his deceased brother *C*—Admission of *A* is relevant under S. 32(3) being against his pecuniary interests inasmuch as he would lose his share in property of *C* if *B* was his adopted son—Admission relevant also under S. 32(5)—Admission binding on grandson of *A* under S. 18(2)—The words 'during the continuance of the interest' only mean while the interest was subsisting and before that interest was parted with—Document also constituted evidence of *B*'s assertion of the right that he was adopted son of *C* and was relevant under S. 13 read with S. 32(7-B) being dead—Under S. 21(1) admission of *B* in his own favour as adopted son of *C* was relevant: I.L.R. (1962) Cut. 422: A.I.R. 1963 Ori. 45.

Statement of deceased inadmissible—Admissibility as evidence of his conduct. *See* (1954) 1 M.L.J. 194: A.I.R. 1954 Mad. 215.

The value of the evidence admissible under Ss. 32, 49 and 60 depends on the characters of the witnesses who depose to what they heard from deceased persons and also on the characters of the deceased and whether they were expressing their own opinion or merely repeating hearsay. [I.L.R. 23 All. 37 (P.C.), Foll.]: A.I.R. 1933 Sind 213.

Affidavit of a person who died subsequently and was not subjected to cross-examination is not admissible. *See* A.I.R. 1927 Mad. 507: 52 M.L.J. 477.

Statement by person not examined as witness—Person making statement not proved to be dead or incapable of giving evidence, etc.—Statement is inadmissible in evidence: (1965) 78 Mad.L.W. 404: (1966) 1 M.L.J. 109: I.L.R. (1965) 2 Mad. 404: A.I.R. 1966 Mad. 99.

(*g*) The question is, whether *A*, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day is relevant.

(*h*) The question is, what was the cause of the wreck of a ship.

A protest made by the Captain, whose attendance cannot be procured, is a relevant fact.

(*i*) The question is, whether a given road is a public way.

A statement by *A*, a deceased headman of the village, that the road was public, is a relevant fact.

(*j*) The question is, what was the price of grain on a certain day in a particular market.

A statement of the price, made by a deceased baniya in the ordinary course of his business, is a relevant fact.

(*k*) The question is, whether *A* who is dead, was the father of *B*.

A statement by *A* that *B* was his son, is a relevant fact.

(*l*) The question is, what was the date of the birth of *A*.

A letter from *A*'s deceased father to a friend, announcing the birth of *A* on a given day, is a relevant fact.

(*m*) The question is, whether and when, *A* and *B* were married.

An entry in a memorandum book by *C*, the deceased father of *B*, of his daughter's marriage with *A* on a given date, is a relevant fact.

(*n*) *A* sues *B* for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

---

2. Relative scope of section 32 and section 33.—Ss. 32 and 33 give different instances where evidence is relevant. It cannot be said that S. 33 governs S. 32: 1941 Rang.L.R. 258: A.I.R. 1941 Rang. 301.

S. 32 is not controlled by S. 33 of that Act: A.I.R. 1949 Sind 12.

Evidence in regard to a statement made to the complainant by a person who has not been examined as a witness, is not admissible either under S. 32 or S. 33: 79 Cal.L.J. 149: A.I.R. 1945 Cal. 360.

A previous statement by a person is not relevant when it is not covered by Ss. 32, 33 and 145, unless it is an admission in which case only it becomes relevant under S. 21: 1941 All.W.R. (Rev.) 501: 1941 R.D. 503: 43 Cr.L.J. 125.

Previous statements may be relevant: (*a*) when the person making the statement is not called as a witness, and (*b*) when such a person is called as a witness. In the former case previous statements may be relevant under S. 32 while previous depositions made in a judicial proceeding may be relevant under S. 33. Where the person making the statement is not called, they may be proved under S. 155(3) or under S. 157 of the Act. In the former case the provisions of S. 145 must be complied with: 1948 R.D. 461.

A previous statement which is not made in Court and at the trial can be used only for the limited purpose of corroborating or contradicting a witness and does not become substantive evidence in the case. When the statement of a witness previously made is used as evidence under the provisions of Ss. 32 and 33, then any other statement made by that witness can be used by virtue of S. 158 for the purpose of contradicting that witness as if such witness had appeared in Court and was cross-examined on such previous statement and on question being asked had denied the facts mentioned in the same: A.I.R. 1930 Lah. 409: 127 I.C. 850.

Where a witness, though alive, was not produced in the Court, *held*, her previous statement made in another proceeding could not be relied on: A.I.R. 1972 All. 291.

The deposition of a witness in a previous suit would not be admissible when he was not called as a witness in the subsequent suit and it was not shown that the person was either dead or otherwise not available: (1972) 1 Mys.L.J. 473 (D.B.).

Where in a prosecution on the basis of private complaint for criminal breach of trust in respect of a company's funds, a witness at a later stage of the proceedings disappeared and was not available for cross-examination

inspite of all reasonable efforts made by the prosecution to secure his presence, *held*, in these circumstances the evidence of the witness should not be discarded merely because he was not available, his evidence was very much part of the record and the same was certainly admissible but the same will have to be approached with a degree of caution: 1993 Cr.L.J. 3384 (Bom.).

The statement of a deceased recorded in the accused's absence is not admissible either under S. 33 or S. 32(1) unless it is proved either by the Magistrate who recorded it or some one else in whose presence it was recorded: 20 I.C. 220: 14 Cr.L.J. 396.

Where in a suit upon promissory note, one of the attesting witnesses to the execution of the promissory note cannot be called to prove execution, he being dead, his statement in a previous suit not *inter partes* cannot be brought on the record, when the statement does not fall either under S. 32 or under S. 33 of the Evidence Act: (1959) 61 Punj.L.R. 813: A.I.R. 1960 Punj. 261.

The accused was tried for the murder of *B*. When *B*'s mother left the house in the morning *B* and her sister *A* were both in the house. The mother finding *A* alone in the house when she returned enquired from her about *B*. She made certain statement about *B* to her mother and later in the day to others. But *A* died before her statements could be recorded in a judicial proceeding. *Held*, that the statements of *A* were not admissible either under S. 32 or S. 33 of the Act and could not be referred to in stating the facts of the case. S. 33 was clearly out of the way because *A* made no statements in a judicial proceeding or before any person authorised by law to take her evidence. The only relevant clause of S. 32 which may be said to have any bearing was Cl. (1) which related to statements made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death. The statements made by *A* did not relate to the cause of her death or to any of the circumstances relating to her death; on the contrary, the statements related to the death of her sister. Therefore, the statements did not come within S. 32(1) of the Evidence Act: A.I.R. 1959 S.C. 18.

3. Scope of clause (1).—Hearsay evidence is barred, but S. 32 is an exception thereto inasmuch as it permits proof of what the victim stated in his dying declaration as the cause of his death or the circumstances which resulted in his death where such cause or circumstances are relevant: 1985 Cr.L.J. 336: (1985) 1 An.W.R. 354: (1984) 2 An.L.T. (N.R.C.) 69 (D.B.).

The rule admitting a dying declaration is also subject to the rule against hearsay. It is immaterial to whom the declaration is made. It may be made to a Police Officer or to a private person. It does not become inadmissible by reason of its having been made in the course of the investigation. It may be oral or it may be reduced in writing by any other person but in either case it must be duly proved: A.I.R. 1951 Him. Pra. 1: 52 Cr.L.J. 50.

The dying declaration is only a piece of untested evidence. It must, like any other evidence, satisfy the Court that what is stated therein is the unalloyed truth and the whole truth and that it is absolutely safe to act upon it: A.I.R. 1970 Assam 137: 1970 Cr.L.J. 1599.

S. 32(1) is attracted where: (*1*) the cause of death is required to be ascertained; (*2*) the deceased's statement is related to the cause of death, or (*3*) to circumstances connected with death: 1987 Cr.L.R. 494 (Mah.).

A dying declaration cannot be interpreted like a legally drafted document so as to contain minute details. If on reading the dying declaration as a whole an impression is left that it contains substratum of truth, it can be accepted: 1979 Raj.L.W. 267: 1979 W.L.N. 384 (D.B.).

An omnibus statement by a group of persons including the deceased who are alleged to have met the witness and told him about the incident is not an exclusive statement made by the deceased as a dying declaration; the rigour of a dying declaration which enjoins its being recorded in the very words of the deceased would be completely dissipated if such general statements were accepted as the statement of the deceased; the sanctity attached to a dying declaration would thereby be destroyed: 1972 All.W.R. 521: 1972 All.L.J. 744.

There is no warrant for the view that a dying declaration cannot be acted upon unless it is exhaustive and discloses all the surrounding circumstances. Such a view is not consistent with S. 32 of the Evidence Act. The section only requires that there must be a statement made by a person about the cause of his death: 1952 Cr.L.J. 1558: A.I.R. 1952 Trav.-Co. 449.

Under S. 32 of Evidence Act it is the statement actually made by the deceased as to the cause of his death, etc., which is relevant and not what he omits to state. No inference can be drawn from the failure to mention a fact in the declaration: 1952 Cr.L.J. 600: A.I.R. 1952 All. 289.

Statement by deceased before Third Class Magistrate not competent to record statement under Cr.P.Code, S. 164, is yet relevant under S. 32(1): A.I.R. 1930 Lah. 60.

Where a statement is relevant under the provisions of S. 32(1), it is not inadmissible by reason of the fact that the Magistrate who recorded it was not competent to record it under S. 164, Cr.P.Code: 1941 Rang.L.R. 258: A.I.R. 1941 Rang. 301.

A dying declaration under S. 32 is not like a statement of the accused and other witnesses recorded under S. 164 of the Code of Criminal Procedure; such persons are required to appear in the Court later on to testify afresh; the dying declaration does not fall under S. 164; it will not be invalid merely because the Magistrate recording it had not been conferred powers under S. 164. [A.I.R. 1932 Lah. 14; A.I.R. 1941 Rang. 301; A.I.R. 1955 Trav.-Co. 243; (1958) 60 Bom.L.R. 153 (F.B.); A.I.R. 1976 S.C. 1994, Rel. on]: 1978 Mah.L.J. 324 (D.B.).

Evidence recorded under S. 512(1), Cr.P.Code [S. 299 of New Code]—Test of credibility—Dying declaration—Difference: A.I.R. 1958 All. 214: 1958 Cr.L.J. 324.

S. 162 of the Cr. P. Code provides a wholesome safeguard to the accused; its denial to him is justified only under exceptional circumstances as set out in Ss. 27 and 32(1): (1992) 1 An.W.R. 16.

Under S. 32 it is only statements made by the deceased as to the cause of his death or the circumstances of the transaction that resulted in his death which can be admitted. The circumstances must be circumstances of the transaction; general expressions indicating fear or suspicion, whether of a particular individual or otherwise and not directly related to the occasion of death cannot be admissible. Statement by the deceased which provide nothing more than grounds for supposing that the deceased suspected the accused of having betrayed a relation of his in a civil suit which are in no way associated with the actual murder cannot be admitted under S. 32 and must be excluded. Even if the accused does not object to such evidence, it must be excluded. At any rate it is the duty of Public Prosecutor to see that such wholly inadmissible evidence is not placed before the Court: I.L.R. (1941) Mad. 81: A.I.R. 1941 Mad. 101: (1940) 2 M.L.J. 715. *See* also 1941 Pat.W.N. 255: A.I.R. 1941 Pat. 362; I.L.R. (1941) Nag. 100: A.I.R. 1940 Nag. 300; I.L.R. (1943) 1 Cal. 423: (1942-43) 47 Cal.W.N. 332; A.I.R. 1943 Cal. 465.

The portion of the dying declaration made by one deceased person which pertains to the cause of death of another deceased person is beyond the scope of S. 32(1) and consequently inadmissible as evidence. The language of S. 32(1) clearly shows that the cause of death must be the cause of death of the person making the statement and the circumstances resulting in death must be the circumstances which led to his death and the question involved in the case in which the cause of death comes up for consideration must be the death of the person making the statement. Sanctity is attached to the truthfulness of a dying declaration because of the imminent idea of death hovering over the mind of the person making the dying declaration. The language employed in S. 32(1) fortifies the view that in order that the dying declaration may constitute evidence under that provision, it must be a dying declaration relating to the facts and circumstances resulting in the death of the person making it: 1969 Cr.L.J. 98 (Punj.).

The statement in a dying declaration of one dead person in regard to the death of another is not a relevant fact with respect to the question about the death of the latter and so would not be admissible in evidence with respect to the offence of murder of that person: 1947 All.L.J. 627: A.I.R. 1948 All. 170: I.L.R. (1948) All. 122. But *see infra*. The view that the statement of one dead person is not a relevant fact with respect to the question about the death of another person or with respect to the causing of hurt to a third is too narrow to be accepted. To exclude from the evidence of statements made by a deceased person as to incidents which occurred during the course of the transaction which resulted in his death statements other than those relating to the cause of his death, would be to import a limitation to the words used in the section which their natural meaning does not warrant. When a limitation like that is intended, the Legislature specially provides for it: A.I.R. 1955 Trav.-Co. 104: I.L.R. (1954) Trav.-Co. 1308.

Whether one person's dying declaration is a relevant fact in regard to the death of another person would depend on: (*1*) whether it was made in continum of the narration as to final occurrence concerning his own death; (*2*) whether the other person's death had occurred in the presence or sight or hearing of the first person; (3) whether the two final occurrences had some proximate relation; and (4) whether declaration, on the occurrence of the other person's death being excluded, would be rendered un-intelligible or distorted. Thus, where one victim declared that when the two of them were standing, the accused came to the spot and asked them whether they were in search of him for assaulting and, taking out an open knife, the accused stabbed the other person on chest twice and on the declarant's trying to save the victim, the accused stabbed the declarant also, *held*, the dying declaration was relevant and admissible to be used against the accused for murder of the other person; *res gestae* elaborately discussed: (1984) 1 Bom.C.R. 563: 1984 Cr.L.R. 194 (D.B.).

A statement by a dying person not about the circumstances of his death, but about a dacoity that was taking place at the time of his death is not admissible under S. 32 (1) in a trial for the dacoity. Nor can those statements be admissible under S. 32(3) unless they would have exposed him to criminal prosecution: 20 I.C. 990: 14 Cr.L.J. 510. *See* also (1944) 46 Punj.L.R. 135: A.I.R. 1944 Lah. 377.

4. Constitutional validity of clause (1).— The Legislature under S. 32(1) in its wisdom has made dying declarations admissible out of necessity; authors of dying declarations may not survive to give evidence in the Court; being of persons usually close to death, great solemnity is attached to the dying declarations. The authors of dying declarations are thus, a class apart; and the classification is reasonable. S. 158, besides, provides an assurance that dying declarations are tested by other relevant evidence so that they may not lead to injustice. S. 32(1) is, therefore, not violative of Art. 14 of the Constitution: 1985 All.W.C. 399: 1985 All.Cr.R. 196.

5. Dying declaration—When admissible.—The authorities and the clear language of S. 32(1) suggest the following propositions: (*1*) S. 32 is an exception to the rule of hearsay; it makes admissible the statement of a person who dies, whether by homicide or a suicide, provided it relates to the cause of, or the circumstances leading to, his death; (2) The test of proximity should not be too literally construed to reduce it to a cut-and-dried formula of universal application confined in a strait-jacket. Thus, where death is a logical culmination of a continuous long drama, a final of the story, the statement regarding each step directly connected with the death would be admissible; it would have to be read as an organic whole, not torn from the context. Sometimes statements relevant to or furnishing immediate motives may also be admissible as a part of the transaction of death like where the death takes place within a very short time of marriage or the time is not spread over more than 3-4 months; (3) The second part of S. 32(1) is yet another exception to the rule of criminal law that evidence of a person, not subjected to or given an opportunity to be cross-examined by the accused is of no value; for a person on the verge of death is not likely to make a false statement unless there is strong evidence that the statement was secured by prompting or tutoring; (4) Importantly, S. 32 does not speak of homicide alone but includes suicide also, and all circumstances relevant to prove homicide would be equally relevant to prove a suicide; and (5) Where the main evidence consists of the deceased's statements and letters directly connected with or related to her death, revealing a tell-tale story, the same would be admissible as they clearly fall within the four corners of S. 32; the distance of time alone in such cases would not make the statements irrelevant. [A.I.R. 1950 Cal. 306, Overruled]: A.I.R. 1984 S.C. 1622: (1985) 1 Bom.C.R. 208: (1988) 4 S.C.C. 116: 1984 Cr.L.J. 1738.

Principles governing the law on dying declarations laid down by the Supreme Court are: (*1*) There is no rule of law or prudence that a dying declaration cannot be acted upon without corroboration; (2) The Court can, on being satisfied as to the truth and voluntary nature of the dying declaration, enter conviction without corroboration; (3) The Court should carefully scrutinise the dying declaration to ensure that the declarant was free from tutoring, prompting or imagination, that he had the opportunity to see and identify the assailants and that he was fit to make the statement; (4) A suspicious dying declaration should not be acted upon without corroboration; (5) A dying declaration of an injured, unconscious and unable to make the statement, must be rejected; (6) A dying declaration suffering

from infirmities is no valid base for conviction; (*7*) A dying declaration should not be rejected merely because it lacks in details of the occurrence; (*8*) A brief dying declaration cannot be discarded for its brevity which itself guarantees truth; (*9*) Though the Court normally goes by medical opinion to ascertain the injured being fit to make statement, but where the eye-witnesses testified to the injured being fit, the medical opinion to the contrary is not to prevail; and (*10*) A dying declaration containing a version different from that of the prosecution version cannot be acted upon: A.I.R. 1992 S.C. 1817: 1992 Cr.L.J. 2919: (1992) 2 An.W.R. 60: (1992) 2 S.C.C. 474: (1992) 1 Crimes 1180; 1994 Cr.L.J. 1886: 1994 M.P.L.J. 630 (D.B.); 1987 W.L.N. (U.C.) 560 (Raj.).

Before accepting a dying declaration, an uncross-examined statement taken behind the accused's back, the Court must seriously consider whether: (*a*) the dying man had an opportunity to observe the accused, (*b*) the dying man had the capacity to recollect and recite the facts stated by him, (*c*) he was consistent if he had more than one occasion to make the declaration, (*d*) the duration of time between the occurrence and the dying declaration was normal. The Court must also examine whether the dying man was possibly tutored or his statement was 'touched up' by interested persons: (1975) 1 A.P.L.J. 265 (D.B.).

The tests to ascertain the veracity and authenticity of a dying declaration are: (*1*) Could the deceased see and identify the assailant? (*2*) Is the deceased's version intrinsically sound and in accord with probabilities? and (*3*) Whether any material part of the statement is proved to be false by other reliable evidence on the record? Merely because the deceased did not disclose the names of his assailants to the person who took him to the hospital on a bus or to other co-passengers or to the Doctor attending on him in the hospital, *held*, was no ground to discard the dying declaration: (1981) 22 Guj.L.R. 426: 1981 Cr.L.R. 288 (D.B.).

S. 32 of the Evidence Act makes admissible in evidence a statement of a deceased person. That statement may be an oral statement or a written statement or a statement reduced to writing; and if it is a statement reduced to writing by a person other than the maker thereof, it must be a statement in the words used by the person making it and not in the words of a person reducing it to writing. If it is written in the words of the person reducing it to writing, it cannot strictly and properly be called a statement of the deceased person. The Court should know what precisely the questions were, though they might be leading questions. Unless the form and the words of a question are known, the effect of an answer may not be appreciated and the value of the answer may not be correctly assessed by the Court; and this must effect the evidential value of the answer. There is always a probability of some questions at least being put to the deceased in a leading manner and answers elicited from him by nods; and in such a case it would be difficult to say that what purports to be a statement of the deceased was made by him intelligently or of his own free will. If leading questions are put to a deceased, the weight of the answers would be effected. Inconvenience to the Magistrate or Sub-Inspector can be no justification or denying to the Courts the benefit of the actual words of the deceased which it is so essential to know for the proper administration of justice. Whenever it is practicable to record the statement in those words, there could be no valid excuse for not doing so, when the life and death of a prisoner at the bar depend upon the construction of that statement. When, however, the Sub-Inspector or the Magistrate recording the statement does not know the script of the language spoken by the deceased, though he understands and speaks that language, he may record the statement in English, and if it is recorded as the result of questions put to the deceased and the answers given by the deceased, those questions and answers must always be recorded to enable the Courts to understand the full significance of the statement. It is, therefore, essential, for proper compliance with the provisions of S. 32 of the Evidence Act to record the statement in the precise words in which the questions are put and take down the answers in the actual words in which the answers are given, when the statement is the result of questions put and answers given. If answers are given by gestures, the Court should know what those gestures were. The interpretation of those answers by gestures would ultimately be a matter for the Court and not for the investigating Sub-Inspector. When one expresses in his own words and in a different language what is stated by another person, there is always a probability which cannot be ignored that with the best of intentions he may unwittingly put his own gloss or construction upon the other

person's statement in order perhaps to make that statement more intelligible, understandable or logical: I.L.R. (1957) Bom. 396: A.I.R. 1957 Bom. 223.

A dying declaration made to a Police Officer during the course of investigation is taken out of the limitations imposed by sub-S. (2) of S. 162, Cr.P.Code. The relevancy and admissibility of a dying declaration is governed by S. 32(1), Evidence Act. Such a statement is relevant whether or not the person making it was at the time under expectation of death and this is so irrespective of the nature of the proceedings in which the cause of his death comes into question. A dying declaration may in a fit case form the sole basis of a conviction, but each case has to be considered on its own fact in the background of the circumstances in which it is made. It, therefore, follows that for determining the trustworthiness and value of a dying declaration it is incumbent on the Court to bear in mind the capacity and opportunity of the person making the declaration, to observe the incident in question and to identify the guilty person his faculty to remember the facts observed by him and to reproduce them, the opportunity and the likelihood of his having been tutored or otherwise influenced by other circumstances or persons in the matter, and the consistency in the various declarations if he has made more than one. Where a dying declaration is oral and has not been recorded in the words of the author, then the Court has to take precautions of subjecting it to proper scrutiny in the light of all those facts which affect the reliability of such oral evidence. In case there is also a declaration made before a Magistrate the probative value of such a declaration has to be tested by considering the manner in which it has been recorded: whether it is recorded in the form of questions and answers and whether the words of the person making a declaration have been actually reproduced. Finally, a dying declaration from the very nature of things should be closely scrutinised because having been made in the absence of the accused its veracity is not tested by cross-examination and then the Court too has not had any opportunity of watching the demeanour of the person making it. Observations in A.I.R. 1953 S.C. 420, held to be *obiter*: (1962) 64 Punj.L.R. 1064: I.L.R. (1962) 2 Punj. 855: (1963) 1 Cr.L.J. 469: A.I.R. 1963 Punj. 170.

Statement written or verbal of relevant facts made by a person who is dead is called 'dying declaration'. Dying declaration is an important piece of evidence and conviction can be based solely on the dying declaration. In the present days when there is spate of dowry deaths, dying declaration has assumed much importance. The principal on which the dying declarations are admitted in evidence is indicated in legal maxim *nemo moriturus praesumuntur mentiri, i.e.*, a man will not meet his maker with a lie in his mouth. [1993 Cr.L.J. 426 (S.C.); 1986 Cr.L.J. 836 (S.C.); 1976 Cr.L.J. 1718 (S.C.); 1976 Cr.L.J. 1548 (S.C.); 1972 Cr.L.J. 828 (S.C.); 1958 Cr.L.J. 106 (S.C.); (1948) 49 Cr.L.J. 140 (All.); (1789) 1 Leach 500, Rel. on]: 1995 Cr.L.J. 312 (All.) (D.B.).

Dying declarations are important pieces of evidence, as they are made under a sense of impending death, concerning circumstances with regard to which the deceased is not likely to be mistaken. It is wrong to think that a dying declaration becomes less credible, merely because a number of persons are named as culprits. It is unsafe to found a conviction solely upon a dying declaration; unlike the evidence of an accomplice, a dying declaration is not tainted, nevertheless, it is a rule of prudence that to found a conviction upon it, a dying declaration should be corroborated in material particulars. This rule of prudence, however, does not affect the law of the matter, namely, that a dying declaration may well be the sole basis of a conviction. The Court must bear in mind the declarant's power of observation and such opportunity as he had of seeing his assailants and whether his capacity to remember the facts stated remained unimpaired at the time of the declaration. Evidence of enmity furnishes a motive for the crime as well as a motive for falsely implicating the accused persons; it is in such state of things that the Court requires strong corroboration as to the identity of the assailants before convicting the accused solely upon the dying declaration.

Where the deceased before making his dying declaration had a talk with his partymen, it was held that it was quite possible that the dying declaration, implicating many persons belonging to opposite party might be an inducted or prompted one and, hence, could not form the sole basis for the conviction of all the accused persons: (1962) 4 Ori.J.D. 17.

It is well settled law that the statement of a deceased person to be admissible in evidence as a dying declaration under S. 32(1) must satisfy two tests; firstly, it must refer to the cause of his death or as to any of the circumstances of the transaction which resulted into his death, and secondly, it could be

admitted in evidence in those cases only in which the cause of that person's death comes into question: 1973 Cur.L.J. 276: (1973) 75 Punj.L.R. 521.

The last statement of the deceased may very well be taken as admissible under S. 32(1) inasmuch as it is a statement made by a person as to the cause of his death, or the circumstances which resulted in his death, and much more so when the cause of that person's death is in issue; the law is clear that even on an uncorroborated dying declaration, if otherwise believable, a conviction can be sustained: (1975) 41 Cut.L.T. 1379.

A dying declaration, like any other piece of evidence, is to be appraised in the context of its surrounding circumstances and as per the rules of probative weight; the Court must consider whether the dying man had the opportunity to identify the accused, whether his faculty to recollect the facts was impaired, whether he was consistent in his version where he had, apart from his recorded statement, made several other declarations, whether the declaration was made at the earliest opportunity, and whether he was tutored by interested persons: (1977) 1 S.C.C. 762: 1977 S.C.C. (Cr.) 181; 1990 Cr.L.J. (N.O.C.) 183 (Del.) (D.B.).

It is well settled that dying declarations are admissible on the principle of necessity; an exception to the general rule forbiding hearsay evidence, they are made admissible because a dying person will not falsely implicate an innocent person; the requirement of oath and cross-examination of the dying person is dispensed with; to base conviction solely on the basis of a dying declaration, it must be shown that the deceased had the opportunity to see and identify the accused and the declaration should be thoroughly reliable and free from blemish and that the declaration was voluntary, uninfluenced by any tutoring and was made when he was in a fit state of mind; a dying declaration is an independent piece of evidence like any other evidence—neither extra strong nor extra weak; it can sustain conviction if otherwise true or reliable even without corroboration: (1991) 2 Hindu L.R. 71: (1991-1) 39 B.L.J.R. (N.O.C.) 1 : (1991-1) 32 Guj.L.R. 125: (1991) 1 Crimes 349 (S.C.).

Dying declaration can be made a basis of conviction only if it is satisfactorily established that the victim had all the opportunity to observe the incident and identify his assailants: 1975 Cr.L.J. 285: (1975) 1 Karn.L.J. 193: 1975 M.L.J. (Cr.) 132: I.L.R. (1975) Karn. 355 (D.B.).

A dying declaration made by the victim in a fit mental condition and on the verge of death has a special sanctity; at that solemn moment, a person is most unlikely to make an untrue statement; the shadow of impending death is itself the guarantee of the truth of his declaration as to the causes or circumstances leading to his death; a dying declaration is almost sacrosanct: (1993) 1 Hindu L.R. 511 (S.C.).

The sanctity of a dying declaration is embodied in the maxim *nemo moviturous procoumitus mentire*, meaning that a man will not meet his maker with lie in his mouth. As Woodroffe and Amir Ali say, when a man is dying, the grave position in which he is placed is held by law to be a sufficient ground for his veracity, and, therefore, the tests of oath and cross-examination are dispensed with: 1993 Cr.L.J. 1756 (Pat.) (D.B.).

The victim of the assault is indeed its principal eye-witness; with death hovering around, truth sits on his tongue; he feels like a conscientious and virtuous man under oath; merely because the accused will be handicapped in testing the truth of the declaration by cross-examining the dying man is no ground to exclude the dying declaration from evidence in the case; it would certainly defeat the ends of justice: (1973) 75 Punj.L.R. 801 (D.B.).

The shadow of immediate death is the best guarantee of the truth of the statement made by a dying person regarding the cause and circumstances leading to his death which are absolutely fresh in his mind or are untainted or discoloured by any other consideration except speaking the truth and, therefore, special sanctity should be attached to a dying declaration: 1985 Cr.L.R. 675 (Raj.).

A dying declaration whether oral or written is a solemn and important statement since it comes from a person at a time when he is apprehending death and, therefore normally, not expected to lie: (1984) 25 Del.L.T. 33.

A dying declaration, oral or recorded, is made by a person not alive to admit or deny having made it, *held*, it is clearly necessary to scrutinise all such statements, if there are more than one, to find out whether they are substantially consistent. Where such a statement was found on scrutiny to be voluntary, without tutoring or concoction, it may be acted upon: for a dying person on the threshold of death is not expected to die with a lie on his lips; a dying declaration has a special sanctity unless variations therein amount to

contradictions and its truthfulness becomes doubtful: 1991 Cr.L.J. 1636 (Bom.) (D.B.).

A dying declaration is undoubtedly admissible under S. 32; not capable of being subjected to cross-examination, the Courts must apply to it strictest scrutiny and the closest circumspection before acting upon it. While great solemnity and sanctity is attached to it as a man on the verge of death is not likely to tell lies or to concoct a falsehood to implicate an innocent person, yet such a statement may result from tutoring or prompting or a figment of his imagination. The Court, therefore, must satisfy itself that the deceased was in a fit state of mind to make the statement after he had a clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rancour; once it finds the dying declaration to be true and voluntary, it can enter conviction even without further corroboration: A.I.R. 1976 S.C. 1994: 1976 Cr.L.J. 1548: (1976) 3 S.C.C. 618; A.I.R. 1983 P.&H. 305: 1983 Cr.L.J. 1093 (F.B.); (1983) 3 Crimes 514 (Raj.); (1984) 3 Crimes 136 (All.): (1984) 2 Crimes 361: 1985 Cr.L.J. 248: (1984) 1 Ori.L.R. 756; (1986) 3 Crimes 106 (Del.); (1987) 3 Crimes 115 (Gau.); 1988 Cr.L.J. 1614 (Cal.) (D.B.); 1989 Cr.L.J. 193: (1989) B.B.C.J. (H.C) 422(Pat.); (1990) 2 Crimes 301 (Raj.); 1990 Cr.L.J. 119 (All.) (D.B.); 1993 Cr.L.J. 2696 (Raj.) (D.B.).

The danger of wrong identification has to be borne in mind in dealing with what are called dying declarations. Before acting on it the Court will apply to it every test of its genuineness and good faith which it is possible in the circumstances of the case to apply. Special caution is needed in dealing with a dying declaration when the prosecution evidence shows signs of attempt to improve and develop it at successive stages, or when there is serious room for doubt as to whether the contents of the dying statement include matter suggested to the deceased by the outsiders: 194 I.C. 186: A.I.R. 1941 Pat. 409.

Before a conviction can be made on a dying declaration, the Court must be fully satisfied that the declaration is reliable in the sense that it was actually made by the deceased when fully possessed of the power to understand the implication of her statement and the same was made without any exterior influence or ulterior motive. It has further to be proved that the said declaration reflects a true version: (1990) 41 Del.L.T. 542: 1990 Cr.L.J. (N.O.C.) 10 (D.B); (1993) 3 Crimes 709 (Del.).

Where the injuries inflicted were grave, the night was foggy, the deceased had mentioned only the name of the assailant, and there was another relation of the convict with the same name in the area, *held*, the convict was not conclusively connected with the murder: 1981 Cr.L.J. 1110 (Gau.) (D.B.)

Where the dying declaration did not identify the accused beyond reasonable doubt, *held*, the accused is liable to be acquitted: (1992) 1 Crimes 1167: 1992 Cr.L.J. 2644: 1991 C.Cr.L.R. 297: (1991-92) 96 Cal.W.N. 233 (D.B.).

A dying declaration made at the time when a person is in a precarious condition does not cease to be such and become inadmissible under S. 32 merely because the declarant happens to linger for a few days more: 113 I.C. 177: A.I.R. 1929 Lah. 64.

6. "Statement as to cause of death or as to any circumstances of transaction which resulted in his death".—S. 32(1) takes in its ambit not only the statement as to the cause of the declarant's death, but also the statement "as to any of the circumstances of the transaction which resulted in his death." The whole statement of a person in regard to the entire transaction which resulted in the death of that person becomes admissible under S. 32(1) in any case where the cause of that person's death comes into question: (1980) 2 An.W.R. (N.R.C.) 34 (D.B.).

Statements made by deceased regarding circumstances of the transaction which resulted in his death are admissible under S. 32: 34 Cut.L.T. 60: I.L.R. (1967) Cut. 951: 1968 Cr.L.J. 848.

The dying declaration is the statement made by person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death and such details which fall outside the ambit of this are not strictly within the permissible limits laid down by S. 32(1) of the Evidence Act and unless absolutely necessary to make a statement coherent or complete should not be included in the statement. In the Punjab no rules have been made in regard to the recording of dying declaration which has been done in several others States. It would be desirable if some such rules were framed and included in the Rules and Orders made by the High Court for the guidance of persons recording dying declarations. The authenticity of the dying declaration has to be judged in accordance with the circumstances of each case depending upon many factors which would vary with each case but those recording such statements would be well advised to keep in view the fact that the object of a dying declaration is to get from the person making the statement the cause of death or the circumstances of the transaction which resulted in death: A.I.R. 1957 S.C. 904: 1957 Cr.L.J. 1459.

The Indian law on the nature and scope of a dying declaration is distinctly different from the English law where only the statements which directly relate to the cause of death are admissible: A.I.R. 1984 S.C. 1622: (1985) 1 Bom.C.R. 208: (1984) 4 S.C.C. 116: 1984 Cr.L.J. 1738.

The statements of the deceased which are admitted under S. 32(1) admittedly must be statements of circumstances intimately and inextricably connected with the transaction resulting in death. The date or dates on which the statements were made from the viewpoint of admissibility must be judged in the light of their link with the transaction that resulted in death: (1978-79) 83 Cal.W.N. 248: (1979) 1 Cal.L.J. 119 (D.B.).

The statement of a person, who subsequently dies, as to the circumstances resulting in his death is admissible under S. 32 (1): A.I.R. 1950 Trav.-Co. 41: 51 Cr.L.J. 988.

The test of relevancy of statement under S. 32(1) is not what the final finding in the case is but whether the cause of the death of the person making the statements comes into question in the case. The expression "any of the circumstances of the transaction which resulted in his death" is wider in scope than the expression "the cause of his death". In other words sub-S. (1) of S. 32 refers to two kinds of statements—(*1*) when the statement is made by a person as to the cause of his death, or (2) when the statement is made by a person as to any of the circumstances of the transaction which resulted in his death. The words "resulted in his death" do not mean "caused his death": 1952 B.L.J.R. 333: A.I.R. 1953 Pat. 354; (1959) 1 M.L.J. 246: 1959 M.L.J. (Cr.) 245.

'Circumstances of the transaction' is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in 'circumstantial evidence' which includes evidence of all relevant facts. It is on the other hand narrower than '*res gestae*'. Circumstances must have some proximate relation to the actual occurrence and must be of the transaction which resulted in the death of the declarant. It is not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, for the condition of the admissibility, of the evidence is that "the cause of the (the declarant's) death had come into question": (1980) 17 Del.L.T. 431 (D.B.). *See* also 1989 C.Cr.L.R. 25: (1988-89) 93 Cal.W.N. 899.

It is well-settled that declarations are admissible only in so far as it points directly to the fact constituting the *res gestae* of the homicide; that is to say the act of killing and to the circumstances immediately attendant thereon like threats. Acts, declarations and incidents which constitute or accompany and explain the fact or transaction in issue are admissible for or against either party as forming parts of *res gestae*. The statement made by witnesses for the prosecution that the deceased told them that he had brought the vessels and arrack of the accused a little while ago would afford a motive for the accused to commit the crime and is admissible under Ss. 8 and 32(1) of the Evidence Act: (1959) 1 M.L.J. 246: 1959 M.L.J. (Cr.) 245.

A statement falling under S. 32(1) may be made before the cause of death has arisen or before the deceased has any reason to anticipate being killed. A statement by the deceased, that he was proceeding to the spot where in fact he was killed later, or as to his reasons for so proceeding or that he had been invited by a particular person to meet him, or that he was going to such person would each of them be circumstances of the transaction, and would be so whether the person was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. The "circumstances of the transaction" must have some proximate relation to the actual occurrence, though, as for instance in a case of prolonged poisoning, they may be related to dates at a considerable distance from the date of the actual fatal dose. The "circumstances" are of the transaction which resulted in the death of the declarant: 66 I.A. 66: I.L.R. 18 Pat. 234: (1938-39) 43 Cal.W.N. 473: A.I.R. 1939 P.C. 47: (1939) 1 M.L.J. 756 (P.C.).

Where a person had stated that he was proceeding to meet a particular person at a particular place where his dead body was found, *held*, it was a circumstance of the transaction resulting in his death; his statement fell under S. 32(1): 1975 Raj.L.W. 286 (D.B.).

Just a day before the murder, the deceased had made a statement to one of the witnesses for the prosecution that the deceased had been to jungle in the company of the accused in order to procure certain herb to attract the husband of the deceased and that as the accused could not get the final medicine on that

day, she promised the deceased to procure the same, on the next day. On the next day, the deceased was found in the jungle in an injured condition which resulted in her death.

Held, that the statement was admissible in evidence under S. 32(1) as it disclosed the circumstances under which the deceased was seriously injured ultimately resulting in her death: (1965) 1 Cr.L.J. 317: I.L.R. (1964) Cut. 752: A.I.R. 1965 Ori. 33.

Under S. 32(1) the statement of a deceased person will not be admissible unless it relates to the circumstances of the transaction which resulted in his death: I.L.R. (1943) 1 Cal. 423: A.I.R. 1943 Cal. 465. *See* also (1940) 2 M.L.J. 715.

The expression 'circumstances of transaction which resulted in death' in S. 32(1) means only such facts or series of facts which have a direct or organic relation to death; they must have some proximate relation to the actual occurrence. Circumstantial evidence of the transaction is different from the circumstances of the transaction itself. Thus, a statement merely suggesting motive cannot be admitted in evidence unless it is intimately connected with the transaction itself as a circumstance; statements made by the deceased long before the incident suggesting motive are not admissible. [A.I.R. 1933 Nag. 136; A.I.R. 1939 P.C. 47, Foll.]: 1974 M.P.L.J. 429 (D.B.).

Statements by deceased as to the cause of his death are admissible, not only as against the person who actually caused the death of the deponent, but also against other persons concerned in the transaction which resulted in the deponent's death in cases in which the cause of that person's death comes into question: 162 I.C. 491: A.I.R. 1936 Rang. 187.

S. 32(1) does not permit the reception in evidence of all such statements of a dead person as may relate to matters having a bearing howsoever remote on the cause or the circumstances of his death. Under the section are admissible only such statements as relate to matters so closely connected with the events which resulted in his death that they may be said to relate to circumstances of the transaction which resulted in his death.

The alleged statement was made more than ten years before the death of the maker and its bearing in the present case was not that it related to any of the circumstances of the transaction which resulted in his death but it afforded proof of the background of those embittered relations between the accused on the one side and the deceased on the other which ultimately led to the latter's murder.

Held, that the statement was clearly outside the purview of S. 32(1) and was not receivable in evidence: 1966 Cr.L.J. 369: A.I.R. 1966 All. 142.

Where the statement in question was said to have been made months before the alleged murder. *Held*, that it could hardly come within terms of S. 32: 66 Cal.L.J. 196: A.I.R. 1938 Cal. 125. Dying declaration of accused recorded by Magistrate—Declaration containing statement amounting to confession—Declaration becoming inadmissible in evidence—Admissibility in evidence of declaration as confession. *See* A.I.R. 1954 All. 633: 1953 All.L.J. 614.

The test of the relevancy of the statement under S. 32 (1) is not what the final finding in the case is, but whether the cause of death of the person making the statement comes into question in the case. The words 'resulted in his death' do not mean 'caused his death'. Thus, it is well settled that declarations are admissible only in so far as they point directly to the fact constituting *res gestae* of homicide: that is to say, to the acts of killing and the circumstances immediately attendant thereon like threats and difficulties, acts and declarations and incidents which constitute or accompany and explain the fact or transaction in issue admissible for or against either party as forming part of the *res gestae*.

Held, in a murder case, that the statement of the deceased heard by the prosecution witnesses stating that he should not be assaulted and he would produce his brother who was wanted by the accused, the assaulting party was a circumstance which had some proximate relation to his death and was clearly relevant under S. 32(1): I.L.R. (1962) Cut. 582: 28 Cut.L.T. 398: (1963) 1 Cr.L.J. 377.

The expression 'any of the circumstances of the transaction which resulted in his death', in S. 32(1) is wider in scope than the expression 'the cause of his death'. The words 'resulted in his death' do not mean 'caused his death'. Thus, where a girl, after being subjected to rape, told her mother that she was raped by the two accused and after that a stick was inserted in her private part and after about 10 days she died in the hospital due to profuse bleeding from her private part, *held*,

looking to the proximity of relationship to the actual occurrence and the alleged dying declaration, the statement attributed to the deceased as to any of the circumstances of the transaction which resulted in her death were admissible, as in this case, the cause of her death came into question: 1990 Cr.L.J. 1129 (Madh. Pra.) (D.B.).

Where the deceased's modesty was outraged by the two accused who also intimidated her that she would be defamed in society and after a short interval she immolated herself, *held*, her statement before her death narrating the incident which drove her to suicidal was admissible as a dying declaration; conviction could be based on it: 1994 Cr.L.J. 767: 1993 M.P.L.J. 729.

Where a woman raped made a statement to her relative shortly after and committed suicide about three days after the occurrence, rape not being the cause of her death, her statement is not admissible under S. 32(1): 1930 Mad.W.N. 702: A.I.R. 1931 Mad. 233.

The statement recorded by the Executive Magistrate of a witness does not amount to dying declaration under S. 32(1), if it is not proved that the witness died due to the cause or circumstances mentioned therein. If the maker of the statement is not proved to have died as a result of the injuries received in the incident, the statement cannot be said to be the cause of his death or as to any of the circumstances of the transaction which resulted in his death. [A.I.R. 1964 S.C. 900, Rel. on]: 1984 M.P.L.J. 492 (D.B.).

Sub-section (1) of S. 32 makes a statement of a person who has died relevant only when that statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. When the deceased is not proved to have died as a result of injuries received by him in the incident where the deceased is alleged to have been killed, his statement relating to that incident cannot be said to be the statement as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death: (1964) 1 S.C.R. 688: I.L.R. (1963) 2 All. 708: A.I.R. 1964 S.C. 900; (1979) 2 M.P.W.N. 82.

Where the medical evidence clearly showed that the injured did not die of the stabbing injuries inflicted upon her, *held*, her statements made to her daughter or neighbours or even the Doctor and the Magistrate as regards the stabbing were not dying declarations; they were not admissible under S. 32: (1984-2) 25 Guj.L.R. 900.

Statement must relate to the injuries by which death was caused, sub-Cl. (1) applies to the class of statement made by a dying declaration as to the injuries which have brought him or her to that condition, or the circumstances under which those injuries came to be inflicted: I.L.R. 4 Lah. 481: A.I.R. 1924 Lah. 253; A.I.R. 1929 Sind 250. *See* also 29 Nag.L.R. 251: A.I.R. 1933 Nag. 136.

Where direct and organic relationship between the death and the transaction which resulted in death is established, second part of S. 32(1) is attracted; the words 'which resulted in his death' are not synonymous with the 'cause of his death' appearing in the first part; obviously, the words resulting in death have a wider scope. Thus, where the injuries may not have caused the death, but it occurred due to septicaemia arising out of post-operative complications which but for the injuries would not have arisen; thus, the transaction's starting part was sustaining injuries and death was their culmination: 1988 Mah.L.J. 147: (1988) 1 Bom.C.R. 234 (D.B.).

If the injuries borne by the deceased had no connection with the cause of death then his dying declaration will lose the protection of S. 32: (1994-1) 14 Guj.L.H. 451: 1994 Cr.L.R. 246.

Where the statement of the victim of the assault was recorded in the Police Station diary the same day and he died later on due to infection, probably tetanus, developed in his wounds, *held*, the transaction of injuries inflicted and infection resulting in death is a single transaction; the statement is admissible under S. 32(1): 1991 Cr.L.J. 599 (Ori.). *See* however 1994 M.P.L.J. 862: 1995 Cr.L.J. 17 (D.B.) [Where as per autopsy report the murdered wife had suffered only one injury over the anterior mastoid and her death was caused by tetanus due to infection developed by the wound, *held*, the death being not attributable to probable causes of the injury, the deceased's declaration did not amount to a statement as to the cause of or circumstances resulting in her death; conviction set aside.]

Where the victim was stabbed in the abdomen and developed peritonitis and empyema

which resulted in his death within a week, *held*, his death being a natural consequence of the injuries, his statement recorded as to the injuries sustained and other circumstances before death is to be taken as a dying declaration: (1993) 2 Ker.L.J. 479 (D.B.).

Injuries inflicted by the accused on the person of the deceased resulting in fracture of his ribs—Deceased when questioned, soon after, stating that it was the accused who inflicted injuries—Doctor's evidence establishing that the injuries to the ribs were a contributing factor to the death—Statement of the deceased is relevant under S. 32(1) of the Act as it was one made by a person who subsequently died and obviously related to the circumstances of the transaction which ultimately resulted in his death—It is also admissible under S. 6 of the Act, as it was made by the deceased very shortly after he sustained the injuries: I.L.R. (1964) 16 Assam 67: (1964) 1 Cr.L.J. 393: A.I.R. 1964 Assam 53.

In the absence of evidence to show that the acid burns suffered by the deceased indeed resulted in his death nearly 2 months and 23 days thereafter, *held*, the statements made by him immediately after the burns to a Magistrate or a Police Head Constable are not admissible under S. 32(1): 1971 M.L.J. (Cr.) 392: (1971) 1 An.W.R. 13.

Where though the deceased spoke about the assault by the accused, there was no evidence regarding any thigh injury caused by him and the deceased died due to non-healing of wound on thigh, *held*, deceased's dying declaration was not admissible in evidence. [(1964) 1 Cr.L.J. 727 (S.C.), Rel. on]: 1994 Cr.L.J. (N.O.C.) 244 (Ori.).

Evidence Act makes dying declarations relevant facts as written statements of deceased or written records of verbal statements which the deceased makes and which becomes substantive evidence of the cause of deceased's death: 31 I.C. 359: 16 Cr.L.J. 759 (M.). *See* also 160 I.C. 597: A.I.R. 1936 Rang. 42.

The statement of the deceased that he was going to the accused to release his cow which the accused had confined, made almost immediately preceding the quarrel over the recovery of the cow during the course of which the deceased had sustained an injury from the accused resulting in his death is admissible in evidence under S. 32(1) as it relates to the circumstances of the transaction which resulted in his death: (1953-54) 58 Cal.W.N. 160: A.I.R. 1954 Cal. 379.

Statement made by the deceased to her mother in the evening that he had dispute with the three accused earlier in the day, *held*, would be relevant when the cause of his death comes into question: (1971) 73 Punj.L.R. 11 (S.N.) (D.B.).

Where the deceased before going for a particular job told his father that he was being sent to spray insecticides and he died due to poisonous chemicals, *held*, his statement as to the cause of death was admissible: 1984 All.Cr.L.J. 233.

Statement of the deceased to a witness in the previous evening regarding presence of accused husband in the house is admissible under S. 32(1) since it relates to the circumstances of the transaction which resulted in her death: (1986-87) 91 Cal.W.N. 561 (D.B.).

A statement of a rumour by the deceased who was murdered that a certain amount was offered by the accused for the head of the deceased, is hearsay of the very worst type, and cannot implicate the accused in the offence. Such statement is not admissible as a dying declaration. It is not, and cannot be a statement made by the person as to the cause of his death or as to any of the circumstances of the transaction resulted in his death: 1952 Cr.L.J. 623: A.I.R. 1952 Cal. 231.

A complaint in writing, made to the Police by a person who died sometime thereafter, expressing apprehension of death at the hands of certain persons, is admissible in evidence under S. 32(1) and (8), when the person whose conduct is the source of the apprehension is charged with the offence of murder of the person making the complaint: 1971 Cr.L.J. 1764 (Punj.) (D.B.).

Where the deceased within three days prior to her death had told her daughter that she had a property dispute with her son, who was eventually prosecuted for killing his mother by strangulating her; the prosecution relied upon the deceased's statement about the property dispute with the accused as motive for the murder; *held*, the motive factor present in the deceased's statement to her daughter cannot be discarded as a remote circumstance; it is intimately connected with the circumstances of the occurrence; the circumstances specifically narrated have direct and proximate bearing on the causes which ultimately resulted in

the murder; it is not necessary that the deceased, while making the statement, must have an apprehension of being killed for that motive: 1994 Cr.L.J. 1155: (1994) 1 Ker.L.J. 559 (D.B.).

Where the Court concluded that the death of a Sub-Inspector in his seat at the Police Station by bullets could have been homicidal and at the hands of his subordinates, yet it could not rule out the theory of suicide with reasonable certainty, and the other circumstance indicating that the deceased could not have committed the suicide because, as deposed to by his wife, the deceased while leaving for his duty in the morning had asked her to await him for lunch, and he had no reason to feel depressed, *held*, though the wife's deposition was certainly a 'circumstance' even if distant in time, it was not a circumstance of the transaction of his death; it was, therefore, not relevant under S. 32(1). However, as S. 32 does not control Ss. 6, 11, and 14, the wife's deposition is certainly admissible under these sections that the deceased had no intention at that time to commit the suicide, though it does not mean that he could not have changed his mind afterwards: 1992 Cr.L.J. 2860 (Ker.) (F.B.).

The accused were charged under S. 330, I.P.Code, with having, for the purpose of extorting a confession, caused hurt, to one *R*, who committed suicide owing to the ill-treatment: *Held*, that ill-treatment was the cause though not the direct cause of the suicide and although the accused were not legally responsible for the suicide, the whole affair, ill-treatment and subsequent suicide, being one transaction the statement of the deceased was admissible under S. 32(1): 20 P.R. 1916 (Cr.): 35 I.C. 998.

Where the deceased being in the Police lock-up made a statement to a person, who saw him bleeding profusely and marks of hitting with rods and burning by cigarettes ends on the body of the deceased, that he was assaulted by the Police, *held*, as the statement of the deceased was with regard to the cause of his death made shortly before his death, it was clearly admissible as dying declaration under S. 32(1): 1990 Cr.L.J. 2093 (Cal.) (D.B.).

Where it was the case of the prosecution that the accused wanted to do away with the deceased because of her pregnancy through him: *Held*, that the statement of the deceased to the witnesses of her condition and of the person responsible for it would be admissible under S. 32(1) as it was a circumstance which had some proximate relation to her death: 1954 Ker.L.T. 801: A.I.R. 1955 Trav.-Co. 87.

Statement "as to circumstances of the transaction which resulted in death"—Murder to avoid scandal from pregnancy of deceased by accused—Her statement before death about her pregnancy is covered by Cl. (1): 1969 All. Cr.R. 556: 1970 All.L.J. 149: 1969 All.W.R. (H.C.) 865.

Deceased widow asking for Police protection on account of apprehension of trouble from her brothers-in-law at the time of undertaking sowing operation—Two months later deceased found murdered—Her application for Police protection held admissible under S. 32(1): (1970) 72 Bom.L.R. 405: 1970 Mah.L.J. 634: A.I.R. 1970 Bom. 438.

Ss. 32(1), 9, 7, 8, 11, 112, 60, 14, 151 and 145—'Statement of person as to cause of his death or as to any circumstances of the transaction which resulted in his death'—Conviction based on identification—It is not every statement of a relevant fact made by a person who is dead that is itself made relevant: I.L.R. (1967) 2 Ker. 21: 1967 M.L.J. (Cr.) 569: 1967 Ker.L.T. 466.

Where the victim stated in the *ejahar* that he could recognise the accused as one of the dacoits but without any statement as to the cause of death and the victim did not say anything before the Police or the public about his recognising the culprits and he died before the trial could commence, *held*, the *ejahar*, uncorroborated, was no substantive evidence: 1982 Cr.L.J. 572 (Gau.) (D.B.).

Voluminous evidence in the form of letters sent by deceased to her brothers expressing her plight, *viz.*, constant torture, beating, non-supply of food and other necessities, which showed that it ultimately resulted in her death—*Held*, statements and letters written by the deceased being directly connected with or related to her death and which revealed a tell-tale story, same clearly fell within the four corners of S. 32 and, therefore, admissible: 1993 Cr.L.J. 3580 (Bom.) (D.B.).

Where deceased during her visits to her parental place spoke about the harassment/cruelty to her and about the demands for dowry and ultimately she died by drowning in a well, *held*, such statements were admissible under S. 32 (1): 1992 Cr.L.J. 2455: (1993) 2 Hindu L.R. 196 (Bom.) (D.B.).

Where the accused-husband was a Police Officer and the deceased-wife did not implicate him and his relatives in her dying declaration, however, there was documentary evidence in the shape of letters written over a period of time by her stating her intention to commit suicide for reasons of ill treatment and cruelty to which he was subjected by the accused, *held*, her dying declaration could not be said to be destructive of the other evidence; non-implication in dying declaration could be due to the fact that she was virtually terrified of her husband and he did make full use of his position as a Police Officer *vis-a-vis* the wife and her relatives: 1993 Cr.L.J. 1134: (1994) 1 Bom.C.R. 84 (D.B.).

Where the wife, tortured and burnt to death by her husband and in-laws for more dowry, had been writing to her parents about the maltreatment and torture she was being subjected to after the commencement of torture, *held*, the letters had direct nexus with the accused's design to administer to the victim slow and steady mental and physical torture to bring about her ultimate death; the earlier incidents were, even if somewhat remote in time, nevertheless parts of the same transaction; the letters are admissible under S. 32(1): 1981 Cr.L.J. 1373 (Punj.) (D.B.).

Where in a case for abetment to suicide, the deceased's letters to her relatives and friends written during the last two years of her life were sought to be proved as evidence of systematic ill-treatment, cruelty and instigation, *held*, the letters constituted a statement of relevant facts by a dead person as to the circumstances resulting into her death where the fact in issue is the cause of her death; the letters are relevant though not sufficient in the absence of proof of incitement to commit the suicide; whether the correspondence is proximate in time or not is of little importance: (1976-77) 81 Cal.W.N. 713 (D.B.).

Where the alleged statements made six months before the actual date of occurrence by the deceased to her cousin-brother about the torture by her husband-the accused, were vague to the extreme and did not disclose overt acts of such nature which were likely to drive the deceased to commit suicide or even endanger her life or limb and further the alleged circumstances had no proximate relation to the actual occurrence, namely, suicide, *held*, the alleged statements were not admissible under S. 32(1): 1992 Cr.L.J. 1017 (Cal.) (D.B.). *See* also 1982 M.P.W.N. 375.

7. Dying declaration—Evidentiary value.—It is safer to rely on the dying declaration rather than on the first information report, for a great sanctity is attached to the former as it is expected that the person who is on the verge of death will tell the truth: 1938 O.W.N. 1103: A.I.R. 1939 Oudh 33.

There is one weakness in a dying declaration that the accused had no chance to cross-examine the deceased, and, therefore, it cannot be given the same value as a statement which is given in the Court: 1956 Raj. L.W. 178: 1957 Cr.L.J. 240. Evidence recorded under S. 512(1), Cr.P.Code—Test of credibility—Dying declaration—Difference. *See* A.I.R. 1958 All. 214.

The dying declaration is not by any means so important for the purpose of the prosecution when apart from it there is the evidence of four eye-witnesses that it was the accused who entered the house and attacked the deceased: 1966 Cr.L.J. 1012 (2): A.I.R. 1966 Madh. Pra. 261.

It is true that a dying declaration cannot be contradicted by reference to extraneous evidence of witnesses. It has to stand by itself or not at all. The witnesses may exaggerate the facts or introduce fresh matter in evidence in order to aggravate the offence. However, that would not in any way militate against the reliability of the dying declaration of the deceased. There is no rule of law permitting the dying declaration being tested on the crucible of evidence of witnesses; indeed such a doctrine would violate the fundamental principle of criminal jurisprudence, which is that the evidence in the nature of the dying declaration or otherwise has to be judged on its own in the light of the surrounding circumstances: 1967 All.W.R. (H.C.) 345: 1968 Cr.L.J. 227: A.I.R. 1968 All. 83.

Under ordinary circumstances a dying declaration has considerable evidential value, but in cases where the deceased was himself the aggressor and there was sufficient lapse of time between the occurrence and recording of his statement the dying declaration loses its value: 1946 M.L.R. 27 (Cr.).

A dying declaration which contradicts itself in its various parts is inadmissible. Even if it is admissible its evidentiary value is negligible: 108 I.C. 526: 28 Cr.L.J. 418.

It is not safe to base a conviction on the dying declaration of the deceased, when the

other evidence in the case is tainted and has to be rejected: 150 I.C. 819: 11 O.W.N. 851: A.I.R. 1934 Oudh 405. *See* also 164 I.C. 139: 37 Cr.L.J. 990: A.I.R. 1936 Rang. 324; 176 I.C. 683: A.I.R. 1938 Rang. 282.

Dying declarations no doubt are important pieces of evidence, as they are made under a sense of impending death, concerning circumstances with regard to which the deceased is not likely to be mistaken. A dying person would invariably tell the name or names of the actual culprits if he knows them. When only one person is pointed out, by the dying person, to have caused his death the statement will ordinarily be entitled to great truth unless of course there are circumstances to cast doubt on the same. Where the Judge pointed out that the deceased was accompanied by several persons who used to talk to him on their way to the hospital and, therefore, it was quite possible that the dying declaration implicating many persons might be an induced or prompted one. *Held*, that that was a matter of opinion under the circumstances of the case. Therefore, merely because that the Judge had been influenced by the statement made by a certain witness which itself was inadmissible could not be a sufficient ground to interfere with his finding: 1958 An.L.T. 580: 1958 Cr.L.J. 1118: A.I.R. 1958 Andh. Pra. 571.

A dying declaration may well be the sole basis of a conviction. A dying declaration is not upon oath, is not made in the presence of the person affected, and is not tested by cross-examination. Again, the Court must consider whether the declaration was made at the earliest opportunity and to a proper person and whether it was recorded in a manner which reflected what the declarant had in fact said. The Court must also bear in mind the declarant's powers of observations such opportunity as he had of seeing his assailants and whether his capacity to remember the facts stated remained unimpaired at the time of the declaration. If the Court, after taking everything into consideration, is convinced that the declaration is true, it is its duty to convict, notwithstanding that there is no corroboration: 1960 Cr.L.J. 1075: A.I.R. 1960 Cal. 509.

No doubt a dying declaration has to be subjected to a very close scrutiny bearing in mind that the statement has been made in the absence of the accused who had no opportunity of testing the truth of the version. It is also to be seen whether the statement was the result of tutoring by interested persons. But when the Court after considering the evidence in the case comes to the conclusion that the dying declaration is the truthful version as to the circumstances of the death and the identity of the assailant, the dying declaration has to be accepted: 1960 Ker.L.T. 435: 1960 Ker.L.J. 377.

Before the aid of S. 32(1) of the Evidence Act can be availed of, the prosecution has to establish that the statement in the dying declaration is made by a person who is dead as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death. Thus, the burden of establishing the requirements of S. 32 is on the prosecution: 1962 M.L.J. (Cr.) 25; (1962) 1 Cr.L.J. 619: A.I.R. 1962 Mys. 82.

A dying declaration cannot be relied upon when it does not record what deceased himself wanted to say, but records what he says on the suggestions of other persons: A.I.R. 1971 S.C. 953: (1971) 1 S.C.C. 513.

The non-mention of the making of a dying declaration in the F.I.R. is fatal to the prosecution case concerning the alleged dying declaration—However, a conviction on the sole basis of a dying declaration can be recorded in the absence of any factors militating against the truth of said dying declaration: 1976 Cr.L.J. 1921 (Gau.) (D.B.).

The recording of a dying declaration is a grace and solemn proceeding. The proceeding should be so conducted that the declarant is as free from personal influence in making his declaration as he would be if he were giving evidence in a Court of law: 152 I.C. 741: A.I.R. 1934 All. 908. The dying declaration being an important piece of evidence must be as exact and full as possible: 15 I.C. 308; 22 M.L.J. 453. *See* also A.I.R. 1924 Lah. 12; I.L.R. 5 Lah. 205: A.I.R. 1924 Lah. 581; I.L.R. 16 Pat. 593: A.I.R. 1938 Pat. 52; 1937 Mad.W.N. 333.

A dying declaration which records every word of a dying man unattended by interested person is a most valuable evidence: 1995 Cr.L.J. 312 (All.) (D.B.).

Where a dying declaration recorded by a Magistrate was impeached as untruthful as containing alterations (scoring out or overwriting at two places which are neither very material nor change the text), *held*, that does not by itself render it untrue or lacking in veracity; rather it lends to the declaration more probative value; for if the Magistrate had tried to forge the statement, he could have

written it afresh on another paper to avoid the mistakes: 1988 Mah.L.J. 641.

A dying declaration can be used as evidence even though the accused is not charged with the offence of homicide: I.L.R. 6 Pat. 747: A.I.R. 1928 Pat. 162.

Sometimes, attempts have been made to equate a dying declaration with the evidence of an accomplice or the evidence furnished by a confession as against the maker, if it is retracted, and as against others, even though not retracted. But it is not right in principle to do so. Though under S. 133 of the Evidence Act, it is not illegal to convict a person on the uncorroborated testimony of an accomplice. Illustration (*b*) to S. 114 of the Act, lays down as a rule of prudence based on experience, that an accomplice is unworthy of credit unless his evidence is corroborated in material particulars and this has now been accepted as a rule of law. The same cannot be said of a dying declaration because a dying declaration may not, unlike a confession, or the testimony of an approver, come from a tainted source. Generally speaking, the maker of a dying declaration cannot be tarnished with the same brush as the maker of a confession or an approver: A.I.R. 1958 S.C. 22: 1958 M.L.J. (Cr.) 100.

8. Dying declaration—Whether requires corroboration.—It cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable; in the words of the maker of the declaration, stands on much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties. [(1940) 1 M.L.J. 124 (F.B.), Approved]: A.I.R. 1958 S.C. 22: 1958 M.L.J. (Cr.) 100; A.I.R. 1966 Manipur 12; 1969 M.L.J. (Cr.) 427: (1969) 1 An.W.R. 519; 1979 Cr.L.R. 493 (Raj.).

It is not an absolute rule of law that in every case corroboration must be sought for the dying declaration irrespective of the circumstances of the case. If the Court after taking into consideration all the factors feels convinced that the statement is true, it could convict the accused although there is no corroboration in the true sense: 1957 M.L.J. (Cr.) 460: (1957) 2 An.W.R. 187; 1977 Cr.L.R. 402 (Raj.).

There is nothing in law to prevent the Court from regarding a dying declaration as sufficient to justify a conviction where the Court is entirely satisfied with regard to its truth, though there is no corroboration: I.L.R. (1943) Kar. 587; I.L.R. (1952) Raj. 298: A.I.R. 1952 Raj. 155.

Dying declaration—Reliability—To pass the test of reliability dying declaration has to be subjected to very close scrutiny—Once the Court has come to conclusion that it was true, there is no question of further corroboration: 1969 Raj.L.W. 610: I.L.R. (1969) 19 Raj. 626: A.I.R. 1970 Raj. 60.

A dying declaration may take the form of an F.I.R. and may be taken as a piece of substantive evidence under S. 32 (1) as a statement as to the cause of the informant's death. In order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once the Court has come to the conclusion that the dying declaration was a truthful version as to the circumstances of the death of the victim, there is no question of further corroboration. If on the other hand, the Court after examining a dying declaration

in all its aspects and testing its veracity has come to the conclusion that it is not reliable by itself and that it suffers from an infirmity, then without corroboration it cannot form the basis of conviction. Thus the necessity for corroboration arises not from any inherent weakness of the dying declaration as a piece of evidence, but from the fact that the Court in a given case has come to the conclusion that that particular dying declaration was not free from infirmities. [Observations in A.I.R. 1953 S.C. 420, held to be in the nature of *obiter*]: A.I.R. 1958 S.C. 22: 1958 M.L.J. (Cr.) 100; (1990-2) 38 B.L.J.R. (N.O.C.) 26.

Held, on evidence, that the dying declaration of the deceased represented the truthful version of the incident and it also got further corroboration from the recoveries and other circumstances. Thus, there was no legal bar to base a conviction on such a statement which was admissible under S. 32 (1) even without any independent corroboration: I.L.R. (1963) Cut. 443: (1964) 1 Cr.L.J. 461; 1975 All.W.C. 34 (D.B.).

It is now well settled that it is neither a rule of law nor of prudence that a dying declaration requires corroboration before a conviction can be based thereon. The necessity for corroboration in certain cases arises not from any inherent weakness of a dying declaration as a piece of evidence but from the fact that it was tainted and not free from infirmity. Great value is generally attached to a statement which has been consistent throughout when the deceased had several opportunities of making a dying declaration, and the statement was made at the earliest opportunity and was not the result of tutoring by the interested parties. The dying declaration of a deceased husband cannot be said to have arisen from a tainted source so as to require corroboration where the evidence shows that though the husband and wife were having usual differences arising in married life and in conducting family affairs, there was no enmity between the two. It can itself constitute the basis for conviction provided the Court comes to the conclusion that the deceased died as a result of some poison administered to him by the accused in some eatable and version given by the deceased, that the accused gave chatni which tasted bitter whereafter he had vomiting on the next day, is a truthful one: (1965) 1 Cr.L.J. 321: A.I.R. 1965 Ori. 38.

No rule of law or even of prudence enjoins that a reliable dying declaration cannot be acted upon unless it is corroborated: (1991-1) 32 Guj.L.R. 125: (1991) 1 Crimes 349: (1991) 2 Hindu L.R. 71: (1991-1) 39 B.L.J.R. (N.O.C.) 1 (S.C.). A dying declaration if otherwise truthful, reliable and voluntary may alone sustain conviction for a dowry murder: A.I.R. 1992 S.C. 1817: 1992 Cr.L.J. 2919: (1992) 2 An.W.R. 60: (1992) 2 S.C.C. 474: (1992) 1 Crimes 1180; (1988) 15 Cr.L.T. 450 (P.&H.) (D.B.).

Law is well settled that the dying declaration, if true and reliable, can constitute the sole basis of the conviction: (1972) 38 Cut.L.T. 754 (D.B.); (1973) 39 Cut.L.T. 619 (D.B.); I.L.R. (1971) 21 Raj. 541.

A dying declaration is relevant and material evidence in the prosecution of the assailants and a truthful and reliable dying declaration may form the sole basis of conviction, even though it is not corroborated. But the Court must be satisfied that the declaration is truthful. The reliability of the declaration should be subjected to a close scrutiny, considering that it was made in the absence of the accused who had no opportunity to test its veracity by cross-examination. If the Court finds that the declaration is not wholly reliable and a material integral portion of the deceased's version of the entire occurrence is untrue the Court may, in all the circumstances of the case consider it unsafe to convict the accused on the basis of the declaration alone without further corroboration: 1968 All.L.J. 61; A.I.R. 1965 S.C. 939: 1965 M.L.J. (Cr.) 510.

Held, on facts, that considering all the circumstances of the case, the dying declarations suffered from an infirmity and were not reliable by themselves and could not safely form the basis of the conviction of the accused without further corroboration. As no such corroboration was forthcoming in the case, the accused were given the benefit of doubt and were acquitted: 1965 M.L.J. (Cr.) 510: A.I.R. 1965 S.C. 939.

It is well settled that a dying declaration without any corroboration can solely form the basis of conviction, if it is reliable; in order to pass the test of reliability a declaration should be subjected to a very close scrutiny keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing veracity of the statement by cross-examination. [A.I.R. 1958 S.C.

22, Foll.]: (1991) 4 Bom.C.R. 617 (D.B.); 1982 Cr.L.J. 400 (Gau.) (D.B.); 1982 Cr.L.J. 1163 (Ori.) (D.B.); 1982 All.W.C. 351: 1982 All.Cr.R. 197: 1982 All.L.J. 1027; 1982 Cr.L.J. 389; (1983) 2 Crimes 547 (P.&H.); (1985) 1 Crimes 1126 (All.); (1987) 3 Crimes 115 (Gau.); (1988) 1 Crimes 647 (Del.); 1989 C.Cr.L.R. 108 (Cal.); 1989 Cr.L.J. (N.O.C.) 191 (Cal.) (D.B.); (1990) 2 Crimes 301 (Raj.); (1983) 55 Cut.L.T. 145 [Unless one is certain about the exact words stated by the deceased, no reliance can be placed on verbal statements of witnesses and on such oral declaration made by the deceased].

A dying declaration found to be truthful and reliable and free from infirmities may be the sole basis for recording conviction; to discard it on flimsy and fanciful grounds would tantamount to wreaking gross injustice: (1992-1) 32 Guj.L.R. 646.

There is no rule of law prohibiting conviction solely on an uncorroborated dying declaration; corroboration is not meant to rectify inherent infirmities in the dying declaration as evidence; the corroboration is sought where a particular dying declaration is not free from some infirmities: (1974) 76 Punj.L.R. 57 (D.B.).

There is no legal bar to base a conviction for murder solely on the dying declaration if otherwise complete, categoric, true and reliable; not being evidence of an accomplice, it requires no corroboration; it is like any other piece of evidence to be appraised as such though it has to bear the Court's closest scrutiny and circumspection. The law would require corroboration only if the declaration is not reliable and suffers from any legal infirmity. [1958 Cr.L.J. 106 (S.C.); 1962 Cr.L.J. 479 (S.C.); 1970 Cr.L.J. 1415 (S.C.); A.I.R. 1972 S.C. 1776: 1972 Cr.L.J. 828 and 1976 Cr.L.J. 1718 (S.C.), Rel. on]: 1981 Cr.L.J. 1165 (Ker.) (D.B.); 1980 Jab.L.J. (Notes) 37; 1980 Raj.L.W. 159: 1980 W.L.N. 452: 1981 Cr.L.J. 852 (D.B.); (1977) 2 Karn.L.J. 350; 1977 M.P.L.J. 321 (D.B.); A.I.R. 1976 S.C. 2199: 1976 Cr.L.J. 1718; 1976 Cr.L.J. 828: 1975 Raj.L.W. 435: I.L.R. (1975) 25 Raj. 971.

A dying declaration can form the sole basis for conviction without any corroboration if the same is true and correct version of a dying man and is not stated to have been made under any doubtful circumstances. It is like any other prosecution evidence and subject to scrutiny. Corroboration is not sought for because it is a weak piece of evidence, but corroboration is sought for because it suffers from certain infirmity. Thus, where according to the prosecution the first wife caused death of the deceased who was second wife by burning but there was no evidence that the deceased and the accused were sleeping in the night together and the doctors did not opine whether the injuries were sufficient in the ordinary course of nature to cause death and further, the dying declaration was not free from infirmities as it was unsigned and uncorroborated, *held*, it would not be proper to sustain the conviction only on the basis of dying declaration: 1995 Cr.L.J. 2412 (Ori.) (D.B.).

A dying declaration does not come from a tainted source; the declarant is not an accomplice; the declaration ordinarily requires no corroboration. Thus, where the declaration mentioned the cause and place of the quarrel as well as the names of the accused and of the weapons in their hand, *held*, its veracity could not be doubted for want of corroboration: 1984 Cr.L.R. 441: (1984-2) 25 Guj.L.R. 1019: (1984) 4 Guj.L.H. 761.

Law is well settled that a dying declaration can be acted upon without corroboration; there is no rule of prudence hardened into a rule of law to that effect; the primary effort of the Court is to find out if declaration is true and if it is so, no corroboration is called for. Thus, where the deceased was in Policemen's exclusive custody in the Police Station where none else could influence or tutor him, and which also ruled out the possibility of his being assaulted by any one else, *held*, his dying declaration that he was beaten by the Policemen there could safely be accepted as true and acted upon: A.I.R. 1985 S.C. 416: (1985) 1 S.C.C. 552: (1985) 1 Crimes 344.

Where the prosecution rested its case for murder on circumstantial evidence and the dying declaration recorded by the Police in the presence of the Doctor on duty and the deceased's parents which was found on close scrutiny by the Court to be truthful, *held*, it is open to the Court to record conviction without independent corroboration of the dying declaration: A.I.R. 1979 S.C. 190.

Once a dying declaration and its testifying witnesses pass the test of careful scrutiny by the Court, it becomes a very important and reliable evidence; if the Court is satisfied that the declaration is true and free from embellishment, it is by itself sufficient to record conviction without seeking corroboration: (1993) 1 Hindu L.R. 511 (S.C.); (1992) 3 Crimes 716 (Andh. Pra.).

It is accepted law now that when the Court finds a dying declaration to be true, that by itself can form basis of conviction: 1958 Ker. L.J. 1202. When the dying declaration has

passed the test of reliability it is substantive evidence which does not require any corroboration: 1959 Ker.L.T. 914: 1960 Cr.L.J. 477; A.I.R. 1960 Ker. 120.

While considering the relevancy and admissibility of a dying declaration, the declaration has to be closely scrutinised as it is not given on oath nor is it subject to cross-examination. But it cannot be said that dying declaration cannot form the sole basis of conviction unless it is corroborated by some other reliable evidence.

A dying declaration stands on the same footing as any other piece of evidence and has to be judged and tested in the light of surrounding circumstances and with reference to principles governing the weighing of evidence. In order to test the reliability of a dying declaration the Court has to see the circumstances in which the dying declaration has been made, for example, the opportunity of the dying man for observation, whether the capacity of the dying man to remember the facts stated had not been impaired at the time he was making the statement and also if the statement has been made at the earliest opportunity and was not the result of tutoring by interested parties. Once the Court has come to the conclusion that the dying declaration is a truthful version as to the circumstances of the death and the identity of the assailants of the victim, there is no question of further corroboration: A.I.R. 1970 Goa 96: 1970 Cr.L.J. 1081.

It is neither a rule of law nor of prudence that a dying declaration requires to be corroborated by other evidence before a conviction can be based thereon. The evidence furnished by the dying declaration must be considered by the Judge, just as the evidence of any other witness though undoubtedly some special consideration arise in the assessment of dying declarations which do not arise in the case of assessing the value of a statement made in Court by a person claiming to be a witness of the occurrence. In the first place, the Court has to make sure as to what the statement of the dead man actually was. In the second place, the Court has to be certain about the identity of the persons named in the dying declarations. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, but from the fact that the Court, in a given case has come to the conclusion that that particular dying declaration was not free from the infirmities as may be disclosed in evidence in the case: (1962) 1 S.C.R. (Supp.) 104: A.I.R. 1962 S.C. 439; 1968 Cr.L.J. 1237 (Manipur).

It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. Each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made. Where a Court has come to the conclusion that the dying declaration was truthful version as to the circumstances of death of the victim, there is no question of further corroboration. The dying declaration is a sanctified statement because the sense of impending death creates a sanction equal to the sanctity of an oath. It is said that where a person is on the verge of death, the motive to falsehood is silenced and the mind is induced by the most powerful consideration to speak nothing but the truth. No doubt sometimes a dying declaration is not to be trusted but each case must be determined on its own merits: (1962) 2 Cr.L.J. 672 (Madh. Pra.).

Dying declaration—Conviction based on it—Legality: 1970 Pat.L.J.R. 172.

A dying declaration by itself requires no corroboration if believed to be true, but if it suffers from inherent infirmities like any other evidence it requires corroboration, for in such a case it cannot form the basis of a conviction: (1961) 3 Ori.J.D. 360.

A truthful and reliable dying declaration even if not corroborated, may form the sole basis of conviction; but the declaration should be subjected to a close scrutiny as it is made in the absence of the accused who had no opportunity to test its veracity by cross-examination. If the Court finds that the declaration is not wholly reliable and a material and integral portion of the deceased's version of the entire occurrence is untrue, the Court may, in the circumstances, consider it unsafe to convict the accused on its basis alone, without further corroboration. [A.I.R. 1965 S.C. 939; (1973) 39 Cut.L.T. 619; A.I.R. 1972 S.C. 1776, Rel. on]: (1975) 41 Cut.L.T. 636 (D.B.).

A dying declaration can be accepted without corroboration; all that is necessary for the Court is to satisfy itself that the statement is true; the Court is then duty bound to convict the accused relying on the dying declaration. Merely because the person giving the dying declaration belonged to a political party having no faith in the existence of God would make no difference in assessing the truth or otherwise of the dying declaration; may be the party may not believe in God, but persons belonging to it may have: (1975) 2 M.L.J. 318: 1975 M.L.J. (Cr.) 594 (D.B.).

A dying declaration can be the sole basis of conviction even in a murder charge provided it stands the test of reliability. However, the declaration has to be subjected to close scrutiny keeping in view the fact that the statement is made in the absence of the accused. One has to see that the declaration does not come from any tainted source; but once the Court is convinced that the declaration is a truthful version as to the circumstances of the death and the assailant of the victim, there may be no need for any further corroboration and conviction can be based on the strength of the dying declaration alone: 1961 Raj.L.W. 82: I.L.R. (1961) 11 Raj. 134.

A conviction can be based solely on a dying declaration provided it is a truthful version of the deceased. To test whether it is truthful or not, the Court must always be very careful. Since a dying declaration is made in the absence of the accused who has no opportunity for cross-examination, the Court is to carefully scrutinise the surrounding conditions, the intrinsic character of the dying declaration and decide whether it is true or not. Thus, when a deceased, fully conscious and in a position to understand the implication of the questions put to him and his answers thereto, has made a simple dying declaration to a Magistrate in the presence of a doctor, and both of them are unimpeachable witnesses with nothing to depose falsely and no enmity or ill-feeling is alleged between the deceased and the accused, such a declaration is a true version of the incident and it can itself without corroboration sustain the conviction of the accused: I.L.R. (1968) Cut. 809: 1969 Cr.L.J. 703.

Dying declaration is a piece of evidence, and if the Court comes to the conclusion that it is a truthful version, a conviction can be based on the dying declaration alone without any corroboration. It stands on the same footing as any other piece of evidence and has to be judged in the light of surrounding circumstances and the principle governing the weighing of evidence. When the statement of the deceased is not recorded in the presence of the accused and the deceased is not subjected to cross-examination with reference to that statement, the dying declaration must be very critically scrutinised. If the Court comes to a conclusion that the dying declaration depicts a truthful version of the occurrence, it itself will constitute the basis of conviction. A dying declaration in the form of questions and answers and as far as practicable in the words of the maker of the declaration stands on a much higher footing: I.L.R. (1964) Cut. 841.

In a proper case, it may be permissible to convict the accused only on the basis of a dying declaration; thus, where the dying declaration was properly proved and no questions in cross-examination were asked as to the deceased's state of health nor any suggestion was made that the deceased was not in a fit state to make the statement and the Doctor's evidence also clearly indicated that the deceased could make the statement attributed to her and the dying declaration bore her thumb impression, *held*, in the absence of any of the witnesses of the declaration having any ill-feeling against the accused, his conviction was sustained: A.I.R. 1983 S.C. 164: 1983 Cr.L.J. 221: (1983) 1 S.C.C. 211: (1983) 3 Guj.L.H. 337.

If the Court on materials on record is satisfied that the deceased had a clear opportunity to observe and identify his assailant, he was in a fit state of mind and had made his dying declaration without any influence or rancour, and that the declaration was true and voluntary, *held*, such declaration, without further corroboration, is sufficient to convict the accused; even otherwise, the testimony of other witnesses also corroborated the dying declaration: 1977 Cr.L.J. 1626: 1977 All.W.C. 657: 1977 All.Cr.R. 453 (D.B.).

Where deceased was in a fit state of mind to make a statement after he had a clear opportunity to observe and identify his assailant and made the statement without any influence or rancour, *held*, it can be accepted without corroboration and the conviction can be founded on it: 1992 Cr.L.J. 1294 (All.) (D.B.).

Dying declaration—Evidentiary value—Test of reliability—It can form sole basis of conviction—Corroboration—When necessary—Law laid down in. [1958 S.C.J. 198: A.I.R. 1958 S.C. 22 reiterated and applied]: 1961 Pat. L.R. 60.

A dying declaration, if believed, is a substantive piece of evidence. It stands on the same footing as any other piece of evidence and has to be judged in the light of the surrounding circumstances and with reference to the principles governing the weighing of evidence. There is no rule of law nor precedent that dying declaration requires corroboration: 1990 Cr.L.J. 1129 (Madh. Pra.) (D.B.); 1988 Cr.L.J. (N.O.C.) 71: (1988) 3 Crimes 530 (Cal.) (D.B.); (1988) 1 W.L.N. 387: (1988) 1 Raj.L.R. 396.

A dying declaration must be closely scrutinised to ascertain its truthfulness, like any other important piece of evidence, in the light of its surrounding facts and circumstances, bearing in mind, on the one hand, that

the statement is by a person not examined on oath in the Court and, on the other hand, that a dying man is normally not likely to falsely implicate innocent persons. If the Court is satisfied that the dying declaration is truthful, it may convict the accused without any independent corroboration: A.I.R. 1972 S.C. 1776: 1972 Cr.L.J. 828.

Although a dying declaration should be carefully scrutinised but if after perusal of the same, the Court is satisfied that the dying declaration is true and is free from any effort to prompt the deceased to make a statement and is coherent and consistent, there is no legal impediment in founding the conviction on such a dying declaration, even if there is no corroboration. [A.I.R. 1953 S.C. 420 held overruled in view of A.I.R. 1962 S.C. 130]: A.I.R. 1980 S.C. 559: (1980) 2 S.C.C. 207: 1980 Cr.L.J. 408.

It is well settled that there can be conviction on the basis of dying declaration alone and it is not at all necessary to have a corroboration provided the Court is satisfied that the dying declaration is truthful and not vitiated in any manner. The satisfaction of the Court may be based on various circumstances and consideration: 1992 Cr.L.J. 1294 (All.) (D.B.).

A dying declaration even though untested by cross-examination stands on the same footing as any other evidence; if the Court after strictest scrutiny is satisfied about its truthfulness and reliability, it may convict the accused on the sole basis of the dying declaration though it may not always be safe to do so unless the declaration is corroborated on material points by other independent evidence: I.L.R. (1979) 2 Del. 118: 1979 Cr.L.J. 1477 (D.B.); 1979 W.L.N. (U.C.) 364: 1976 Cr.L.R. 112 (Raj.).

A conviction can be based solely on a dying declaration without corroboration, if the Court otherwise finds the same to be reliable and not to suffer from any inherent improbability or any other infirmity. But whether in a given case, it is or is not safe to do so would depend on the facts and circumstances of that case and other materials on record and the question must be left to the Court concerned without any attempt at generalisation: 1992 Cr.L.J. 2574 (Cal.) (D.B.). *See* also I.L.R. (1977) 2 Karn. 1276: (1977) 2 Karn.L.J. 350.

Even an uncorroborated dying declaration, it is now well recognised, may sustain a conviction where: (*i*) it was actually made by the deceased when he was capable of understanding its implications and was under no external influence and had no ulterior motive, and (*ii*) it was a truthful version of what had actually occurred; but the Court, before it enters conviction, must carefully and closely scrutinise the evidence to ensure that the two tests are satisfied: 1985 Cr.L.J. 1436: I.L.R. (1984) Him. Pra. 793.

The law is well settled by the judicial pronouncements that a conviction can safely be placed on a dying declaration provided the said dying declaration is free from vice of infirmities and if that dying declaration commands acceptance at the hands of the Court: A.I.R. 1994 S.C. 129: 1994 Cr.L.J. 617.

A dying declaration, before it could be relied upon, must pass a test of reliability as it is a statement made in the absence of the accused and there is no opportunity to the accused even to put it through the fire of cross-examination to test its genuinity or veracity. The Court has, therefore, to subject it to close scrutiny. But once the Court is satisfied that it is a truthful version as to circumstances in which the death resulted and the persons causing injuries, law does not expect that there should be corroboration before it could be relied upon. However, if there are infirmities and the Court does not find it safe to base any conclusion on it without some further evidence to support it, the question of corroboration arises. No inherent infirmity as such attaches to a dying declaration as a piece of evidence: 1968 Cr.L.J. 1549: A.I.R. 1968 Guj. 296.

A dying declaration stands independently as a good piece of evidence for sustaining a conviction, if it is found to be true and free from infirmity, and corroboration need not be sought for. Necessity for corroboration arises only where the dying declaration presents suspicious features and infirmity. Invariably, it is subjected to strictest scrutiny and the Court should be on guard to ensure that declaration is not the result of tutoring, prompting or imagination and that the deceased had the opportunity to observe and identify the assailants and was fit for making the declaration. Where dying declaration is suspicious, it should not be relied upon without strong and convincing corroborative evidence: 1990 Cr.L.J. 1333 (Gau.) (D.B.).

Where the person giving dying declaration in a murder case was in a fit mental state

and the dying declaration was untutored and related to an incident where there could be no mistake as to identity of the assailants and had been given at the earliest opportunity, *held*, the same even without corroboration had to be accepted. There is no rule of law that such a dying declaration needs corroboration: 1978 All.L.J. 51: 1978 All.Cr.R. 11: 1978 Cr.L.J. 196 (D.B.).

A conviction can be based upon a dying declaration alone; it is not at all necessary to look for its corroboration, if the Court is satisfied about its truthfulness and reliability. But, where the deceased in hospital for eight days did not disclose to anyone that her husband had set her on fire and it was only on meeting her uncle on the 8th day that she made such an oral declaration to him and later to the Magistrate implicating her husband without even correctly naming him, *held*, probably her statement might have been inspired by her uncle; thus, it is not safe to base conviction on the dying declaration alone: A.I.R. 1983 S.C. 274: 1983 Cr.L.J. 426: (1983) 2 S.C.C. 14: (1983) 1 Crimes 380.

A dying declaration is admitted in evidence on the principle of necessity. The fact that it is not tested by cross-examination on behalf of the accused merely serves to put the Court on its guard by imposing on it an obligation to scrutinize all the relevant circumstances. If the dying declaration is acceptable as truthful then even in the absence of other corroborative evidence the Court can act upon it and convict the accused: A.I.R. 1970 S.C. 1566: 1970 Cr.L.J. 1415.

Ss. 32 and 3—'Proved'—Evidentiary value of dying declaration—A dying declaration can well be on proper appreciation thereof, basis of conviction: 1968 Cr.L.J. 344: A.I.R. 1968 Guj. 77.

A dying declaration is not a weak piece of evidence; it can by itself form a basis for conviction without further corroboration, provided it is truthful and reliable; its truthfulness, reliability and acceptability is to be adjudged in the light of attendant circumstances of each case with strict scrutiny as in case of other evidence, direct or circumstantial; it should not be rejected merely because of some improvements made in the oral testimony of other witnesses: (1985) 1 An.W.R. 354: (1984) 2 An.L.T. (N.R.C.) 69: 1985 Cr.L.J. 336(D.B.).

There can be conviction on the basis of dying declaration and it is not at all necessary to have a corroboration provided the Court is satisfied that the dying declaration is a truthful and genuine dying declaration. Thus, once the dying declaration recorded by the Executive Magistrate is proved by the oral evidence and inspires confidence of the Court, it is admissible in evidence and conviction can be based on dying declaration alone in absence of any direct or corroborative evidence: (1991-1) 11 Guj.L.H. 307: (1991-2) 32 Guj.L.R. 850: 1992 Cr.L.R. 600 (D.B.). *See* also 1982 M.P.W.N. 362.

No conviction can be entered on a dying declaration recorded in suspicious circumstances or suffering from infirmities unless it is corroborated; to be accepted as reliable, it must be subjected to a very close scrutiny; it must be satisfactorily established that the deceased was in a fit state of mind: (1990-1) 38 B.L.J.R. 139 (D.B.).

Where the deceased as per evidence on record was in a fit state of mind and capable of making the statement which was recorded, when there was absolutely no scope for tutoring, in question and answer form by the Medical Officer wherein the deceased categorically named the accused as firing the gun, and the deceased's oral dying declaration as well as other evidence corroborated the recorded dying declaration, *held*, the dying declaration alone could form the basis of conviction: 1991 Cr.L.J. 2024 (Ori.) (D.B.). *See* also (1979) 1 M.P.W.N. 297 [Where dying declaration was testified by independent witnesses and corroborated by promptly lodged First Information Report]; 1980 Jab.L.J. (Notes) 37.

A weak and unsatisfactory dying declaration implicating one accused while excluding others, *held*, cannot be made the basis for conviction: 1989 C.Cr.L.R. 1 (Cal.). *See* also (1990) 2 Hindu L.R. 140 (Bom.).

A dying declaration can be made the sole basis of conviction, when the witnesses proving it are reliable and their credibility is above board: (1984) 3 Crimes 379 (Raj.).

Where the dying declaration recorded by the Magistrate in question and answer form and in the words of the victim was consistent with the accident registers of two Government Hospitals to which he was admitted as also with his statement recorded under S. 161 of the Code of Criminal Procedure at the earliest opportunity and there was no tutoring by interested parties, *held*, being a truthful

version free from infirmities, the Court need not look for corroboration and may enter conviction relying solely on the dying declaration. [A.I.R. 1976 S.C. 2199 and A.I.R. 1992 S.C. 2037, Foll.]: (1993) 2 An.L.T. (Cr.) 86: (1993) 2 An.W.R. (N.R.C.) 43 (D.B.).

Although a dying declaration can be taken as evidence and may in certain circumstances be accepted as the sole basis for conviction, normally some corroboration of the statement must be forthcoming from other evidence in the case. This is particularly necessary in relying on extra-judicial confessions, and particularly when there is no evidence in the case corroborating the dying declaration attributed to the deceased a conviction should not ordinarily be based on such uncorroborated statement: 1967 Cr.L.J. 714: A.I.R. 1967 Assam 26; 1982 M.P.W.N. 421.

Though an uncorroborated dying declaration, otherwise truthful and reliable, may justify a conviction, yet the rule, not so much of law but of prudence, has been that ordinarily it would be unsafe to do so unless the declaration is corroborated on material points; the rule has been evolved because there can be no scope for testing veracity of the dying declaration by cross-examining its maker: (1973) 75 Punj.L.R. 801 (D.B.).

It is quite unsafe to sustain a conviction on a dying declaration which is not corroborated in material particulars by other independent evidence. The corroboration need not be by way of direct evidence. It can be in the shape of circumstantial evidence: 1955 An.W.R. 435.

There has to be material corroboration of a dying declaration before it can be used as evidence: 1957 All.L.J. 459: A.I.R. 1957 All. 177. But *see infra*. A person can be convicted upon a dying declaration of the deceased without corroboration. When the deceased said that he was attacked by the respondent and that statement is believed, it follows that the respondent is guilty (in the absence of any mistake of identity); nothing remains to be done except to find him guilty. If the dying declaration is not believed, it is a different matter. But once it is believed, it leads to the conclusion of the respondent's guilt. There is no presumption that a dying declaration is false or that it is unworthy of belief. There is no justification for treating it as a piece of tainted evidence as if it were a confession of a co-accused or evidence of an accomplice. So it cannot be laid down as a matter of law that no dying declaration should be believed unless it is corroborated. The law contemplates its being believed and some dying declarations may be believed even though not corroborated. Whether a dying declaration should be believed or not would depend upon the circumstances of the case. It is essentially a question of fact to be determined by the Court on the basis of the circumstances of each case. As far as the credibility is concerned, it is just like the evidence given by a witness. It is for the Court to decide whether to believe it or not and no rule can be laid down either that it should be believed or that it should not be believed. Once it is believed, it is irrelevant and illogical to consider that it is not made on oath and that the maker has not been subjected to cross-examination. When the law had made it a "relevant fact" notwithstanding the absence of oath and cross-examination, it means that it will not be held to be unbelievable merely on account of the absence of these matters. If it is held to be unbelievable, it must be done on the basis of other circumstances. So long as it cannot be predicted in respect of a dying declaration that had its maker been subjected to cross-examination his credibility would have been shaken, it cannot be said that the dying declaration should not be acted upon because there has been no cross-examination: *Held*, that when the dying declaration was made, the deceased was under apprehension of death and that though his was not a condition for admissibility of the dying statement under S. 32, as under the English Law, still the apprehension of the approaching death gave the statement the sanction of an oath: 1953 All.L.J. 615: A.I.R. 1954 All. 153.

Generally speaking, a declaration relevant under S. 32 but not made by one in immediate expectation of death and not made in the presence of the accused, ought not to be acted upon unless there is some reliable corroboration: I.L.R. 58 Bom. 31: A.I.R. 1933 Bom. 479 (2).

Dying declaration—Unless one is certain about words uttered by deceased, it cannot be acted upon without sufficient corroboration: 1969 Jab.L.J. 186: 1969 M.P.W.R. 924: 1969 M.P.L.J. 901.

In considering the value of a dying declaration the circumstances and the surroundings under which it is made have to be taken into consideration. When it is proved that the deceased was already given information about

the names of the assailants and the manner of attack, it is not quite safe to place much reliance on the dying declaration made by such person. It is hardly safe to act upon a dying declaration which is uncorroborated. It is incumbent on the Court to see how far it is corroborated: A.I.R. 1955 Andhra 105: 1955 Cr.L.J. 915.

Although the statement made by the deceased to the doctor just before his death is admissible in evidence as dying declaration still in order to convict the accused of murder there must be independent corroboration of facts and circumstances to prove the offence: A.I.R. 1929 Pat. 249. *See* also I.L.R. (1945) Nag. 613: 1945 Nag.L.J. 139: A.I.R. 1945 Nag. 153.

In a murder trial, the dying declarations made by the deceased were put in evidence. The statement of the declarant had the stamp of outside influence and had been made in a spirit of revenge and the declarant was unwilling to state the facts in a consistent and coherent manner. There was enough material on the record to show that the different declarations made by the deceased had inconsistencies and contradictions in them. *Held*, that under the circumstances the conviction of the accused could not be based merely upon the dying declaration of the deceased: 1957 All.L.J. 295: A.I.R. 1957 All. 466.

Where dying declaration alone was held to be sufficient for proving the guilt of the accused. *See* (1989-2) 37 B.L.J.R. 116.

When the dying declaration of the deceased and the statement of prosecution witnesses corroborate each other on the main points, undue reliance should not be accorded to minor discrepancies in the details: (1983) 2 Crimes 828 (Raj.).

Where in his oral declaration made by the deceased to his son, he stated that some eleven persons belonging to the other feuding family had assaulted him but it was found that all the accused were not from that family and as per medical evidence, the deceased could not survive to make the declaration and the blow having been given to him from behind, he could not have seen the assailants either and there were also discrepancies in the evidence of the witnesses, *held*, no reliance could be placed on the dying declaration without independent corroboration: (1988) 3 Crimes 530: 1988 Cr.L.J. (N.O.C.) 71 (Cal.) (D.B.).

Where deceased made a number of dying declarations and the one made to the Executive Magistrate suggested that deceased might have committed suicide, *held*, the conviction of accused could not be sustained on dying declaration alone: (1987) 1 Crimes 96 (Bom.).

Where the deceased who made dying declarations, as well as the witnesses who spoke about the dying declarations had no animus against the accused, *held*, the dying declarations in themselves were sufficient to seek the conviction of the accused: 1984 W.L.N. 461 (Raj.).

Where the dying declaration is corroborated by circumstances that the accused alone had perpetrated the murder, *held*, conviction under S. 302, was liable to be confirmed: (1988) 1 Crimes 687 (Bom.).

Law permits the inference of guilt against the accused even on charge of murder on the sole testimony of a dying declaration provided it is coherent and trustworthy. [A.I.R. 1983 S.C. 274, Rel. on]: 1987 M.P.L.J. 495 (D.B.).

Conviction cannot be ordered solely on the basis of a dying declaration which has deliberately and meticulously attempted to involve the accused: (1984) 3 Crimes 26 (Guj.).

A dying declaration which names only one person where the killing took place under circumstances where there could be no doubt that the dying man identified his assailant, is the very strongest possible form of evidence. But where a large number of people are implicated, it is very different matter and in the absence of corroboration of the dying declaration, the accused should not be convicted: I.L.R. (1942) Lah. 619: A.I.R. 1941 Lah. 368.

While closely scrutinising a dying declaration, like any other important evidence, the Court must bear in mind that it was not a testimony on oath recorded in the Court; that a dying person normally does not implicate innocent persons falsely; and if the Court is satisfied about its truthfulness it may enter conviction even without independent corroboration. Thus, where the dying man, burnt in the accused's house, had fallen unconscious and removed to the hospital, regaining consciousness by an intravenous injection, he called the Police for recording his dying declaration which the Tehsildar recorded in the presence of the Doctor who testified the dying man as not confused but having a clear understanding, *held*, the dying declaration was sufficient proof for the accused's conviction: 1979 W.L.N. (U.C.) 364 : 1976 Cr.L.J. 112 (Raj.) (D.B.).

Where the dying declaration could not be proved to have in fact been made, *held*, it could not corroborate the statements of the eye-witnesses: A.I.R. 1976 S.C. 2013: (1976) 3 S.C.C. 401.

The accused alleged that he had been keeping out of the way of the Police because he was suspected in another case; and he had not left the city of Nagpur and gone out of the jurisdiction of the local Police. *Held*, that in those circumstances the Supreme Court was not prepared to say that the alleged absconding of the accused could afford sufficient corroboration of the dying declaration, if corroboration of the dying declaration was needed: A.I.R. 1958 S.C. 22: 1958 M.L.J. (Cr.) 100.

9. Dying declaration—Whether can be accepted in part.—The maxim *falsus in uno, falsus in omnibus* is generally not applicable in India; thus, where a dying declaration is partly true and corroborated by other evidence, and partly false, the declaration cannot be discarded as a whole; its true part may be relied upon but not if its false part is found to be a deliberate lie: (1973) 75 Punj.L.R. 801 (D.B.).

Though the rejection of a part of the dying declaration should put the Court on the guard and make it invoke the rule of caution, it does not necessarily justify rejection of the dying declaration as a whole; however, if two of its parts are indissolubly linked, the Court has to reject both of them but not where they are severable and the correctness of one does not depend upon the correctness of the other. Normally, the Court would not act upon a part of the dying declaration unless it is corroborated in material particulars by other evidence on record: A.I.R. 1974 S.C. 2188: 1974 Cr.L.J. 1500.

Under S. 32 the whole of the statement must be taken into consideration. Parts of the statements made here and there cannot be divested from their context for purposes of propping up the prosecution case: A.I.R. 1957 Andh. Pra. 729: 1957 Cr.L.J. 1086. *See* also (1945) 47 Bom.L.R. 992: A.I.R. 1946 Bom. 189.

The value of a dying declaration altogether disappears when part of it have obviously been supplied to the dying man by other persons, whether interested parties or Police Officers. A 'touched up' dying declaration has no value: (1934) 36 Punj.L.R. 24: A.I.R. 1934 Lah. 805. *See* also A.I.R. 1941 Pat. 409.

If a portion of a dying declaration is untrue, the rest of it cannot necessarily be rejected. However, if a part of such statement is shown to have been concocted deliberately, the Court may decline to believe the rest of it without corroboration: A.I.R. 1953 Madh. Bh. 249: I.L.R. (1953) Madh. Bh. 343.

Where a portion of dying declaration gets corroboration from other evidence, the Court can accept it: (1990) 1 Crimes 381 (Del.).

Although a portion of a dying declaration is untrue, it need not necessarily be rejected *in toto*. The Court would decline to believe the rest of it without corroboration: I.L.R. (1946) Nag. 235: 1946 Nag.L.J. 241: A.I.R. 1946 Nag. 301. *See* also A.I.R. 1946 Bom. 189: (1945) 47 Bom.L.R. 992.

A dying declaration which comes under S. 32(1) from the point of view of admissibility, should not be put on a different footing from any other piece of evidence, so far as the appraisement of its evidentiary value is concerned. Merely because a part of the statement is untrue, it does not follow that the rest should be disbelieved. If a tribunal finds that a part of it is concocted, it would decline to believe the rest of it without corroboration; but the Court or the jury is not debarred from accepting the rest: (1935-36) 40 Cal.W.N. 1377: A.I.R. 1936 Cal. 793; A.I.R. 1938 Rang. 282; A.I.R. 1941 Mad. 290; A.I.R. 1941 Pat. 409.

Dying declaration of deceased mentioning *A* and *B* as amongst his assailants—No description of *A* sufficiently to identify him given—Description of *B* sufficient to identify—Accused *A* held could not be connected with assailant *A* and dying declaration could not be used against him—Accused *B* held same as assailant *B* and that dying declaration could be used against him—It did not amount to accepting dying declaration in part—It was accepting it wholly: 1953 All.L.J. 615: A.I.R. 1954 All. 153.

Dying declaration that both *A* and *B* gave injuries to deceased—*A* held to have been falsely implicated by deceased and, therefore, acquitted — Same dying declaration could not constitute safe piece of evidence for convicting *B*—For, ordinarily dying declaration should be either accepted or rejected as a whole: (1962) 64 Punj.L.R. 1064: I.L.R. (1962) 2 Punj. 855: (1963) 1 Cr.L.J. 469: A.I.R. 1963 Punj. 170.

Where the deceased in his dying declaration stated that one accused had gagged him from his mouth and nose and the other had stabbed him with a knife and it was found that the gagging part of the declaration was not true but the stabbing part found corroboration from medical and other evidence, *held*, the true part of the declaration may be relied upon; though, generally, a dying declaration is to be considered as a whole but there is no bar to accept its true part and reject its other portion; however, the position will be different if the two portions are not severable: (1992) 1 Ker.L.J. 748 (D.B.).

Where the deceased engulfed in flames came out at night shouting that the accused had set her on fire and the accused was seen running away, chased and brought back and in her dying declaration the deceased stated that the accused had been threatening her (though never coming to her) with death to compel her to marry him to which she was not agreeable and it was he who had set her ablaze by pouring kerosene on her, *held*, in view of evidence that the two were on intimate terms, the portion pertaining to the accused not coming to her may be doubted or construed as the deceased not allowing him intimacies, yet it is severable from the other parts of the dying declaration which were found to be free from infirmities and had a ring of truth; it could be acted upon after discarding the doubtful part: 1987 Mah.L.J. 820: (1987) 3 Bom.C.R. 139 (D.B.).

10. Dying declaration—Whether necessarily to be made under expectation of death.—English law admits as dying declaration only such statements of material facts concerning the cause and circumstances of homicide, as are made by the victim under the fixed and solemn belief that his death is inevitable and near at hand. The solemnity of the occasion on which the statements are made is deemed to supply the sanction of oath. The approach of death is deemed to produce a state of mind in which the statements of the dying person are to be taken as free from all ordinary motive to mistake. The law in India does not make the admissibility of a dying declaration dependant upon the person's having a consciousness of the approach of death. Even if the person did not apprehend that he would die, a statement made by him about the circumstances of his death would be admissible under S. 32, Evidence Act: 1953 All.L.J. 615: A.I.R. 1954 All. 153; A.I.R. 1960 Punj. 310: 1960 Cr.L.J. 851. Thus, it is immaterial whether there existed any expectation of death at the time of dying declaration: 1995 Cr.L.J. 312 (All.) (D.B.).

The Indian Law on the subject of dying declarations differs from the English Law in that under the English Law the declaration should have been made under the sense of impending death, whereas under the Indian Law it is not necessary for the admissibility of a dying declaration that the deceased at the time of making it should have been under expectation of death. Thus, the view that such a declaration, in order to be relevant under S. 32(1) should have been made when the person making the same was in actual danger of death and had given up all hope of recovery at the time when he made the said declaration, is obviously erroneous: 1988 Cr.L.J. 1062 (Del.) (D.B.); 1994 Cr.L.J. 1886: 1994 M.P.L.J. 630 (D.B.).

S. 32 does not require that a statement made by the injured in expectation of death alone can be taken as a dying declaration: A.I.R. 1979 S.C. 1347: 1979 All.W.C. 57; 1980 Raj.Cr.C. 49: 1980 Raj.L.W. 112: 1981 Cr.L.J. 1474 (D.B.).

When a statement is made by a person as to the cause of his death, such statement becomes relevant notwithstanding the fact whether the person who made it was or was not, at the time when he made it, under expectation of death, in cases in which the cause of that person's death comes into question: 1992 Cr.L.J. 2415 (Him. Pra.) (D.B.).

A statement made by a person who is dead as to the cause of his death is evidence notwithstanding that he was not under expectation of death when he made it. Such a statement does not necessarily require corroboration. If the Court, after taking everything into consideration, is convinced that the statement is true, it is its duty to convict notwithstanding that there is no corroboration in the true sense: I.L.R. (1940) Mad. 158: A.I.R. 1940 Mad. 196: (1940) 1 M.L.J. 124 (F.B.). *See* also 1940 Mad.W.N. 163: A.I.R. 1941 Mad. 290.

Where liaison between the accused and the wife of the deceased is the alleged motive of murder, the statement of the deceased as reproduced by a witness to the effect that the accused had approached the deceased for the release of the latter's wife from marriage is admissible under S. 32(1), though the statement was not made before the murder and the deceased was not near his death when he made the statement as S. 32 (1) is not subject to these limitations: 1953 Cr.L.J. 1900: A.I.R. 1954 Him. Pra. 11.

The fact that a deceased person's statement was not made under apprehension of

death, is no doubt to be considered in evaluating such a statement. But the law is not that such statement is not sufficient proof of its contents. The rule of law only says that a deceased person's statement is to be scrutinised just as a witness would be cross-examined. But if it passed such test, it is quite good evidence: A.I.R. 1950 Kutch 2. *See* also I.L.R. 16 Lah. 589: A.I.R. 1935 Lah. 94; 1940 Nag.L.J. 459: A.I.R. 1940 Nag. 340.

Where the statement made by the deceased is one relating to the cause of his death and to the circumstances of the transaction which resulted in his death, the statement is relevant under S. 32(1) of the Evidence Act as a dying declaration even though at the time when the statement was made, the deceased might not be under expectation of death: (1965) 1 Cr.L.J. 321: A.I.R. 1965 Ori. 38.

In regard to the admissibility of dying declaration, to say that when the deceased made the declaration if there was no prospect of his death then reliance cannot be placed thereon, is to overlook the language of S. 32(1) of the Act. Under that provision such statements are relevant whether the person who made them was or was not at the time when they were made, under expectation of death, whatever may be the nature of the proceeding in which the cause of his death comes into question. This part of the law is a departure from the English law where such statements should be made when the declarant is in settled hopeless expectation of imminent death. The second departure is that such statements are admissible in civil proceedings. Under the English law they are not: A.I.R. 1970 Goa 96: 1970 Cr.L.J. 1081.

It is immaterial that the person who made the statement was not at the time when he made them under expectation of death. The nature of the proceedings in which the death comes into question also does not matter. It need not necessarily be a proceeding on a charge of murder or homicide. It may be even a civil action: 1940 Nag.L.J. 459: A.I.R. 1940 Nag. 340.

A statement of the deceased made to other caste members before attack but after the incident earlier in the morning is admissible, not regarding the cause of his death; but as one regarding a circumstance of the transaction which resulted in his death. The declarant need not have been actually apprehending death: (1964) 1 Cr.L.J. 198: A.I.R. 1964 Madh. Pra. 30.

Where soon after the making of statement after the assault, the deceased died, *held*, whether or not he was under expectation of death, said statement was admissible under S. 32(1): (1987-1) 35 B.L.J.R. 896 (D.B.).

11. When declarant survived.—Before a dying declaration may be admitted, it must be proved that the person who made it is dead. When a person making a dying declaration survives, his statement cannot be admitted under S. 32 but may be relied on under S. 157 to corroborate or under S. 145 to contradict his statement in Court: 1995 Cr.L.J. 312 (All.) (D.B.).

When a person who has made a declaration did not die but survived, *held*, his statement is not admissible in evidence as a dying declaration under S. 32; nor can it be used or relied upon even for the purpose of corroboration under S. 157, especially when the person making the declaration is not the complainant: 54 Mys.H.C.R. 120. *See* also A.I.R. 1958 All. 255.

Where a dying declaration was recorded but the declarant survived, *held*, there is no dying declaration in the eye of law; under S. 32 a dying declaration indicates the cause or other circumstances leading to the declarant's death: 1993 Cr.L.J. 1756 (Pat.) (D.B.).

Where an injured person who was in a serious condition made a statement as to the cause of injuries, etc. but he survived, *held*, his statement could not be called a dying declaration, it is only a formal statement under S. 157 to be used only to corroborate or contradict the witnesses in the Court: 1994 Cr.L.J. 978 (Pat.) (D.B.); 1980 All.W.C. 54.

Statements made by the persons in expectation of death, who are not only survived but deposed in the Court, are not admissible under S. 32; but the statements are admissible under S. 157 as their former statements to be used to corroborate their testimony in Court: A.I.R. 1983 S.C. 126: 1982 All.L.J. 1524.

Where the maker of a dying declaration survives, *held*, it can be used not as a piece of substantive evidence but only to corroborate or contradict him: 1984 Cr.L.J. 1215: (1984) 57 Cut.L.T. 505.

Where the maker of a statement chanced to survive, *held*, that statement is clearly not admissible as a dying declaration; it could only be admitted as a previous statement for corroborating under S. 157 or for contradicting under S. 145 his evidence in Court: 1993 Cr.L.J. 1881 (Madh. Pra.) (D.B.); 1978 M.P.L.J. 820: 1978 Jab.L.J. 741.

Statement of the injured recorded by the Magistrate, *held*, can be used as previous statement, when the injured survived; but the

Magistrate must be examined to prove recording of the statement: 1975 Mah.L.J. 36: 1976 Cr.L.J. 871.

12. Statement recorded during investigation.—Statements made by witnesses under S. 162 of Cr.P.Code in the course of investigation cannot be used as substantive evidence except for those statements falling within the provisions of S. 32(1): A.I.R. 1980 S.C. 873: 1980 Cr.L.J. 564: (1980) 2 S.C.C. 390. *See* also 1973 Kash.L.J. 123.

Where deceased made a dying declaration a day after the occurrence which was recorded by a Police Officer, *held*, in view of the provisions of S. 162(2) of the Code of Criminal Procedure, no illegality or infirmity would arise affecting the admissibility of the statement on the ground of its being recorded by a Police Officer during investigation: 1992 Cr.L.J. 2574 (Cal.) (D.B.).

Where though the doctor declared the injured to be fit for making statement but as his condition was not serious and he was not expected to die on that day, the Police Officer did not feel it necessary to call a Magistrate to record statement, *held*, in such circumstances, statement recorded under S. 161, Cr.P.Code. was admissible: I.L.R. (1979) 2 Del. 102 (D.B.).

In a proper case, it may be permissible to convict a person on the basis of statement under S. 161, Cr.P.Code which is treated as dying declaration later under S. 32 of Evidence Act: (1984) 1 Crimes 1: 1984 Cr.L.R. 216 (Del.). *See* however 1982 All.W.C. 596: 1982 All.Cr.R. 353.

Where Investigating Officer did not record statement of the victim of crime as a dying declaration but in the ordinary course of investigation under S. 161, Cr.P.Code and the victim died subsequently, *held*, the statement could be used as a dying declaration: 1988 Cr.L.J. 1062 (Del.) (D.B.); (1986) 1 Karn.L.J. 123: I.L.R. (1985) Karn. 2257 (D.B.).

Where after making the statement before the Police, the victim succumbed to his injuries, his statement could be treated as a dying declaration and was admissible under S. 32(1) and would be protected by S. 162(2) of the Code of Criminal Procedure: 1981 Cr.L.J. 1745 (Gau.) (D.B.). *See* also 1971 B.L.J.R. 353; 1982 All.L.J. 140.

Report made by deceased at Police Station—Report being dying declaration can be made before or during investigation and can still be substantive evidence—S. 161 of the Cr.P.Code not applicable: 1967 All.W.R. (H.C.) 345: 1968 Cur.L.J. 227: A.I.R. 1968 All. 83.

13. First Information Report lodged by deceased.—The F.I.R. lodged by the deceased himself and duly proved could be used as a dying declaration: 1994 Cr.L.J. 848 (All.). *See* also (1981) 1 M.P.W.N. 2.

First information report is admissible under S. 32(1) whereit is the statement of a person who is since dead relating to the circumstances of the transaction which resulted in death: A.I.R. 1930 Lah. 450.

Where after making the statement before the Police, which was recorded as F.I.R., deceased succumbed to his injuries, *held*, the statement could be treated as a dying declaration and was admissible under S. 32(1): A.I.R. 1976 S.C. 2199: (1976) 3 S.C.C. 104: (1976) 2 S.C.R. 764: 1976 Cr.L.J. 1718.

First information report—Use of—Natural death of informant long after occurrence but before commitment proceedings—F.I.R. not admissible either under S. 32(1) or S. 8, Evidence Act: (1964) 2 Cr.L.J. 696: A.I.R. 1964 Ori. 262.

Where the dying declaration is a long document and is a narrative of a large number of incidents which happened before the actual assault, such long statement being more in the nature of first information reports than recital of the cause of death or circumstances resulting in it, or likely to give the impression of their being not genuine or not having been made unaided and without prompting. The dying declaration, though in the form of F.I.R., was held prompted and voluntary: 1957 Cr.L.J. 1459: A.I.R. 1957 S.C. 904.

Though the report lodged by the deceased under S. 323, I.P.Code, can undoubtedly be treated as his dying declaration, but where it was lodged with delay without any explanation therefor, *held*, it was unsafe to place reliance upon the same: 1990 Cr.L.J. 850: 1989 All.L.J. 468 (D.B.).

Where in a murder trial the prosecution depended on the deceased's statement made to the Police while she was in the hospital and the same was treated as first information report, *held*, that had not the deponent died that document would have been useful only to corroborate or contradict her testimony in Court. But by reason of her death it became a piece of substantive evidence under S. 32(1) as a declaration as to the cause of the informant's death or as part of the informant's conduct under S. 8 and was, therefore, admissible in evidence: I.L.R. (1956) Trav.-Co. 311: A.I.R. 1956 Trav.-Co. 207. *See* also A.I.R. 1953 Madh. Bh. 249: 1954 Cr.L.J. 1764.

Where the Sub-Inspector, after reaching the hospital contacted the doctor incharge and obtained his permission for recording the statement of the deceased and thereafter he recorded it as first information report and there was nothing on record to show that the said statement was given on account of some deliberations or prompting and further, said statement was in consonance with the dying declaration recorded by the Magistrate, *held*, dying declaration recorded in the form of F.I.R. by the Sub-Inspector was not liable to be rejected: 1995 Cr.L.J. 2699 (Del.) (D.B.).

Informant belaboured—F.I.R. after occurrence—Informant dying natural death before examination as witness—Statement in F.I.R. admissible under S. 8 of the Evidence Act—Doubt regarding name of prosecution witness can be removed by looking into F.I.R.: 1961 M.P.L.J. (Notes) 309: (1961) 1 Cr.L.J. 270: A.I.R. 1961 Madh. Pra. 45.

Where deceased who was stabbed on beach himself gave report to the Police that the accused stabbed him with knife, *held*, statement was relevant under S. 32: 1994 Cr.L.J. (N.O.C.) 297 (Mad.).

Where besides the F.I.R. lodged by the injured stabbed with a *gupti* by the accused there were other oral dying declarations proved by witnesses who were not even cross-examined and the *gupti* was also recovered at the accused's instance, *held*, it amounted to overwhelming, clear, cogent, convincing and credible evidence of murder; conviction upheld: 1984 Raj.L.W. 148 (D.B.). *See* also 1983 M.P.W.N. 86.

14. Recording of dying declaration—By whom.—A dying declaration recorded by a competent Magistrate stands on a higher footing than an oral declaration or one recorded by the Investigating Officer: (1985) 1 An.W.R. 354: (1984) 2 An.L.T. (N.R.C.) 69: 1985 Cr.L.J. 336 (D.B.); (1987) 2 Crimes 40 (All.); (1984) 1 Crimes 108: 1984 Cr.L.J. (N.O.C.) 53: (1984) 25 Del.L.T. 405; (1987) 3 Crimes 115 (Gau.) [Recording of dying declaration by Investigating Officers should not be encouraged]. *See* however 1976 Cr.L.R. 102 (Raj.).

Law does not require that a dying declaration must necessarily be made to a Magistrate; the evidentiary value or weight to be attached to such a declaration must necessarily depend on the facts and circumstances of each case: A.I.R. 1983 S.C. 164: (1983) 3 Guj.L.H. 337: (1983) 1 S.C.C. 211: 1983 Cr.L.J. 221: 1983 All.W.C. 321: 1983 All.Cr.R. 170.

It is not the requirement of law that the dying declaration must necessarily be recorded by a doctor or a Magistrate. It will always depend upon variety of factors: (1986) 1 Crimes 13 (Del.).

Before recording a dying declaration, the Magistrate must obtain a certificate of the Doctor appended, regarding the mental state of the deponent and, secondly, the Magistrate should mention the time when such statement was taken down. It is unsafe to rely on the statement if it does not contain these rudimentary factors: 1977 Cr.L.J. 1626: 1977 All.W.C. 657: 1977 All.Cr.R. 453 (D.B.).

The Magistrate before recording a dying declaration should ask direct questions to the victim to satisfy himself about the victim's state of mind to ensure that it was a conscious and voluntary statement; however, if the Magistrate omits to do so, it would not detract from the dying declaration's reliability: (1985) 1 An.W.R. 354: (1984) 2 An.L.T. (N.R.C.) 69: 1985 Cr.L.J. 336 (D.B); (1984) 2 An.L.T. 94: (1985) 1 An.W.R. 337 (D.B.) [The Magistrate, while recording the dying declaration, to the possible extent, should insist upon the presence of the Medical Officer and obtain an endorsement from him that the declarant was in a fit condition to make a statement and not the usual statement that the declarant was conscious]; 1988 Cr.L.R. 376 (Raj.) [Where the Magistrate while recording the statement did not call doctor, nurse or ward boy or the attendants of the other patients, *held*, such a statement having not been properly recorded raised suspicion].

The necessity of recording a dying declaration arises only when the hopes of life of the man are given up: 52 C.L.J. 425: 32 Cr.L.J. 416. A statement intended to be proved as a dying declaration under S. 32 need not be recorded by a Magistrate. Law does not require such statements to be made necessarily under expectation of death: 190 I.C. 322. An injured man who is waiting to be operated on should not be subjected to anything like a third degree cross-examination, by the Magistrate who records his dying deposition but the Magistrate should not content himself with merely recording the statement made by the injured man; he should ask him such simple questions as may occur to his mind in order that the dying deposition may be an account of some value: 176 I.C. 683; A.I.R. 1938 Rang. 282.

Where dying declaration reduced to writing before Magistrate and was corroborated by medical report was accepted. *See* 1991 Cr.L.J. (N.O.C.) 17 (Mad.).

Where a dying declaration was recorded by a Naib Tehsildar in the presence of the

doctor in the very words of the deceased, then quite conscious and it was also corroborated substantially by the F.I.R. lodged by the deceased and the deceased's earlier statement to another witness, *held*, the dying declaration was sufficient to convict the accused. [A.I.R. 1958 S.C. 22; A.I.R. 1972 S.C. 1778 and A.I.R. 1974 S.C. 2138, Rel. on]: 1977 M.P.L.J. 321 (D.B.); (1987) 2 W.L.N. 311 (Raj.).

A dying declaration need not be recorded by the Executive Magistrate alone, it is an approved rule that once the Court is satisfied that the testimony regarding the dying declaration recorded by any officer who may or may not be competent officer inspires its confidence and does not leave any shadow of doubt, the Court can act upon and rely upon the dying declaration alone and need not require any corroboration. Thus, where dying declarations were recorded by a Special Executive Magistrate who was not entrusted with the duty of recording the dying declarations and there were no discrepancies in said dying declarations, *held*, impugned dying declarations could be relied upon. [1978 Cr.L.J. 1869 (S.C.); 1958 Cr.L.J. 106 (S.C.); 1983 Cr.L.J. 1457 (S.C.), Foll.]: 1995 Cr.L.J. 1956 (Bom.) (D.B.).

Where the Police had requisitioned an Executive Magistrate to record a dying declaration who deputed the Deputy Mamlatdar who did so, *held*, the declaration could not be faulted for on that ground; there is no requirement of law that dying declarations should be recorded by Executive Magistrates; they can be recorded by any one, including Police; but their probative value will vary and depend upon circumstances of each case; of course, a dying declaration recorded by an Executive Magistrate would be more reliable: (1989-1) 9 Guj.L.H. 131: (1989-1) 30 Guj.L.R. 262: 1989 Cr.L.R. 149 (D.B.).

The doctor is the best person to opine about the fitness of the deceased to make the statement; where the doctor found that life was ebbing fast and there was no time to call the Police or a Magistrate, the doctor would be justified, indeed, he would be bound, to record the dying declaration. He is a disinterested and respectable witness. The trial Judge would be unjustified in rejecting evidence of the Medical Officer: A.I.R. 1976 S.C. 1782: 1976 Cr.L.J. 1382: 1976 Cr.L.R. (S.C.) 260: (1976) 4 S.C.C. 351: 1976 S.C.C. (Cr.) 625.

Where the life was ebbing out fast, it was the duty of medical jurist to record the dying declaration: 1985 Cr.L.R. 675 (Raj.).

Where dying declaration was recorded by the duty Doctor as condition of deceased was very serious and the impugned dying declaration was very natural and straight forward and there was no reason as to why the deceased implicated accused falsely and there was no scope of tutoring as no relation of deceased was present when his dying declaration was recorded by the duty Doctor, *held*, said dying declaration could be relied upon; there was no necessity, under the circumstances, to get a fitness certificate from the incharge of the hospital. [1980 Cr.L.J. 925 (S.C.); 1980 Cr.L.J. 408 (S.C.); 1987 Cr.L.J. 1065 and 1985 Cr.L.R. 73 (Raj.), Rel. on]: 1995 Cr.L.J. 25 (Raj.) (D.B.).

Where the Magistrate, being out of town, could not come when called for recording the injured's statement and the Doctor, apprehending death of the injured, who was fit to make statement, himself recorded the dying declaration which the injured thumb-marked after he had fully understood it, *held*, the dying declaration could not be discarded merely because it was not recorded by the Magistrate; in the absence of the Magistrate, the Doctor was the most capable person authorised to record the declaration: 1991 Cr.L.J. 3244: 1991 All.L.J. 1016 (D.B.).

Where dying declaration was recorded by a doctor and thereafter Sub-Inspector also recorded dying declaration of victim whereafter she died, *held*, merely because the Magistrate had not recorded the dying declaration of the deceased, the dying declarations which were recorded by doctor and Sub-Inspector and which were proved to be truthful, could not be said to be inadmissible: 1995 Cr.L.J. 689 (Andh. Pra.) (D.B.).

Under Rules and Orders of Punjab High Court, Vol. 3, Chap. 13-A, R. 2, it is mandatory for the Investigating Officer to apply to the Chief Metropolitan Magistrate to depute some Magistrate for recording of the dying declaration: 1990 Cr.L.J. 790 (Del.) (D.B.).

Evidentiary value of the dying declarations recorded by the Police Officers is much lower than the evidentiary value of the dying declaration recorded by the Executive Magistrate or the Doctor. Thus, where the dying declarations recorded by the Executive Magistrate and the Doctor are both available, it is better to keep out of consideration the dying declaration recorded by the Police Officers: (1991) 4 Bom.C.R. 618 (D.B.).

A dying declaration cannot be said to be unsafe to rely on merely because it is recorded by a Head Constable and not a Magistrate. It is, no doubt, desirable that such a declaration should be recorded by a Magistrate but for the purpose of law this is not an indispensable requirement: A.I.R. 1970 Goa 96: 1970 Cr.L.J. 1081.

Where an attempt was made to procure the services of a Magistrate for recording the dying declaration but the Magistrate was not available and the dying declaration had to be recorded by the Head Constable and said fact was supported by several witnesses including independent witnesses, *held*, said dying declaration was acceptable. [A.I.R. 1983 S.C. 14, Rel. on]: A.I.R. 1995 S.C. 777.

Though a dying declaration recorded by a Police Officer during investigation is admissible under S. 32, it is better, in view of the exception provided in S. 162(2) of the Code of Criminal Procedure, 1973, to leave such dying declarations out of consideration until and unless the prosecution satisfies the Court as to why it was not recorded by a Magistrate or a Doctor. That, however, does not mean that such dying declarations are always untrustworthy; what is emphasized is that better and more reliable methods of recording dying declarations should be resorted to and the one recorded by the Police Officer may be relied upon if there was no time or facility for adopting the better method: A.I.R. 1979 S.C. 1173: 1979 Cr.L.J. 700; (1984-2) 25 Guj.L.R. 1019: (1984) 4 Guj.L.H. 761. Thus, where the deceased was in a critical condition and no other person was available in the village to record the dying declaration, *held*, such statement recorded by the Investigating Officer could be relied upon but was rejected as it contained a bit of false statements: A.I.R. 1979 S.C. 1173: 1979 Cr.L.J. 700. The broad proposition that a dying declaration made before the Investigating Officer should not be believed unless corroborated by other evidence cannot be accepted; dying declaration, cannot be rejected on the sole ground that they are recorded by the Investigating Officer. [A.I.R. 1979 S.C. 190, Rel. on]: 1982 M.P.L.J. 772.

Dying declaration taken down by Investigating Officer in presence of Doctor and other high officials and when deceased was conscious is not bad and its rejection in evidence is not proper: I.L.R. (1963) 15 Assam 552.

Where a dying declaration was recorded neither by a Magistrate nor a Doctor but by the Investigating Officer himself, though in the doctor's presence who had opined that the injured was in a fit condition to make a statement, *held*, the Investigation Officer being naturally interested in the success of investigation, the dying declaration recorded by him has to be scrutinized very cautiously and closely; it is only when the Court is satisfied about its truthfulness that it should enter conviction: 1993 Cr.L.J. 2696 (Raj.) (D.B.).

In regard to dying declaration and the admissibility of such declarations recorded by the Police Officers, the following propositions emerge: (*1*) A dying declaration recorded by a Police Officer during the course of investigation is admissible in evidence. (*2*) It is better to leave such dying declaration out of consideration until and unless the prosecution satisfies the Court as to why it was not recorded by a Magistrate or a Doctor. (*3*) It is not prudent to base the conviction on a dying declaration made to an Investigating Officer. (*4*) The practice of the Investigating Officer himself recording a dying declaration during the course of the investigation should not be encourged: 1990 Cr.L.J. 1049 (Gau.).

Investigating Officers are naturally interested in the success of the investigation; the practice of the Investigating Officer himself recording a dying declaration during investigation, thus, ought not to be encouraged. But no hard and fast rule can be laid down in this regard; each case depends upon its own facts and circumstances. Thus, where an Assistant Sub-Inspector belonging to a Police Station where the incident occurred, upon intimation that the victim was admitted in a hospital 92 Kms. away, falling in another district, straightway went to that place, met the doctor and recorded the victim's statement which also became basis of the F.I.R. and investigation was conducted at the Police Station where the incident had occurred, *held*, no fault could be found with the Police for not getting the dying declaration recorded by a Magistrate: A.I.R. 1988 S.C. 2013: 1989 Cr.L.J. 95. *See* also (1979) 2 M.P.W.N. 43.

No law bars Police Officers from recording dying declarations; such a declaration, supported by another such statement recorded by a Magistrate constitutes evidence of a high order. That, however, does not mean that if the prosecution merely relies upon a dying declaration recorded by the Investigating Officer in the presence of a Doctor, a completely independent witness, the Court should ignore it simply because a Magistrate was not associated even when there was sufficient time to call him. The Court is required to evaluate the evidence adduced by the prosecution to form its opinion whether the case is proved beyond reasonable doubt or not: 1992 Cr.L.J. 2415 (Him. Pra.) (D.B.).

Where the dying declaration recorded by Police Officer was natural, coherent, truthful, narrating incident without embellishment and explicitly identifying accused, *held*, conviction under S. 302, Penal Code solely on such declaration, is correct: I.L.R. (1979) 1 Del. 752 (D.B.).

Dying declaration recorded by Investigating Officer—*Held*, it should have been

recorded at least in presence of Doctor after obtaining his certificate of fitness: 1979 W.L.N. (U.C.) 474 (Raj.).

Where accused threw acid on the deceased and Investigating Officer recorded statement of the deceased implicating the accused and there was no possibility of false implication, *held*, dying declaration was admissible: 1994 Cr.L.J. (N.O.C.) 294 (All.) (D.B.).

A dying declaration recorded by Police does not stand self-condemned though the Courts generally look at such a dying declaration with suspicion, particularly when the Police did not requisition the services of a Doctor or a Magistrate when there was opportunity to do so. But where the occurrence took place at an unearthly hour of night and the victim was in a very serious condition and had died shortly after his removal to the hospital necessitating the recording of his statement by a Police Officer, *held*, it cannot be said that the services of a Doctor or a Magistrate were readily available, and that too before the injured would succumb to his injuries; the Police Officer acted wisely in recording the dying statement: 1992 Cr.L.J. 2644: (1992) 1 Crimes 1167: 1991 C.Cr.L.R. 297: (1991-92) 96 Cal.W.N. 233(D.B.). *See* also (1989) 3 Crimes 315 (Bom.); 1978 Mah.L.J. 324.

Legally, there may be no bar against recording of dying declaration by the Police Officer, however, it is safe as well as prudent to get it recorded through independent persons or the same be recorded in their presence and attested by them. In case this course is not followed, the dying declaration requires strict corroboration before it is accepted in evidence. Thus, where the Head Constable who recorded the dying declaration, did not explain the circumstances why he could not associate the independent witnesses or associate the Doctor actively and attested the document through him, *held*, such a dying declaration could not be relied on in absence of corroboration: 1995 Cr.L.J. 3134 (Him. Pra.) (D.B.).

A dying declaration made before the Police when the deceased had no motive to falsely implicate the accused, if otherwise without infirmities, *held*, may be relied upon though the prosecution's failure to get it recorded by the Magistrate is criticised: A.I.R. 1987 S.C. 692: (1987-2) 7 Guj.L.H. 284: 1987 Cr.L.J. 537: (1987) 1 S.C.C. 467: (1987)1 Crimes 250.

It is laid down in S. 162, Cr.P.Code, that the statements recorded by the Police cannot be treated as substantive evidence with the exception, *inter alia*, those recorded under S. 32(1) of the Evidence Act. A statement recorded as dying declaration by a Police Officer conducting the investigation if recorded after the medical opinion as to the person making the statement being in a fit condition to make it, would be as good as recorded by a Judicial Magistrate provided there is nothing to doubt the veracity of the witness recording the statement and the record of the statement being true and correct as made by its maker: (1969) 71 Punj.L.R. 73.

Where on getting information that the victim was admitted in a hospital, the Assistant Sub-Inspector straightway went there, met the doctor and recorded the victim's statement and thereafter issued F.I.R. on basis thereof, *held*, as the A.S.I. did not record the dying declaration in the capacity of an Investigating Officer, its legality could not be doubted: A.I.R. 1988 S.C. 2013: 1989 Cr.L.J. 95.

Where the Investigating Officer had recorded the dying declaration even before the victim was certified by the Doctor to be fit for making a statement and though the victim survived for two weeks thereafter, the Investigating Officer made no efforts to get his statement recorded by a Magistrate, *held*, no reliance could be placed on such dying declaration: 1995 Cr.L.J. 3180 (Del.) (D.B.).

Where in spite of their being enough time and the victim being in conscious condition and also inspite of Magistrate being available on the day when the crime in question occurred, no valid reason was given as to why the Magistrate was not requested to record the same, *held*, dying declaration recorded by the Investigating Officer could not be relied on: 1993 Cr.L.J. 2789 (Andh. Pra.) (D.B.).

Where the Police Officer neither called a Magistrate nor the Doctor but volunteered to record the statement by himself and though the deceased's relations were present in the hospital none of them was called and even though the deceased was literate her signatures were not obtained on her statement, and he neither noted down the time of recording the declaration nor he recorded it in question answer form, *held*, no reliance could be placed on such a dying declaration: A.I.R. 1986 S.C. 250: 1986 Cr.L.J. 155: (1985) 2 D.M.C. 451: (1986) 1 Hindu L.R. 117.

Where the victim's statement under S. 161 of the Code of Criminal Procedure was recorded by the Investigating Officer three days after the occurrence when neither the Doctor nor the nurse was present and no corroboration of the statement was obtained from any other hospital employee and the victim died 17 days thereafter and no explanation was forthcoming for not calling the Doctor while recording the dying declaration and not following other necessary formalities, *held*, the dying declaration, though otherwise

admissible under exception to S. 162 (2) of the Code of Criminal Procedure, be better left out of consideration because it was not even known whether the victim was then fit to make the statement; not that such dying declarations are always untrustworthy but the need to resort to better and more reliable methods of recording declarations is emphasised: 1991 Cr.L.J. 356: (1990) 2 Cal.H.N. 62 (D.B.).

Where the Investigating Officer failed to get the deceased's statement recorded by a Magistrate during the period of nine days he was alive, *held*, though statement made by him to the Police amounted to a dying declaration in law, it was not worthy of acceptance: A.I.R. 1989 S.C. 1097: 1989 Cr.L.J. 879: (1989) 1 Crimes 689.

Where on getting information, the Inspector of Police reached the spot and the Government Doctor, also arriving there on examining the injured opined that the victim would not survive, whereupon the Inspector recorded his dying declaration in the diary and after a short while the victim died but the Inspector offered no explanation as to why he himself recorded the dying declaration instead of asking the Doctor to do so, *held*, apart from non-recording of the declaration by the Doctor, the prosecution did not produce the Doctor, the best person to depose about the mental or physical state of the injured at the time he made the dying declaration; no reliance could be placed on the declaration: 1990 Cr.L.J. 1049 (Gau.).

Where on the victim gradually recovering, his dying declaration was got recorded on an un-numbered page of the case diary by a Sub-Inspector, and not by a Magistrate as required by R. 25.21 of the Punjab Police Rules, and the declaration was attested by a family friend of the deceased, *held*, the declaration could not be taken as a genuine document: I.L.R. (1979) 2 Del. 118: 1979 Cr.L.J. 1477 (D.B.).

Where a Police Officer recorded a dying declaration contrary to the requirement of R. 6.22(3) of the Rajasthan Police Rules, 1965 not in the presence of two or more reliable witnesses unconnected with the Police or the parties and it was not immediately sent to the Police Station, *held*, no reliance could be placed on the dying declaration: 1994 Cr.L.J. 691 (Raj.) (D.B.); 1992 Cr.L.R. 704 (Raj.); (1987) 2 W.L.N. 454 (Raj.).

Where the dying declaration was recorded by Investigating Officer in the presence of a Doctor witness soon after the occurrence on the ground that deceased with 100% burns was in critical state and there was no hope of her survival but was in a good state of mind to make a statement, *held*, conviction could be based on such a dying declaration: 1994 Cr.L.J. 1079 (J.&K.) (D.B.). *See* also (1984) 25 Del.L.T. 33.

Where the injured was conscious and fit to make statement which, recorded by the Police, contained full details of the occurrence, *held*, it could not be discarded merely because it was recorded by Police: 1984 Cr.L.R. 441: (1984-2) 25 Guj.L.R. 1019: (1984) 4 Guj.L.H. 761.

Where the statement of the injured was recorded as *parcha bayan* and a case under S. 448 and S. 324 of the Indian Penal Code was registered, when as per the Doctor and the Station House Officer's testimony the injured was conscious and in a fit state of mind to give evidence, *held*, the *parcha bayan* was then not a dying statement; had the injured been in fact unconscious the case would have been registered under S. 307 instead of S. 324 of the Indian Penal Code, thus, non-requisition of the Doctor then to record the injured's statement was not fatal; the case under S. 302 of the Code was registered only when the injured had later on succumbed to the injuries: 1994 W.L.N. (U.C.) 1 (Raj.).

Merely because the dying declaration recorded by a Police Officer does not contain his signature, it cannot be said that it is not truthful: 1990 Cr.L.J. (N.O.C.) 183 (Del.) (D.B.).

Under the relevant rules applicable to Delhi area, the Investigating Officers were not to scribe the dying declaration: A.I.R. 1986 S.C. 2500; 1989 Cr.L.J. 157: (1987) 33 Del.L.T. 254: (1987) 3 Crimes 747; 1990 Cr.L.J. (N.O.C.) 170.

15. Form of recording.—The dying declaration should be recorded in question and answer form. It has several advantages. Court can judge whether any leading question was put to elicit a certain answer. Secondly, it can be found whether the victim made a coherent statement which will indicate as to whether the victim was in senses: 1992 Cr.L.J. 2644: (1992) 1 Crimes 1167 (Cal.) (D.B.); (1990) 41 Del.L.T. 542 (D.B.) [Advantage of recording it in question and answer form is that while appreciating the same it is apparent as to how much was suggested to the patient while recording the statement]. *See* also (1987) 3 Crimes 115 (Gau.).

When a Magistrate records a dying declaration, preferably it should be in question and answer form: A.I.R. 1980 S.C. 1738: 1980 Cr.L.J. 1257: (1980) 1 S.C.C. 240: 1979 U.J. (S.C.) 830.

It is not an indispensable requirement of law that it should be recorded in a question and answer form, and not in a narrative form. Recording of a dying declaration in a question and answer form may perhaps be a better mode but there can be no hard and fast rule: A.I.R. 1970 Goa 96: 1970 Cr.L.J. 1081.

Though preferably a dying declaration should be in question and answer form, there is no such rule that a dying declaration recorded in the form of a statement cannot be acted upon or would be less reliable or less trustworthy only on that account: 1990 Cr.L.J. 1049 (Gau.); (1988) 15 Cr.L.T. 450 (P.&H.) (D.B.).

Where dying declaration made by the deceased was prompt, voluntarily given and properly recorded, *held*, fact that it was not in question-answer form would not make it inadmissible: 1994 Cr.L.J. 1886 (Madh. Pra.) (D.B.); 1985 Cr.L.R. 79: (1985) 1 Bom.C.R. 559.

Where the dying declaration, recorded in narrative form, appeared to be in the words uttered by the deceased which were put into inverted commas by the Investigating Officer, *held*, its authenticity or veracity could not be doubted on that ground alone: 1989 Cr.L.J. 1106: (1989) 39 Del.L.T. 128. *See* however 1980 All.W.C. 27.

It is not necessary that a dying declaration must always be recorded in the form of question and answer though it is desirable to do so, a dying declaration not in the question-answer form does not deserve to be thrown in the dust-bin; the dying declaration of a seriously injured person recorded by the Head Constable who had rushed to the hospital on being informed about the medico-legal case not discarded merely because it was not in a question and answer form: (1981) 22 Guj.L.R. 426: 1981 Cr.L.R. 288.

Dying declaration—Recording of—Correct mode—It must be recorded in the exact words of declarant—It need not be in the form of questions and answers—Further, it may be open to objection if information is elicited by putting leading question: 1970 Cr.L.J. 1327: A.I.R. 1970 Assam 121 (D.B.).

Where the Executive Magistrate, after the injured was certified by the Doctor as fit to make the statement, recorded her declaration substantially as she narrated it but not in question and answer form, and he admittedly did not put different and separate questions to her, *held*, the form of recording the dying declaration by itself not being important, the dying declaration if otherwise not suffering from any infirmity, could not be discarded: (1993) 1 An.L.T. (Cr.) 233: A.I.R. 1993 S.C. 1180: 1993 Cr.L.J. 298.

Where accused husband was alleged to have caused death of his wife but there was no connection between dying declaration and death and the dying declaration recorded by the Executive Magistrate was not in the form of questions and answers and there was no proof that said declaration contained version of the deceased, *held*, said dying declaration could not be acted upon though dying declaration was not vitiated for the alleged failure of the Magistrate to record it in question and answer form. [A.I.R. 1993 S.C. 1180, Foll.]: 1994 M.P.L.J. 862: 1995 Cr.L.J. 17 (D.B.).

Where a dying declaration is recorded in question and answer form by the Medical Officer, *held*, the dying declaration being a solemn piece of evidence, there was no reason to discard the same as the Doctor was an independent person and the same was also corroborated by the evidence of eye-witnesses: 1993 Cr.L.J. 984 (Ori.) (D.B.).

Where the dying declaration was not recorded in questions and answers form but it was like a statement stating prosecution's case and medical evidence itself showed that the victim was in a critical condition, *held*, in absence of corroboration, conviction could not be based on such dying declaration: 1990 Cr.L.J. (N.O.C.) 107 (Madh. Pra.) (D.B.).

A dying declaration which does not contain the note of the Doctor that the deceased was in a fit condition to make the statement and was not in the question and answer form and recorded by the Investigating Officer himself, *held*, raises the suspicion regarding the truthfulness of the statement allegedly made by the deceased: 1995 Cr.L.J. 2837 (Raj.) (D.B.).

Where the couple having pre-marital illicit relations were forced by their elders to enter into a dowryless marriage some twelve years ago and gave birth to 5 children and the wife, in her dying declaration properly recorded by the Investigating Officer as per law but not in question and answer form, stated that her husband at the instigation of his mother had poured kerosene oil and lit her, *held*, mere absence of the question and answer form did not render the dying declaration of no effect; the wife in the circumstances could not have made the statement unless it was warranted by facts: (1993) 2 An.L.T. 365 (Cr.): (1993) 3 An.L.T. (N.R.C.) 9 (D.B.).

Where a newly wedded wife admitted with 90 per cent. burns on her person in the Hospital told to one Doctor preparing the case history that she was set to fire by her *nanad* (her husband's sister) and to another Doctor she named her Padma, *held*, as her husband had only one sister named Padma, the identity of the accused, thus, stood established; the dying declaration was duly proved by the Doctor's oral evidence fortified by contemporaneous documents; the dying declarations, being admissible and reliable, can sustain conviction; merely because they were not recorded

in question and answer form, their evidentiary value is by no means affected: (1991) 2 Hindu L.R. 71: (1991-1) 32 Guj.L.R. 125 (S.C.).

Exact words spoken by declarant.—The genuineness of dying declaration essentially warrants ascertainment of the exact statement made by the deceased: 1988 C.Cr.L.R. 75 (Cal.). Though the safe, sound and salutary rule is to record a dying declaration to the extent possible, *ipaissima verba, i.e.*, in the exact words spoken, it is, however, not a rigid or inflexible rule; if there is otherwise unimpeached evidence that the dying declaration contains a true and correct record of what the declarant had stated, it does not lose its evidentiary value merely because the declarant's very words were not reproduced; what is to be seen is not the language but the substance: 1985 Raj.L.W. 97 (D.B.).

It is always proper if the dying declaration is recorded in the words of the injured, but simply because the very words uttered by the injured are not reproduced it is no reason to reject the dying declaration if the Court is otherwise satisfied that the dying declaration as recorded correctly reproduces what was stated by the injured. The person who records the dying declaration should also note down the questions put to the deceased. But mere omission to mention the questions in the dying declaration cannot be a ground for rejecting it specially when only general questions are put to the declarant. *Held*, on facts that the document did not contain anything beyond what was stated by mouth of the declarant, though it might be that at the time of giving dying declaration the deceased was making gestures: 1964 Raj.L.W. 228: I.L.R. (1964) 14 Raj. 559: A.I.R. 1965 Raj. 130.

In the case of a dying declaration recorded by the Magistrate, when the exact words stated by a deceased matter and are of importance, a suggestion that the deceased might have said something by mistake cannot be entertained: 1953 Cr.L.J. 1772: A.I.R. 1953 S.C. 420. [Held to have been overruled in view of A.I.R. 1962 S.C. 130 and A.I.R. 1958 S.C. 22 on another point in A.I.R. 1980 S.C. 559].

Language of declaration.—Where a dying declaration was recorded in the language of the declarant, *held*, the same acquired added strength and reliability: 1992 Cr.L.J. 2574 (Cal.) (D.B.); A.I.R. 1979 S.C. 1347: 1979 All.W.C. 57 [Where though the language was of the writer, substance was what the deceased stated, *held*, no infirmity on that ground could be alleged].

When the person recording the statement is not well conversant with the language spoken by the declarant, *held*, there must be cogent and convincing evidence to show that the statement recorded in a language different from the one spoken by the deponent contained its true version: 1984 Cr.L.R. 74: 1984 W.L.N. (U.C.) 557 (Raj.).

Where there were many inconsistencies between the versions of the Head Constable, who recorded the dying declaration and the Doctor who dictated it to the Head Constable and also there was no evidence to show that the Doctor understood 'Marwari' so as to translate in Hindi, while giving dictation to the Head Constable, *held*, no reliance could be placed on such a dying declaration: 1980 W.L.N. (U.C.) 204 (Raj.).

Where a dying declaration was made by the injured in Punjabi but recorded in Hindi at the dictation of the Assistant Sub-Inspector of Police who was, however, not examined as a witness, *held*, it could not be said that the Hindi version was a correct, accurate and faithful reproduction of the deceased's statement; no evidentiary value could be attached to it: (1987) 1 W.L.N. 438 (Raj.).

In the Punjab the dying declarations are taken down in Urdu, though the deceased gave the narrative in the Punjabi and that has been so ever since the Courts were established and judicial authority has never held that to be an infirmity in dying declarations making them inefficacious. As a matter of fact in the Punjab language used in the Subordinate Courts and that employed by the Police for recording of statements has always been Urdu and recording of the dying declaration in Urdu cannot be a ground for saying that the statement does not correctly reproduce what was stated by the declarant. This is a wholly inadequate reason, for rejecting the dying declaration: A.I.R. 1957 S.C. 904: 1958 S.C.J. 106: 1958 M.L.J. (Cr.) 38.

Where the lady was questioned in Hindi but her statement was recorded in Marathi by a Sub-Inspector of Police well versed in both the languages and there was endorsement, admitted to be correct, that her recorded statement was further read over and accepted by her to be correct, *held*, the dying declaration could not be discarded for that reason alone; though it is much better and always desirable that as far as possible it should be recorded in the maker's language: (1985) 1 Bom.C.R. 559: 1985 Cr.L.R. 79 (D.B.).

Where the Magistrate's questions and the 100 per cent. burnt victim's answers were in Sindhi, which, on translation into Hindi, were communicated to the constable who in his turn recorded them in Marathi; the statements so recorded in Marathi were read over to the deceased, obviously, by reversion of the entire process; but the endorsement on the dying

declaration indicated that it was read over and explained to the deceased in Hindi, not in Sindhi as deposed to by the Magistrate; *held*, the dying declaration, not inspiring confidence, could not by itself sustain the conviction: 1993 Cr.L.J. 3269 (Bom.) (D.B.).

The mere fact that the language used in dying declaration is chaste while that used in the First Information Report has some words which are spoken by villagers, *held*, is not of much significance because there is nothing abnormal or unusual in the same person using colloquial language while talking to one person and using refined language while talking to another person: A.I.R. 1974 S.C. 839: (1974) 4 S.C.C. 258: 1974 Cr.L.J. 709: (1974) 3 S.C.R. 570.

16. Dying declaration—Proof of.—160 I.C. 597: A.I.R. 1936 Rang. 42. An oral statement of the deceased about the cause of his death may be proved by any one who heard it as well as by the person who recorded it. Under S. 521, Cr.P.Code, it is not necessary that the Magistrate recording the confession should be called and be asked to refresh his memory by referring to statements of witnesses under S. 159, Evidence Act: 31 I.C. 359: 16 Cr.L.J. 759 (M.).

A dying declaration recorded by a Magistrate is not evidence unless proved by the statement of the Magistrate though he is himself the committing Magistrate in the case. A Court cannot go beyond the rule that every statement placed on the record must be properly proved. Dying declarations are not covered by the provisions of Chap. XLI of the Cr.P.Code: 18 I.C. 883. *See* also 17 Punj. Re. 1911 (Cr.): 14 I.C. 417.

The only way of proving a dying declaration is by the evidence of some witness who heard it made, the witness being at liberty to refresh his memory by referring to the note made by him and read over by him at or about the time the statement is made: A.I.R. 1924 Lah. 12. *See* also I.L.R. 49 Cal. 358: 71 I.C. 685; A.I.R. 1922 Oudh 382; A.I.R. 1930 Lah. 450; A.I.R. 1930 Cal. 228.

It is settled law that unless a dying declaration is proved by cogent and reliable evidence, it cannot be relied upon: A.I.R. 1993 S.C. 2457: 1993 Cr.L.J. 2598.

Witnesses should not be allowed to prove a dying declaration as if it is a substantive piece of evidence in the case. The relevant fact to be proved is the statement made and that statement is not the document made by the Magistrate: 67 I.C. 577: A.I.R. 1924 Lah. 12.

Where a Magistrate who heard the dying declaration being made and at whose instance and under whose supervision it was recorded, has sworn to its authenticity, the non-production of the clerk who did only the writing work does not make the evidence of the Magistrate inadmissible or less reliable: A.I.R. 1951 Pepsu 111: 52 Cr.L.J. 883.

The only satisfactory and reliable way of proving the dying declaration of a deceased person is to let the person who recorded it or in whose presence it was recorded directly prove the writing itself. Otherwise the proceedings would be reduced to a farce. No human being can be expected to remember word for word what he had written long ago and either the witness will have to learn the evidence by heart before he enters the witness-box or no dying declaration could be proved in a satisfactory manner at all: 176 I.C. 471: A.I.R. 1938 Pesh. 33.

Where a dying declaration has to be proved by a Magistrate it is unnecessary for him to repeat the record seriatim in his evidence if he is satisfied that it was correctly recorded; it is sufficient for him merely to refer to the record and testify to its correctness, and that it was made by the person and under the circumstances in question: 1941 Rang.L.R. 258: A.I.R. 1941 Rang. 301.

Where the original dying declaration, testified by the Magistrate to have been given to the Head Constable who testified to have prepared a copy thereof and returned to the Magistrate, had been lost, *held*, the prosecution was entitled to give secondary evidence thereof which would consist the Magistrate's as also of the Head Constable's testimony that the copy prepared from the original was a true copy: A.I.R. 1979 S.C. 1567: 1979 Cr.L.J. 108: 1979 All.W.C. 56. But where the original dying declaration had been lost with no copy thereof having been made and nothing indicated that non-production of the dying declaration was deliberate or with an oblique purpose, *held*, no adverse inference could be drawn against the prosecution; mere plea that the dying declaration might have contained something different and favourable to the defence would not prove prejudice: 1984 All.W.C. (Supp.) 256.

Where the informant died before the commencement of the trial and the Investigating Officer who recorded the First Information Report was also not examined, *held*, such First Information Report cannot be admitted in evidence under Ss. 32 or 33: 1971 B.L.J.R. 353. *See* however 1976 Cr.L.R. 675: 1976 W.L.N. (U.C.) 403 (Raj.), cited under Note 18, *infra*.

17. Dying declaration—Oral or through signs and gestures.—It is well settled law that even an oral dying declaration quite apart from a written one and in some given instances a communication that is intelligible

even if it is through signs and gestures could still be relied upon provided it inspires complete confidence in the mind of the Court. Where immediately after arrest, the two accused were taken to the hospital where the deceased was lying in a serious condition and he, by gestures, indicated that one of them stabbed him while the other was holding him when he was being stabbed and as many as three persons had in terms stated that the deceased had clearly conveyed the same to them without any ambiguity, *held*, even though there was no verbal statement that would constitute a valid dying declaration within the meaning of S. 32(1): 1993 Cr.L.J. 3883 (Bom.) (D.B.). *See* also I.L.R. (1971) 21 Raj. 541.

A dying declaration under S. 32(1) may as well be oral; though it may not be taken at an equal footing with a declaration formally reduced to writing. [A.I.R. 1932 Lah. 14; A.I.R. 1941 Rang. 301; A.I.R. 1955 Trav.-Co. 243; (1958) 60 Bom.L.R. 153 (F.B.); A.I.R. 1976 S.C. 1994, Rel. on]: 1978 Mah.L.J. 324 (D.B.).

The word used is 'verbal' and not 'oral'. Such a dying declaration may, therefore, be in writing or oral or may be made by signs and gestures in answer to questions when the declarant is unable to speak: (1973) 39 Cut.L.T. 186: 1973 Cr.L.J. 1058 (D.B.).

In a trial for murder, the doctor who treated the injured person deposed that after the said person had slightly recovered she stated that the accused had caused her the injuries. From the evidence it appeared that her answer was not in response to any leading question. This evidence of the Doctor was corroborated by that of the Investigating Officer and there was no evidence which went counter to it. Subsequently, the injured person succumbed to her injuries. *Held*, that this evidence of the person's dying declaration though not reduced into writing, could not be rejected: A.I.R. 1956 Cal. 82: 1956 Cr.L.J. 509.

The questions put to the dying person who could not speak and the signs made by him taken together amount to verbal statements within the meaning of S. 32 of the Evidence Act: I.L.R. (1949) Nag. 301: A.I.R. 1949 Nag. 405; I.L.R. 49 Cal. 600: A.I.R. 1922 Cal. 409.

Signs made by an injured person either by a nod of the head to indicate assent or by the sign or motion of fingers or hand in answer to questions put to him for finding out the identity of the individual causing the injury amount to verbal statement within the meaning of S. 32(1): 1956 Cr.L.J. 1240: A.I.R. 1956 Sau. 83.

It is true that when the dying declaration is in writing, the Court is in a better position to assess the import of the declaration. But in a case where the verbal declaration asserts that the accused assaulted the deceased, there is no room for confusion or construction, if those witnesses are reliable and their evidence is acceptable. Therefore, the argument that the oral dying declaration should not be accepted as the Court is not in a position to know the exact statements made, cannot be accepted: 31 Cut.L.T. 387: I.L.R. (1964) Cut. 907: A.I.R. 1965 Ori. 118.

A dying declaration is not a statement which requires to be in writing. Oral evidence as to the statement made by the injured person who happens to die subsequently would prove the declaration. If the declaration is recorded the record would be merely a note made by the witness and would not be substantive evidence: (1962) 2 Cr.L.J. 540 (Guj.).

Gestures made before the death by the person murdered are admissible in evidence, but the opinion of the witnesses as to the meaning of such gestures is not evidence, the interpretation of the gestures being for the Court alone: I.L.R. 1 Pat. 401: A.I.R. 1922 Pat. 535. *See* also I.L.R. (1937) Bom. 68: A.I.R. 1936 Bom. 372; A.I.R. 1938 Pat. 153.

Where the witness had seen the boy, profusely bleeding from his neck wound and asked him as to what happened and the boy unable to speak pointed out at the accused whose clothes were blood-stained, *held*, in the context it amounted to the boy's oral dying declaration that the accused had caused the injury: 1989 Cr.L.J. (N.O.C.) 9: 1988 Cr.L.R. 6 (Madh. Pra.) (D.B.).

A dying declaration can be made in writing or oral or even by gestures. Thus, where a Magistrate, wholly independent and disinterested, in the presence of the Doctor, asked questions to which the injured replied by head nods, *held*, the dying declaration could not be faulted for that reason alone; on facts the Magistrate's performance lauded as ideal and doing credit to a judicial officer: (1987-2) 7 Guj.L.H. (U.J.) 28 (D.B.).

Though the rule of *'ipsissima verba'*, *i.e.*, before a dying declaration is accepted by a Court as such, 'actual words of the declaration must be proved' is a very salutary rule, it cannot be held that unless the actual words are repeated by each witness of the declaration, it is not possible for a Court to come to the conclusion that the declarant made a declaration or what the import or meaning of that declaration was. Thus, where the declaration of the deceased is also the evidence of his conduct which supplies a very important circumstantial link in the chain of circumstances of the case and where in the setting in which the witnesses find themselves, it is difficult for them to be able to correctly reproduce the

words which they heard the deceased utter after he had been shot, all that they can be expected to say is that the words very similar to the words that they purport to put in the mouth of the deceased were uttered by him, and the witnesses can be relied upon to that extent: 1957 All.L.J. 459: A.I.R. 1957 All. 177.

Unless one is certain about the exact words uttered by the deceased, no reliance should be placed on verbal statements of witnesses and the oral declarations made by a deceased:1953 Cr.L.J. 1772: A.I.R. 1953 S.C. 420 [Held to have been overruled in view of A.I.R. 1962 S.C. 130 and A.I.R. 1958 S.C. 22 on another point in A.I.R. 1980 S.C. 559]; 1963 Ker.L.J. 309: I.L.R. (1963) 1 Ker. 609: (1964) 1 Cr.L.J. 101.

When the dying declaration is oral, the exact words stated by the deceased to the witnesses are of the utmost importance and if witnesses improve upon their statements by varying their versions that evidence becomes unreliable. Where there is no consistent version as to what were the words used by the deceased, the alleged dying declaration has only to be eschewed: (1963) 1 Cr.L.J. 175: 1963 M.L.J. (Cr.) 194: A.I.R. 1963 Ker. 54.

Merely because oral dying declarations do not reproduce the exact words of the deceased in direct form or recorded declaration are not in question-answer form, *held*, they are not thereby vitiated; it has to be ascertained in each case on its own facts whether the declaration is truthful or not: 1994 M.P.L.J. 862: 1995 Cr.L.J. 17 (D.B.).

It is almost improbable, if not impossible, for the witnesses to remember the exact words of the deceased after lapse of almost a year, but where they had remembered the essential part of the version given by the deceased at the time when he was in the agony of death, *held*, the dying declaration cannot be discarded on this ground alone: 1990 Cr.L.J. 2720 (Raj.) (D.B.).

Oral dying declarations are to be scrutinised with care. Unless the Court is in a position to know the exact contents of the dying declaration, it would be difficult to base a conviction thereon. The Court has, therefore, to be sure as to what exactly was the statement of the deceased. There is no longer any controversy that a conviction is well founded on the dying declaration itself if it is reliable. Corroboration is not essential in all cases. There is no inherent weakness in dying declaration as a piece of evidence: If it is not free from any infirmity, corroboration, is necessary. *Held*, that the oral dying declaration satisfied all the tests usually adopted to scrutinise it, that is; the memory and the consciousness of the deceased consistency of the statements, definiteness about the identity of the accused and whether it was made at the earliest opportunity, and hence conviction on the basis of that was proper: 1966 Cr.L.J. 336 (Ori.).

Before the testimony of a verbal dying declaration can be accepted it should at least be consistent. There should not be serious discrepancies relating to the evidence of a dying declaration: A.I.R. 1955 All. 189: 1955 Cr.L.J. 473.

In an oral dying declaration, which is sought to be proved by the prosecution there is always a chance for something being added or something being subtracted by the person before whom it is made. But where the declaration has been recorded in writing by the Magistrate and it was read over to the deceased there can be no doubt about the fact that whatever is mentioned in the dying declaration is the faithful statement of the deceased himself: 1956 Raj.L.W. 178: 1957 Cr.L.J. 240.

In case of an oral dying declaration the Court must first satisfy itself on evidence whether the oral declaration had in fact been made and only then proceed to ascertain, as far as possible, the exact words of the dying person; it is only thereafter that the truthfulness and reliability of the statement may be determined: (1975) 1 A.P.L.J. 265 (D.B.).

Undoubtedly a dying declaration based upon oral evidence requires further evidence to lend assurance to the matter, not because the dying declaration is not true or could not form the basis of conviction, but because the judicial mind must be clear that mistakes are eschewed out: (1976) 42 Cut.L.T. 80: 1976 Cr.L.J. 1347: 1976 Cut.L.R. (Cr.) 209 (D.B.).

The witness testifying the deceased's statement as to the cause of his death, must faithfully reproduce it; he should make no additions or improvements in the deceased's statement; if the witness does so a serious infirmity would creep in the dying declaration; the Court shall have no option but to reject it: (1984) 25 Del.L.T. 33.

Where the victim had named the assailant to the witnesses who promptly conveyed the same to the Police, *held*, the victim's oral declaration could be considered as evidence: (1990) 2 Bom.C.R. 51 (D.B.); 1977 All.W.C. 20 [Evidence with regard to alleged dying declaration was found to be unbelievable].

In a trial for murder, the Doctor who treated the injured person deposed that after the said person had slightly recovered she stated that the accused had caused her the injuries. From the evidence it appeared that her answer was not in response to any leading question. This evidence of the Doctor was corroborated by

the Investigating Officer and there was no evidence which went counter to it. Subsequently, the injured person succumbed to her injuries. *Held*, that this evidence of the person's dying declaration, though not reduced into writing, could not be rejected: A.I.R. 1956 Cal. 82: 1956 Cr.L.J. 509; A.I.R. 1960 Punj. 310.

18. Satisfaction as to state of mind of declarant.—When a dying declaration is recorded, the person who records the statement must be satisfied that the person who makes the statement is consciously making the statement understanding the implications of the words he uses: A.I.R. 1972 S.C. 1776: 1972 Cr.L.J. 828; (1972) 74 Punj.L.R. 108 (S.C.). *See* also (1987) 2 W.L.N. 444 (Raj.); 1982 All.W.C. 596: 1982 All.Cr.R. 353 [It is the first duty of the Doctor to certify about the fit mental condition before recording statement of a seriously injured person].

Though in absence of a medical certificate that the patient was in a fit condition to make a statement, the burden is on the prosecution to prove that the patient was in such a condition, but once the prosecution proves same through facts and circumstances of the case, it is then for the defence to successfully assail that position: 1993 Cr.L.J. 3883 (Bom.) (D.B.).

Merely because the Doctor did not certify on the dying declaration that the deceased was in a fit state of health to give the statement, it would be only an irregularity, cured by the Doctor's and Head Constable's statement in the Court: (1977) 2 Karn.L.J. 350: I.L.R. (1977) Karn. 1276.

Where the deceased in her dying declaration clearly implicated the accused as having set her on fire; even though she had 100 per cent. burns, they were generally superficial; and she was then fully conscious as certified to by the doctor, *held*, veracity of her dying declaration could not be doubted, even if the doctor had not certified that she was in a fit condition to make the declaration: 1994 Cr.L.J. 2035: (1994) 1 Bom.C.R. 702 (D.B.).

Where the dying declaration was challenged on the ground that the deceased was in a state of shock, however, the Doctor was not cross-examined as to the fact whether or not despite the shock, the deceased had retained his mental faculties, on the other hand, the coherent and consistent statement made by the deceased clearly revealed the fact that the deceased was fully conscious and was not suffering from any confusion or hallucination, *held*, the challenge was without any force: A.I.R. 1980 S.C. 559: (1980) 2 S.C.C. 207. *See* also 1979 All.W.C. 60.

Where the Doctor had deposed that the deceased was in a fit state of health to make a declaration and that when she recorded the dying declaration, the deceased was capable of deposing and was in her senses and that when she was recording her dying declaration, 'she had started going into coma', *held*, there was no reason for not placing reliance on the dying declaration recorded by the Doctor: A.I.R. 1987 S.C. 860: 1987 Cr.L.J. 775: (1987) 1 D.M.C. 162: (1987) 1 Hindu L.R. 169: (1987-1) 35 B.L.J.R. 372: (1987) 1 Crimes 385: (1987) 2 S.C.C. 32.

Where both before and after recording the dying declaration the Magistrate obtained certificates from the Doctor that the deceased was in a fit state of mind to make the statement, *held*, simply because the Magistrate did not put a direct question to the deceased as to whether she was in a fit state of mind to make the statement, the dying declaration could not be discarded: 1993 Cr.L.J. 3414 (S.C.); 1994 Cr.L.J. 1275 (Andh. Pra.) (D.B.).

Where the injured had intensive burns and in great pain, *held*, it cannot be believed that she was mentally fit to make the statement; since the Magistrate, in disregard of his duty, had neither called the Doctor nor asked her direct questions to ascertain her mental capability, it would be unsafe to convict the accused on the basis of her dying declaration: (1988) 2 W.L.N. 102: 1988 Cr.L.R. 376: (1988) 2 Raj.L.R. 130: 1988 Raj. Cr.C. 214. *See* also 1978 M.P.L.J. 327: 1978 Jab.L.J. 513; 1983 M.P.W.N. 247.

Where the Special Executive Magistrate deposed that he had satisfied himself that deceased was in a perfectly fit condition to make a statement and the Police Officer also supported his version, and there were no interpolations and no apparent inconsistencies and the version set out in that dying declaration was consistent with the versions given in earlier two declarations, *held*, inspite of non-obtainance of the doctor's endorsement regarding fitness of the patient on the dying declaration, the same could be accepted and relied upon: 1993 Cr.L.J. 3883 (Bom.) (D.B.).

Dying declaration recorded by the Magistrate in violation of Rr. 3 and 5 of Ch. 13-A of the Rules and Orders of Punjab High Court, *i.e.*, without satisfying that the declarant was in a fit condition to make statement or without obtaining fitness certificate from the Medical Officer and without obtaining signatures or thumb-impression of the declarant, *held*, was not admissible: 1990 Cr.L.J. 790 (Del.) (D.B.).

Where the difference and inconsistency between her statements was material and the deceased had suffered 80 per cent. burns, *held*, it is extremely doubtful that any of her statements could be true; they are liable to be

discarded as false and concocted: (1988) 2 W.L.N. 102: 1988 Cr.L.R. 376: (1988) 2 Raj.L.R. 130: 1988 Raj.Cr.C. 214.

From the mere fact that the deceased had hundred per cent. burn injuries of second and third degree, *held*, it could not be presumed that the deceased was not physically and mentally fit to give dying declaration. [A.I.R. 1987 S.C. 860: 1987 Cr.L.J. 775, Foll.]: 1995 Cr.L.J. 1004 (Raj.) (D.B.).

Where the injured admittedly had 88 per cent burns and must have been in grave agony and pain and administered sedatives and tranquilizers, *held*, her dying declaration when she could not have given a cogent and coherent statement even if she was conscious could not be expected to constitute evidence sufficient to prove the accused's guilt beyond reasonable doubt: 1986 Cr.L.R. 501 (Mah.).

Where the deceased, an educated house wife, admitted to hospital, had 95 per cent. burn injuries and had been injected with morphia, *held*, Doctor's certificate about the deceased being fit to make the statement was clearly doubtful; especially when the statement was not signed by the deceased but bore only her thumb-impression without any explanation therefor: 1990 Cr.L.J. (N.O.C.) 10 (Del.) (D.B).

Where the dying declaration of a woman with 95 per cent. burns was recorded by one Doctor and another Doctor certified her to be conscious and fit to make statement, *held*, merely because another Doctor of the same hospital who performed the post-mortem examination had stated in cross-examination that she might not have been in a position to speak, a mere opinion based on the post-mortem certificate cannot be taken into consideration; the dying declarations including the one recorded earlier by the Police were sufficient to base conviction upon: 1995 Cr.L.J. 689 (Madh. Pra.) (D.B.).

Where there was no evidence to show that the declarant was mentally conscious, had realised her dying condition or that she possessed memory consciousness or intelligence sufficient to understand what she was doing or saying, *held*, it would be hazardous to act upon it and convict the accused: 1972 Raj.L.W. 629: 1972 W.L.N. 648: 1973 Cr.L.J. 723. *See* also 1983 Jab.L.J. (Notes) 29; 1978 M.P.W.N. 165; (1979) 1 M.P.W.N. 310 [Where declarant was seriously injured and was also in drunken condition, *held*, conviction could not be based on his dying declaration].

Where in the absence of any motive on the part of the accused to commit the offence the Court also found that the deceased, having 6 degree burns, could not possibly had made an intelligible statement and that the declaration recorded did not inspire its confidence either, *held*, it would be risky to act upon the dying declaration: (1992-1) 12 Guj.L.H. 577.

Where the two Medical Officers and the Investigating Officer recording the declaration clearly testified that the deceased was then in a fit state of mind to make the statement but the lay witnesses had testified to the contrary, *held*, it is well settled that in such a case weightage has to be given to the medical experts' testimony: (1990-1) 38 B.L.J.R. 139: (1990) 3 Crimes 168 (D.B.). *See* also (1986) 13 Cr.L.T. 317 (J.&K.) (D.B.).

It is the verification of the fitness of the deponent as evident from the written dying declaration which is of importance and not the subsequent statement of the person recording the statement or present at the time: 1984 W.L.N. (U.C.) 557: 1984 Cr.L.R. 74 (Raj.); (1989) 1 Raj.L.R. 594.

Where the two Doctors who had attended the deceased as well as the Executive Magistrate deposed that the patient was conscious and in a position to give his dying declaration when he made the same, *held*, reliance could be placed on such dying declaration: 1983 Cr.L.R. 303 (Guj.).

Even where the Magistrate who had recorded the dying declaration had died, *held*, his endorsement on the statement that he had satisfied himself about the mental condition of the victim could certainly be believed: 1976 Cr.L.R. 675: 1976 W.L.N. (U.C.) 403 (Raj.). *See* however 1971 B.L.J.R. 353 cited under Note 16, *supra*.

Where the Doctor had certified and deposed that the injured was conscious and fit to make the statement, *held*, it cannot be rejected merely because the injured person's pulse was not palpable, his blood pressure was not recordable and he was gasping; it does not necessarily render him unfit to make the declaration: A.I.R 1978 S.C. 1530: 1978 Cr.L.J. 1603. *See* also (1991) 1 Crimes 349 (Guj.).

Even an injured in serious condition being given oxygen may have moments of improvement; thus, it cannot be said that he could not be fit to make the statement: 1985 Cr.L.R. 691: (1987) 2 Raj.L.R. 600.

Before a conviction can be based on a dying declaration, it must inspire confidence so as to make it safe to act upon it. Thus, where the deceased's vital organs like the peritoneum, stomach and spleen were completely smashed, *held*, it was impossible to believe that he was in a fit state of mind and body to make any kind of coherent or credible statement relating to the circumstances which resulted in his death; his dying declaration could not be relied upon

for any purposes and had to be excluded from consideration: A.I.R. 1983 S.C. 554: (1983) 2 S.C.C. 411: (1983) 1 Crimes 1059.

19. Capacity of victim to make declaration.—Where a deceased received a serious spear wound which penetrated the chest wall and injured the diaphragm, liver and stomach. *Held*, that the deceased could not possibly have lived for two hours after receiving an injury of this description, much less could have been conscious. The probability of his ever living to make a dying declaration two hours later was too remote to be considered: 39 Cr.L.J. 508: A.I.R. 1938 Lah. 268. *See* also 174 I.C. 989: A.I.R. 1938 Lah. 262.

The deceased had received numerous and very serious injuries on his head and it was very doubtful whether under such circumstances he would have been able to utter even a single word. There was no definite opinion of the doctor as to whether deceased would have been then able to speak. *Held*, that the evidence of the prosecution witnesses in respect of the alleged oral dying declaration of the deceased should be discarded: I.L.R. 8 Luck. 570: A.I.R. 1933 Oudh 333.

The prosecution alleged that the deceased who had been severely hit several times by the accused fell down unconscious. The eye-witness who was grazing his camels in a nearby field went to him and sprinkled some water on him. Thereon the deceased recovered consciousness and then was led to a threshing flood at a short distance where he made a statement to *J* regarding the assault. From there he was taken to a neighbouring town to the shop of *G* where he again made a statement to *G*. The prosecution relied on the evidence of the eye-witness and also the dying declaration proved by *G* and *J* for the conviction of the accused for murder. From the doctor's evidence it was found that it was improbable, that the deceased would have been in a position either to walk or speak so as to make a dying declaration. Apart from the fact that the statement of *G* and *J* suffered from material contradictions at various stages the evidence of eye-witnesses was also found to deserve being disregarded. *Held*, in these circumstances the evidence of *G* and *J* could not be a sure foundation for maintaining the conviction when the evidence of the sole eye-witness was disregarded. Ordinarily, the dying declaration of the kind which the prosecution relied upon in the case was by itself sufficient for sustaining a conviction on a charge of murder: A.I.R. 1957 S.C. 589: 1957 M.L.J. (Cr.) 478.

Where the dying declaration itself indicated that the injured could not have been in a conscious state after the incident when he was picked up and taken to the Hospital where he was soon operated upon and an attempt at night to record his dying declaration was also abandoned and yet the witness seeking to prove the oral dying declaration claimed that the deceased had told him the names of the accused, *held*, the witness is guilty of introducing absolutely untrue testimony; his evidence has to be discarded: (1984) 2 Bom.C.R. 633 (D.B.).

Where it was alleged that the deceased had made dying declaration to eye-witnesses, though the Doctor who examined the injured opined that there would have been instantaneous shock, the Doctor who conducted the post mortem was of the view that the deceased might have been conscious and might have been able to speak for some time, *held*, such variance was not sufficient to rule out the possibility of the deceased having made the alleged dying declaration: A.I.R. 1979 S.C. 1831: 1979 Cr.L.J. 1358.

Where the F.I.R. lodged by the father, after he had admitted his son to Hospital, with mention of the dying declaration as well as other material details and the witnesses of the declaration, though interested were declared hostile yet the High Court accepted the dying declaration after considering admissions made by the hostile witnesses in their cross-examination by the prosecution, *held*, since nothing in the Doctor's evidence indicated the deceased's inability to make the declaration, the accused's conviction was justified: A.I.R. 1993 S.C. 250: 1993 Cr.L.J. 304: (1993) 2 (Supp.) S.C.C. 274: (1992) 3 Crimes 904.

Where medical evidence showed that deceased would have lost all his faculties after stabbing, *held*, the alleged dying declaration made by the deceased could not be relied upon: (1985) 28 Del.L.T. (S.N.) 19 (D.B.).

Where the Doctor's evidence was that the deceased was brought to the hospital in a semi-conscious condition and that he became unconscious while making out the statement and could not speak out anything more and died, *held*, his evidence that he read over the contents of the declaration to the maker after it was written and then took his thumb impression carried no meaning or value because at that time the patient was virtually dying or dead and had no sense whatsoever to understand the recital. Further, there was no endorsement on the said dying declaration to the effect that the statement was read over to the maker. Thus, these infirmities weakened the value of the dying declaration: 1990 Cr.L.J. 1333 (Gau.) (D.B.).

Mere omission of the Magistrate to ask the declarant whether he could speak or not would not invalidate the declaration: 1983 Cr.L.J. 1916 (All.) (D.B.).

Oral statements corroborated by testimony of more than one witness including independent witness, *held*, cannot be rejected merely because the ability of the injured to make declaration was not supported by medical evidence: 1981 Cr.L.J. 530 (Madh. Pra.) (D.B.).

Where nature of injuries inflicted on the deceased was fatal so as to make it improbable that he could make any dying declaration and sufficient time had passed when the witnesses arrived at the place of occurrence where the deceased was lying and there were infirmities in witnesses' evidence, *held*, no reliance could be placed on such dying declaration: 1992 Cr.L.J. 161 (Gau.) (D.B.).

Where the deceased was said to have made dying declaration to the Investigating Officer while in semi-conscious state, *held*, when in view of nature of injuries the dying declaration could not be said to be true version, it could not be acted upon: 1990 Cr.L.J. (N.O.C.) 75 (Ori.) (D.B.).

Where the condition of the deceased and the injuries received by him raised a suspicion regarding making of any statement by the deceased to the Police. *See* 1994 Cr.L.J. 314 (Raj.) (D.B.).

Where the deceased's post mortem report disclosed that his mouth, oesophagus and pharynx were choked and his stomach was full of food, making it impossible for him to speak, *held*, his oral dying declaration was not free from doubt; it had no evidentiary value: 1989 Cr.L.J. 1058 (Madh. Pra.) (D.B.).

Where the deceased suffering injury at the back of his neck was in a speaking condition as his vocal cord was intact and the evidence of the witnesses before whom the deceased named the accused as the person responsible for causing his injury was satisfactory, *held*, dying declaration was reliable: 1989 Cr.L.J. 1516 (Pat.) (D.B.).

Where the deceased suffered injuries on the root of her neck but her speaking organs, *i.e.*, the tongue, mouth, pharynx and larynx and windpipe, escaped injury and there was no impediment in her making the dying declaration; the Doctor had also opined that she could survive for half an hour and, with bleeding controlled, even for a longer period and he was not cross-examined on the point; *held*, it could not be contended that she was rendered incapable of speech and unable to make the statement; conviction sustained: (1992) 1 An.W.R. 631: (1992) 1 An.L.T. 562: (1992) 2 Crimes 796 (D.B.).

Where the deceased did not die at the spot but on the way to the hospital, *held*, even though seriously injured, it could not be said that he could not make dying declaration to a person taking him to the hospital: 1994 Cr.L.J. 494 (Madh. Pra.) (D.B.).

20. More than one dying declaration.— When there are more than one dying declarations they should be treated as one to assess their evidentiary value and weight; if they are contradictory, the maxim *morituris proesuniture mentiri*—a man will not meet his maker with a lie in his mouth—stands wiped out; but keeping in mind that this maxim represents the psychic effect on the persons of all religions, it cannot so easily be done away with; the effort should be to ascertain if there is a real contradictory version or only some omissions; absolute truth is not the requirement of a valid dying declaration; the requirement expected is that the deceased is not making a false accusation: 1993 Cr.L.J. 3709 (All.) (D.B.).

If there are more than one dying declarations, the Court is required to scrutinise each one to find out whether it passes the test of trustworthy; the Court must also further find out whether they are consistence with each other in material particulars. It is only then that the declarations can be accepted and relied upon to record conviction: (1993) 1 Hindu L.R. 511 (S.C.).

Where there are more than one dying declarations, all the dying declarations should be consistent. The consistency must be with regard to the assailants and the manner in which the incident had happened. It is not right to say that in a case where there are more than one dying declarations, the Court has to compare all the dying declarations in order to assess the extent of incrimination. Thus, where in the subsequent dying declaration, names of some more persons as his assailants were mentioned which were not mentioned in the earlier dying declaration, *held*, this improvement introduced a serious infirmity in the subsequent dying declaration and in the absence of any other evidence on record corroborating the version contained therein, it could not be accepted: 1994 Cr.L.J. 3782 (Andh. Pra.) (D.B.).

Where the earliest of several dying declarations was found to be truthful, *held*, it could be relied upon: (1977) 1 S.C.C. 762: 1977 S.C.C. (Cr.) 181.

In case of more than one dying declarations, *held*, the one first in time must be preferred to any of the subsequent statement: 1980 S.C.C. (Cr.) 334.

Where two dying declarations made by the deceased were inconsistent and

unreliable on material points, *held*, the conviction could not be based on sole dying declaration recorded by Magistrate whereunder the deceased alleged that her father-in-law had set her on fire: 1994 Cr.L.J. 872 (All.) (D.B.).

The existence of two dying declarations of the deceased does not automatically and invariably mean that the earlier statement should be accepted and the later be necessarily rejected; in assessing their credibility, the Court has to apply the ordinary rules.

Thus, where the wife coming out from her house engulfed in flames and her statement in the Hospital before the Head Constable made it a case of suicide and later on her statement was recorded by the Judicial Magistrate in the presence of the Doctor after taking all necessary precautions wherein she mentioned her husband, troubling her for 3 months, to have lit her by a matchstick after having poured kerosene over her, *held*, the second declaration later in time was rightly preferred by the trial Court; there is nothing to indicate that the later statement emanated by any outside, hostile influence or tutoring; her first declaration was made in the hope of surviving with a view to shield her husband; she came out with truth as she found herself face to face with death, the moment of truth: (1993) 1 An.W.R. 131: (1993) 1 An.L.T. (Cr.) 140: (1992) 2 An.L.T. (N.R.C.) 49 (D.B.).

Dying declarations given by the deceased three times—All the three, free from blemish and inspiring complete confidence—*Held*, conviction could be based on such dying declarations, even if uncorroborated: 1967 Cr.L.J. 1583: A.I.R. 1967 All. 561.

Where the dying declarations by the wife about to die, having suffered 90 per cent. burn injuries, recorded by the Investigating Officer, the Medical Officer who examined and treated her in the hospital where she was brought and the Metropolitan Magistrate that her husband had killed her by pouring kerosene oil over her and setting her ablaze were found to be natural and voluntary and in consonance with other evidence on record, *held*, there being no ground to discard the dying statements, the husband's conviction was rightly founded upon them: 1994 Cr.L.J. 3454 (Del.) (D.B.).

Where the first dying declaration, very short, recorded immediately on arrival in hospital of the injured, in great pain and agony, was found to be 'nothing but truth' and the second declaration recorded after his removal to another hospital contained more detailed particulars of the occurrence suggesting that the latter declaration might not have been given by the deceased, *held*, even if that be so, it did not in the least affect the validity or the weight of the first declaration which was sufficient to sustain the conviction. [I.L.R. (1971) 1 Punj. 437, affirmed on this point]: A.I.R. 1977 S.C. 705: 1977 Cr.L.J. 347: (1976) 4 S.C.C. 311: 1977 U.J. (S.C.) 76.

Where in all the three dying declarations, the deceased had implicated the accused, *held*, the evidence of eye-witnesses who were related to the deceased could not be rejected when their presence at the scene place was most natural and probable especially when their evidence was amply corroborated by the medical testimony of Doctor and as well as by the other witnesses: 1993 Cr.L.J. 2173 (Mad.) (D.B.).

Where dying declarations made by the deceased before his parents and close relative soon after the incident and then to the Doctors and thereafter to the Investigating Officer after having been declared fit for making a statement were consistent, *held*, such a dying declaration could be relied upon: 1992 Cr.L.J. 730: (1991) 43 Del.L.T. 554 (D.B.).

Where the two dying declarations recorded by Head Constable and a Magistrate were proved to be authentic and were in the language of the deceased, *held*, merely because the wife of the deceased was present at the bed-side of her seriously injured husband could not cast any suspicion as in such condition her presence was natural: 1977 Cr.L.R. 402 (Raj.).

Where the dying declarations made to the Village Kotwal, Head Constable of Police and also to the Executive Magistrate, had been deposed to and proved by witnesses who were independent and these declarations had been made in circumstances which could not suggest that the victim was persuaded, forced or coaxed to make allegations against the accused, *held*, those dying declarations could be relied upon to convict the accused: 1979 Bom.C.R. 507 (D.B.).

Where first dying declaration was made by deceased a day after the occurrence which was recorded by Police Officer and second dying declaration was recorded by the Magistrate eleven days after the occurrence and which was similar to the first dying declaration, *held*, the two declarations could safely be taken to have corroborated each other: 1992 Cr.L.J. 2574 (Cal.) (D.B.); 1986 All.W.C. 30. Where all the three dying declarations made to the Sub-Inspector, the Doctor and to the Magistrate had a distinctive feature of

spontaneity and brevity and had been faithfully recorded which clearly implicated the accused, *held*, such statements could certainly be relied on: (1979) 16 Del.L.T. 103 (D.B.); (1987) 2 Raj.L.R. 600: 1985 Cr.L.R. 691.

When there is no material difference or contradiction between dying declarations, *held*, some minor discrepancies would not affect their genuineness: 1988 Cr.L.R. 705: 1988 W.L.N. (U.C.) 578 (Raj.); (1985) 2 W.L.N. 49: 1985 Cr.L.R. 691 (Raj.) [Minor infirmities in the statements given to the Doctor, the Station House Officer and the Judicial Magistrate, *held*, would not affect their veracity].

Merely because the injured had orally told his brother that the accused had given him a pick-axe blow while in his recorded written declaration he had stated that the accused had thrown the pick-axe at him, *held*, it could hardly be taken as an infirmity to reject the declarations: (1984-2) 25 Guj.L.R. 1019: (1984) 4 Guj.L.H. 761: 1984 Cr.L.R. 441.

Where the only discrepancy in the dying declaration of the injured, having 88 per cent burns and in great pain and agony, was about the factum of the accused having abused her through out the night or only most of the night, *held*, it was only a minor but natural discrepancy; it does not detract from the veracity of the declaration: 1985 Cr.L.R. 79: (1985) 1 Bom.C.R. 559 (D.B.).

Where three dying declarations, recorded respectively by a Doctor, by a constable and attested by a Doctor, by an Executive Magistrate and endorsed by a Doctor, that the deceased had been set on fire by her husband, *held*, none of the declarations suffer from any infirmity; they satisfy all the tests; merely because one of the dying declaration was not in question or answer form, they cannot be discarded; conviction upheld: A.I.R. 1993 S.C. 1180: 1993 Cr.L.J. 298: (1993) 2 An.W.R. 29: (1992) 2 D.M.C. 516: (1993) 1 Hindu L.R. 8: (1993) 2 (Supp.) S.C.C. 242: (1992) 3 Crimes 633.

Where the deceased wife murdered by having been set ablaze had made six dying declarations, three of them fully exonerating the husband and the rest three completely implicating him; the two declarations of implications to her sister and brother-in-law who was a real brother of the accused, were rendered unproved as her sister and brother-in-law during the trial turned hostile, obviously to save the accused; the declarations exonerating her husband were made by the deceased to the Doctor on her medico-legal chart in the hospital and then to the Assistant Sub-Inspector of Police in the hospital itself further adding that the burning lamp had accidentally fallen on her bed; it is thereafter that the Police applied for recording of her dying statement by the Magistrate which was recorded after strict compliance with the procedural requirements and the Doctor's certification of her being fit to make the statement wherein she explained away her earlier statements of exoneration having been given by her under the threat and intimidation by her in-laws; this statement having been rightly accepted as true and voluntary, *held*, the accused's conviction based thereon sustained: (1989) 1 Hindu L.R. 90 (Del.) (D.B.).

Where two dying declarations, one recorded by the Doctor in the medico-legal history and other by a Judicial Magistrate after complying with all formalities and precautions, showed that the wife had been lit at night by her husband who had poured kerosene oil over her and both were duly proved and there was other evidence on record to corroborate their truthfulness, *held*, there being no infirmity in the evidence of the witnesses of the declarations, even otherwise independent and reliable, the dying declarations were rightly accepted; conviction upheld: 1985 Raj.L.W. 719 (D.B.).

Where the two dying declarations made within a period of $3^1/_2$ hours were consistent and were corroborated by ocular as well as medical evidence, *held*, the accused was rightly convicted: I.L.R. (1975) 25 Raj. 971: 1975 Raj.L.W. 435: 1975 W.L.N. 812. *See* also (1978) 2 M.P.W.N. 126.

Where the two dying declarations were inconsistent, *held*, they could not be accepted without corroboration: 1977 Cr.L.R. 70 (Raj.).

Where in a case of bride burning, the deceased had made four dying declarations varying by stating therein that (*1*) her mother-in-law had poured kerosene on her and burnt her; (2) her clothes caught fire from the stove; (*3*) that her mother-in-law and father-in-law might have set the fire after pouring kerosene oil over her; and (*4*) when she turned to the store, she heard her parents-in-law talking who poured kerosene upon her and set on fire; she had admitted that it was her husband who had rescued her; and the husband testified that he had suffered burns while rescuing her when he heard her shrieks from the kitchen but stated that his parents were away to Dandi Swami Mandir on the date of occurrence; *held*, the dying declarations could not be accepted as they did not satisfy one important and necessary test that if there are more than one declarations they must be consistent in material particulars; the second,

declaration attributes the occurrence to accident; conviction set aside: A.I.R. 1993 S.C. 374: 1993 Cr.L.J. 68: (1993) 1 D.M.C. 4: (1993) 1 Hindu L.R. 489: (1992) 3 Crimes 1088: (1993) 1 S.C.C. 1.

Where the deceased had made two dying declarations which abounded in contradictions and the place of occurrence mentioned therein was found to be different from the one ascertained in the investigation and the deceased's letters on record pointed not towards death by murder but by suicide, *held*, conviction of the accused was totally unjustified: 1985 Cr.L.J. 1436: I.L.R. (1984) Him. Pra. 793.

Where there were improvements in subsequent dying declaration and certain persons not mentioned in earlier declaration were also named in the second one, *held*, it could not be relied on. [1976 M.P.W.N. 292, Rel. on]: 1982 M.P.L.J. 772.

Where the deceased had made two dying declarations and there was some scope for tutoring the deceased and in fact the case was developed from stage to stage even by the deceased himself when he made a second dying declaration, no reliance can be placed on the dying declarations: (1964) 6 Ori.J.D. 44.

Where the deceased in his earlier dying declaration in his village home had named the accused as his assailant but in his subsequent dying declaration before the Doctor he described the accused as somebody's *sala*, that some body having four *salas*, *held*, it would be safer to acquit the accused by giving him the benefit of doubt: 1979 Raj.L.W. 267: 1979 W.L.N. 384 (D.B.).

Where the injured was first beaten by sticks by the accused who later on in another incident also hurled a bomb on the injured who was then removed to the Hospital where his statement was recorded by the Police and about 4 hours thereafter the injured's statement was recorded by the Magistrate; however, while the injured narrated both the incidents in his statement recorded by the Police but in his statement before the Magistrate he stopped short at the stage where he had completed narration of the first incident, *held*, the injured might not have stated the second incident before the Magistrate due to exhaustion felt by him due to the fatal bomb injury; as both his dying declarations were corroborated even by independent evidence, conviction of the accused was justified: (1991) 2 An.L.T. 668 (D.B.).

21. Details/Particulars in declaration.— The quantum of details in a dying declaration depend upon the injured's capacity for observation, his condition at the time his statement is recorded, his anxiety to mention details and the manner in which questions are put and answers elicited; may be the wealth of detail in the declaration may arouse suspicion but it does not necessarily mean that the declaration is fabricated; the dying declaration on facts accepted as true: A.I.R. 1979 S.C. 1347: 1979 All.W.C. 57.

To enable the Court to assess evidentiary value of a dying declaration it must necessarily have the whole of the deceased's statement, untampered in its terms or tenor. Law does not require that a dying declaration must cover the whole incident or narrate the case history; indeed, quite often, all that the victim may be able to say is that he was beaten by a certain person or persons due to the suddenness of the attack or the conditions of visibility or the victim's physical condition preventing him to recapitulate the entire incident or to narrate it at length. In fact, many a time, dying declarations, copiously worded or neatly structured, excite suspicion for bearing traces of tutoring: A.I.R. 1976 S.C. 2199: (1976) 3 S.C.C. 104: 1976 Cr.L.J. 1717.

Under the law a dying declaration need not be exhaustive, and need not disclose all the surrounding circumstances. It cannot be ruled out because of an omission to refer to a particular circumstance of the transaction, namely, motive, nor can any argument be built upon what the declarant has not said in his declaration: 1971 Cr.L.J. 1656 (Raj.) (D.B.).

The declaration need not contain details to merit its acceptance: 1982 Cr.L.J. 400 (Gau.) (D.B.).

It is not the requirement of law that the person making the dying declaration should make an elaborate and exhaustive statement so as to cover each and every aspect of the incident and narrate the whole history of the case. Where deceased specifically stated that it was the accused who poured kerosene oil and set her body on fire by lighting a matchstick and there was hardly any occasion for the deceased to escape from there, *held*, when according to the medical evidence the deceased had suffered 90 per cent. burns and must have been under a severe stress and agony, and, therefore, it was not possible for her to make a very detailed statement covering the minutest details which could not be expected under the facts and circumstances of present case, the impugned statement did not suffer from any infirmity so as to render it doubtful or unworthy of reliance: A.I.R. 1995 S.C. 777.

Where the dying declaration recorded by the Station House Officer in hospital in the presence of the Doctor, who certified that the deceased was in a fit state of mind contained necessary details such as the name of the accused, the manner of the assault and the weapon of the offence used, *held*, it was admissible in evidence: 1980 Raj.Cr.C. 49: 1980 Raj.L.W. 112: 1981 Cr.L.J. 1474 (D.B.). *See* also 1979 Cr.L.R. 11 (Raj.).

Where the dying declaration, recorded just after the incident and shortly before the death, clearly mentioned all the accused persons and there was no doubt about their identity, and it was substantially corroborated by medical evidence and also by the testimony of eye-witness, *held*, the dying declaration could not be discarded merely because it did not give precise description of all the instruments of offence and also the precise description of the manner in which the injuries were inflicted: A.I.R. 1987 S.C. 1328: 1987 Cr.L.J. 1065: (1987-2) 7 Guj.L.H. 383: (1987) 3 S.C.C. 360.

Where the dying declaration is mentioned at the earliest in the *fard beyan* of the witness and it contained the manner and weapon of the assault and the assailants, corroborated by evidence of other witnesses as well as by medical evidence, *held*, it is a credible dying declaration; it has got sanctity because the deceased as he stands before his creator, is the last person to speak the untruth: 1993 Cr.L.J. 1756 (Pat.) (D.B.).

A dying declaration giving details or role played by the accused and also of the presence of prosecution witnesses, *held*, cannot be discarded: 1994 Cr.L.J. (N.O.C.) 86 (Ori.) (D.B.).

A dying declaration is not complete unless complete names and addresses of the accused persons are given in the dying declaration. Thus, where the deceased had uttered only two words with difficulty which were the first names of the two accused, *held*, no reliance could be placed on such dying declaration : 1993 Cr.L.J. 3869 (Gau.) (D.B.). *See* also (1980) 2 M.P.W.N. 185.

Where deceased made a declaration implicating the accused but the Sub-Inspector who recorded the dying declaration committed a serious mistake in not eliciting the particulars of the accused so as to repel possibility of a mistaken identity and there was no material to identify the convicts with the assailants, *held*, conviction could not be based on such dying declaration: 1992 Cr.L.J. 2644: (1992) 1 Crimes 1167: 1991 C.Cr.L.R. 297: (1991-92) 96 Cal.W.N. 233 (D.B.).

Where the deceased in his statement recorded under S. 161, Cr.P.Code had simply named the accused as his assailant without giving name of his father or the place of his residence, *held*, no reliance could be placed upon the said statement because the identity of the assailant could not be established: 1990 Cr.L.J. 119 (All.) (D.B.).

Where in the dying declaration made to the doctor, the deceased had clearly implicated the accused giving his particulars, namely, his residence and his brother's name also and the Doctor who recorded his statement deposed that the deceased was conscious and was in a fit mental condition at the time of giving the statement, *held*, said dying declaration was rightly relied upon: 1994 Cr.L.J. 240 (S.C.).

Where the deceased in his dying declaration mentioned the date, time and place of occurrence, the names of the accused and their weapons, etc. and the testimony of ocular witnesses was also found to be reliable, *held*, the accused could be convicted: 1994 Cr.L.J. 848 (All.).

Where the dying declaration recorded by a stipendary Magistrate was very coherent and bore thumb mark of the deceased as his arm was injured, *held*, merely because the deceased failed to name a third culprit would not be sufficient to discard the dying declaration: 1989 Cr.L.J. (N.O.C.) 79 (All.) (D.B.).

Where the dying declaration was very detailed giving graphic narration of the entire history of the case, starting from the motive, the enmity and minutest features of assault, *held*, it smacked of concoction, especially when it was not attested either by the deceased's wife present there or the doctor present in the hospital: A.I.R. 1981 S.C. 1578: 1981 Cr.L.J. 998.

Dying declarations being the groaning utterances of a dying woman in the grip of dreadful agony, *held*, cannot be judged by the standards of fullness of particulars which witnesses may give in other situations. To discredit such dying declarations for shortfalls here or there or even in many places is unrealistic, unnatural and unconscionable if basically there is credibility: A.I.R. 1980 S.C. 1226: 1980 Cr.L.J. 925: (1980) 3 S.C.C. 301.

Where the deceased, while making dying declaration to a Magistrate, was in severe bodily pain, and words were scarce, *held*, his natural impulse would be to tell, without wasting his breath on details, as to who had stabbed him; the very brevity of the dying declaration, far from being a suspicious circumstance, was an index of its being true and free from the taint of tutoring: A.I.R. 1976 S.C. 1519: (1976) 2 S.C.C. 788: 1976 Cr.L.J. 1186.

The mere fact that though the deceased had stated in his dying declaration that he had objected to the accused abusing the deceased's son whereupon the accused had stabbed the deceased but did not mention how the accused had sustained injuries, *held*, the High Court was not right in rejecting the declaration on that ground; the injured being in great agony and his words being scarce, interrogating him further would have been sheer torture; the crux of the whole matter was as to who had stabbed him and why: A.I.R. 1981 S.C. 617: 1981 Cr.L.J. 9: 1980 (Supp.) S.C.C. 455.

Where the prosecution had examined an eye-witness when the dying declaration mentioned the names of two others and not of this witness, *held*, it is doubtful whether the eye witness was in fact present there: 1988 Mah.L.J. 147: (1988) 1 Bom.C.R. 234 (D.B.).

Dying declaration—Evidentiary value—Dying declaration made under solemn sense of impending death—Deceased accompanied from place of occurrence to hospital by eye-witnesses to incident—Two of accused mentioned in dying declaration acquitted on basis of benefit of doubt—Name of one of eye-witnesses not mentioned—Occurrence taking place in day light—Eye-witness account strengthening reliability of such declaration—Such declaration is good evidence and is not untrue: I.L.R. (1969) 19 Raj. 641: 1969 Raj.L.W. 601.

Absence of names of eye-witnesses in the dying declaration would not by itself introduce an infirmity in the dying declaration: A.I.R. 1980 S.C. 1738: (1980) 1 S.C.C. 240: 1980 Cr.L.J. 1257.

Where the dying declaration was not produced in the Court by the prosecution because the victim had survived and examined as a prosecution witness who was confronted with her 'dying' declaration produced for her cross-examination by the defence under the Court's orders wherein she had not named two accused whom she had implicated in her statement before the Court, *held*, that by itself is no ground to give benefit to the accused named in the 'dying' declaration, particularly when the case rested on her sole testimony; but the two accused not named in the declaration were entitled to the benefit of doubt: 1993 Cr.L.J. 3251 (S.C.).

22. Signatures/Thumb-mark of declarant on dying declaration.—Generally the signatures of the maker of dying declaration are taken when it is reduced in writing; but when such signatures were not obtained and even the doctor, who was incharge of the Dispensary was not taken into confidence, *held*, no reliance could be placed on such dying declaration: 1986 Cr.L.R. 62 (Raj.).

Where the dying declaration, recorded by a Magistrate, did not contain the signature of the deponent, namely, the deceased and there was no explanation that the deceased was not in a position to put his signature and further neither the time of recording of the statement nor the date was mentioned in the dying declaration, *held*, no reliance could be placed on it: A.I.R. 1994 S.C. 129: 1994 Cr.L.J. 617.

Absence of thumb-impression of deponent on the statement made to the Executive Magistrate, due to severe burn injuries, *held*, is immaterial, even though this fact was not mentioned in the dying declaration: 1994 Cr.L.J. (N.O.C.) 238 (Madh. Pra.) (D.B.).

A dying declaration reduced to writing but not signed by the deponent is not admissible in evidence but must be proved by the oral testimony of the person who heard it. Notes of Police Officer relating to a dying declaration are not admissible in evidence, unless signed by the deponent, but in testifying to it, he can refer to them to refresh his memory: 23 I.C. 195: 10 Nag.L.R. 19.

Where a dying declaration recorded by the Tehsildar could not be signed by the victim because of his physical handicapness nor thumb-marked due to non-availability of the stamp pad, *held*, the declaration could be relied upon if otherwise truthful and trustworthy: (1990) 2 Bom.C.R. 51 (D.B.).

Where the dying declaration of the deceased recorded at the Police Station was a complete statement in that it made a clear accusation against the accused having stabbed the deceased and there was nothing to show that the maker of the statement had anything further to add but the dying declaration was not complete in the sense that on account of sudden collapse of the deceased his thumb impression to the statement was taken only after his death in the presence of witnesses.

Held, that the dying declaration was admissible in evidence and could be taken into consideration even without any corroboration: (1962) 3 S.C.R. 869: (1962) 2 M.L.J. (S.C.) 71: A.I.R. 1962 S.C. 1252.

Where the Doctor recording dying declaration failed to take either the left thumb impression or right thumb impression of the deceased on the statement and explained this lapse that because of extensive burn injuries on the body including two hands, he could not do so, *held*, as nothing prevented the Doctor to get the statement attested either by the

Investigating Officer who was present, or by any of the medical staff or in the worst case by the relations of the deceased, said dying declaration could not be relied upon: 1995 Cr.L.J. 2412 (Ori.) (D.B.).

23. Non-examination of scribe of dying declaration—Effect.—Where the scribe of the dying declaration, a constable, was not examined and, thus, the defence had no opportunity to cross-examine him, *held*, in absence of any explanation regarding the cause for non-production of the scribe of the document, no reliance could be placed on it: A.I.R. 1993 S.C. 2457: 1993 Cr.L.J. 2598.

Absence of witnesses in dying declaration and non-examination of person who recorded it and above all contradictory to medical evidence make such dying declaration unworthy of reliance: (1988) 1 Crimes 673 (Pat.).

Where dying declaration was recorded by a Doctor and a witness attested it and also identified signature of Doctor, *held*, in such circumstances mere non-examination of Doctor would not make the dying declaration inadmissible: 1995 Cr.L.J. 689 (Andh. Pra.) (D.B.).

24. Inconsistency between ocular/medical evidence and dying declaration.—A dying declaration not supported by medical evidence, *held*, cannot be relied on: 1988 C.Cr.L.R. 75 (Cal.). Where deceased in his dying declaration stated that he was stabbed twice by the accused while the medical evidence showed that there was only one incised injury, *held*, said statement of the deceased could not be relied upon: 1994 Cr.L.J. 1250: (1993) 2 Ker.L.J. 515 (D.B.).

Where according to the Doctor the deceased was not in speaking condition as his condition was precarious when the alleged dying declaration was recorded and his evidence ran counter to the evidence of Circle Inspector of Police who claimed to have recorded the dying declaration, *held*, no reliance could be placed on the said declaration: 1993 Cr.L.J. 2379 (Mad.) (D.B.).

Where in his dying declaration the victim stated that he was hit by a single shot and the Doctor who immediately thereafter examined the victim categorically deposed in the Court that the victim had one entry and one exit wound but the Doctor who performed the autopsy stated in his cross-examination that he was unsure whether the wound of exit was of entry or exit, *held*, it could not be contended that the dying declaration on the point was not credible when the defence had not suggested to either of the Doctors in their cross-examination that there were two shots, not one: 1983 Cr.L.J. 1916 (All.) (D.B.).

Where the accused, hacking the deceased with *daos*, had chased away the three eye-witnesses to whom, on their return to the scene, the injured gave the accused's names and died within an hour or so; the F.I.R. lodged without undue delay also contained the accused's names; and the Doctor opined from the nature of injuries that the deceased might not have been able to talk immediately after the occurrence, *held*, since the deceased as per the post mortem report was a 'stout built male' and only one out of the ten injuries was fatal, the Doctor's evidence could not be accepted as conclusive; the dying declaration accepted as true and acted upon: 1991 Cr.L.J. 199 (Gau.) (D.B.).

Where there were suspicious features about a dying declaration that while the Doctor found not only burns on the deceased's body but also other injuries which could have been inflicted by *lathis* and caused lacerations and haematoma, the deceased in his statement made no mention at all of any such injuries even when one of the injuries had resulted in fracture of his sternum nor of the manner in which his sternum could have been fractured, *held*, the circumstances cumulatively led to the irresistible conclusion that the deceased was unconscious and had made no statement: A.I.R. 1982 S.C. 1021: 1982 Cr.L.J. 986.

Where the deceased in his dying declaration had attributed his injuries to a rebounded glass bottle and assault with an iron rod and cricket bat by the accused but it was not supported by medical evidence, *held*, it is not safe to act upon the declaration: 1984 Cr.L.R. 176 (Mah.).

Where there was inconsistency between ocular and medical evidence as to the cause of the injury on the deceased's body and the testimony of the prosecution witnesses of the dying declaration was found to be unreliable as it was most unlikely that the deceased was in a fit mental state to make the statement, *held*, the accused could not be convicted: 1994 Cr.L.J. 1440 (Madh. Pra.) (D.B.).

Where the prosecutioon version regarding the incident as stated by the eye-witnesses materially differed from the version unfolded by the dying declaration, *held*, no reliance could be placed on the dying declaration: A.I.R. 1989 S.C. 1519: 1989 Cr.L.J. 1485; (1984) 25 Del.L.T. 405: (1984) 1 Crimes 108; 1988 Raj.Cr.C. 134.

25. Delay in recording/giving/disclosing about dying declaration.—Where the

deceased wife was said to have been set on fire by her husband at 10 P.M. but she was removed to the village hospital next day at 3 P.M., her dying declaration was recorded in the presence of her relatives and there was no explanation for the delay, *held*, the husband's acquittal by the trial Court could not be reversed: (1988-1) 8 Guj.L.H. (U.J.) 22 (D.B.).

Where the dying declaration of the deceased, who was admitted at 2.30 P.M., was recorded by the Magistrate at 5.10 P.M. in questions and answers form after the Doctor certified that she was conscious and fit for making statement and same was corroborated by her statement earlier made to a Head Constable, *held*, the delay in recording statement was negligible in the circumstances of the case: 1994 Cr.L.J. 446 (Andh. Pra.) (D.B.).

Where the delay in recording dying declaration was properly explained. *See* 1977 Cr.L.R. 402 (Raj.).

Only evidence against accused-husband was the alleged dying declaration made by deceased to her mother—Mother disclosed to Police about such statement only after five days of occurrence—Her evidence suffered from a number of other infirmities which rendered her story inherently improbable—Accused acquitted. [(1975) 2 Cr.L.T. 119 (Him. Pra.), Reversed]: A.I.R. 1980 S.C. 436: 1980 U.J. (S.C.) 122: (1980) 2 S.C.C. 564.

Although the deceased was conscious at the place of occurrence, at the time when he was put on the lorry and also at the time when he was brought to the Nursing Home and was in a position to speak but he did not disclose the names of the assailants to anybody—Evidence showed that he did not know names of the accused nor was he able to identify them in darkness—There was also possibility of tutoring—Magistrate though knew that deceased was suffering from severe pain, did not put a direct question about his mental condition—*Held*, no conviction could be based on such dying declaration: A.I.R. 1976 S.C. 1994: 1976 Cr.L.J. 1548: (1976) 3 S.C.C. 618.

Where an oral dying declaration purportedly made to two witnesses was not submitted to the Police till their statement was recorded on the third day after the occurrence and there was no explanation for such unnatural delay and there was no corroboration of the accused having committed the offence, *held*, his conviction could not be sustained: A.I.R. 1994 S.C. 464: 1994 Cr.L.J. 138.

Where the dying declaration allegedly recorded by the Sub-Inspector of Police was produced for the first time in the Court when he appeared in the witness box on the ground that though he had recorded the statement of injured in the hospital but as he was inexperienced, he did not submit it in the Court nor supplied a copy thereof to the accused, *held*, such a document was not entitled to any credence: 1994 Cr.L.J. 3782 (Andh. Pra.) (D.B.).

Where the deceased implicated only her mother-in-law and not her husband and father-in-law, despite not being on good terms with them, and her dying declaration was corroborated by her statement in the Accident Register, *held*, the facts indicated the truthful nature of the dying declaration; a gap of two hours from her admission in the hospital and the recording of her dying statement would not justify the inference of her being tutored by her parents: 1993 Cr.L.J. 3240: (1993) 1 An.L.T. (Cr.) 692 (D.B.). *See* however (1990) 2 Crimes 574 (Bom.) [Where though conscious and in a condition to make statement, the deceased did not name the accused for three hours, *held*, the accused's complicity in the crime was improbable].

26. Illustrative cases.—Where immediately after the F.I.R. was lodged and the Station House Officer came to the scene and recorded the victim's dying declaration, removed him to the hospital where on the Doctor opining that the victim's condition was deteriorating, the Munsif Magistrate was called who also recorded another dying declaration and the Doctor certified that the victim was conscious and fit to make statement but the second dying declaration ended abruptly as the victim's condition had further deteriorated, *held*, it did not affect the declaration's evidentiary value as it was complete insofar as the accused's role was concerned. [1978 W.L.N. (U.C.) 103: 1978 Cr.L.R. 328 (Raj.), Affirmed]: A.I.R. 1989 S.C. 705: (1989) 37 B.L.J.R. (N.O.C.) 24: 1989 Cr.L.J. 845: (1989) 2 Crimes 181.

Where the Medical Officer, otherwise supporting the prosecution, stated at the fag-end of his cross-examination that he could not say whether or not the Assistant Sub-Inspector had correctly recorded the dying declaration, and that not satisfied with its recording he did not attest the declaration; no suggestion was put to the Medical Officer or indeed to other prosecution witnesses by the defence that though the deceased had mentioned a different person as the assailant, the Assistant Sub-Inspector had substituted him by the deceased's real brother; *held*, the suggestion was unbelievable; any way the Medical Officer's sporadic admission had no

significance and did not affect the veracity of the dying declaration; it could be safely accepted and acted upon: A.I.R. 1992 S.C. 559: 1992 Cr.L.J. 520.

The mere fact that some of the persons named by the deceased in her dying declaration were not challaned, *held*, does not detract from the value of the dying declaration: A.I.R. 1980 S.C. 559: 1980 Cr.L.J. 408: (1980) 2 S.C.C. 207.

Where the Doctor had asked all the necessary questions that could be asked from the deceased and he could not answer the last question 'what more you want to say', because he became semi-unconscious and was unable to answer any further question, *held*, the last question being merely of a formal nature, it could not be said that dying declaration was an incomplete one: A.I.R. 1980 S.C. 559:1980 Cr.L.J. 408: (1980) 2 S.C.C. 207.

Where during the period of one hour the deceased was conscious, the bed ticket was written by Doctor wherein the deceased complained of misbehaviour by her brother-in-law and it stood not only corroborated but clarified by identifying, by entry in injury report, the brother-in-law as the person responsible for the crime, *held*, there was no reason to doubt its authenticity: A.I.R. 1990 S.C. 2134: 1990 Cr.L.J. 2276.

Where the dying declaration was recorded by a Judicial Magistrate and the Doctor certified that the patient remained conscious during the period her statement was recorded and the Judicial Magistrate recorded a certificate that said statement was recorded by him and it contained true version of her statement and she had thumb-marked the same, *held*, such a statement clearly inspired confidence: A.I.R. 1992 S.C. 2037: (1992) 1 Hindu L.R. 571: 1992 Cr.L.J. 3660: (1992) 2 S.C.C. 559.

Where (*i*) the names of the fathers of the accused and their addresses were known to the deceased and the persons who accompanied him to the Police Station were not mentioned; (*ii*) the assault had taken place in a jungle on a dark night which might cause mistaken identity; (*iii*) deceased or his relations had given no reason for the attack by the accused; and (*iv*) there were other persons in the same village on inimical terms with the deceased and having same names as the accused had, *held*, the deceased's dying declaration could not be acted upon without corroboration: A.I.R. 1972 S.C. 1557: 1972 Cr.L.J. 1045.

Where dying declaration was made within one hour of the occurrence and names of all the accused as well as of the witnesses were mentioned therein and the statement was a short one and even the Doctors who examined him did not say, that having regard to the injuries, the deceased would have become unconscious immediately, *held*, there was no doubt of the truth of the dying declaration: A.I.R. 1979 S.C. 1505.

Where name of one of the accused persons did not appear in the dying declaration but his name was clearly mentioned in the F.I.R. as having instigated the assault on the deceased which was lodged within an hour of the occurrence, *held*, the accused was not entitled to benefit of doubt, even though there was enmity between the accused and the informant, as there was corroboration by other independent witnesses: A.I.R. 1979 S.C. 1440.

Where on being attacked, during night time, the deceased shouted and his close relations woke up and came near him to whom he made a dying declaration and there was no finding that any independent witness from the village arrived at that time when the deceased was shouting the names of his assailants, *held*, the evidence regarding the dying declaration was reliable and believable: A.I.R. 1979 S.C. 1433.

Only weapon said to have been used was stated to be a saif, by the deceased in dying declaration—No mention of bhallas or use of any other weapon—One of accused who was stated by deceased to have first used said weapon, was not prosecuted—Version given in F.I.R. found to be entirely different—*Held*, conviction could not be solely based on such dying declaration: A.I.R. 1973 S.C. 1395: (1973) 3 S.C.C. 312: 1973 Cr.L.J. 335.

Merely because the two constables deposed that when they were coming for duty, the deceased came running towards them raising cries 'save me, I am stabbed by one person' and he did not name the assailants, *held*, such an involuntary exclamation, without being asked by those constables as to who his assailant was, could not be put on the same par as a dying declaration and cannot be a ground to reject the dying declaration recorded by the Sub-Inspector later in the presence of the Medical Officer in which he had named his assailant: A.I.R. 1979 S.C. 1181: 1979 Cr.L.J. 708.

Site plan prepared by the Investigating Officer supported dying declaration on the point of place of incident—Medical evidence too in tune with the manner of incident as stated in the dying declaration—It also found corroboration from oral testimony—*Held*, the fact that (*i*) deceased did not make any mention of his son, who was an eye-witness and who was also an informant, and (*ii*) it did not

account for the injuries on the persons of the accused, would not effect the evidentiary value of the dying declaration: A.I.R. 1972 S.C. 1172: 1972 Cr.L.J. 746.

Though Magistrate did not obtain Doctor's certificate about fitness of the deceased to make statement, there was ample evidence that there was no room for any person tutoring her and nobody was present when Magistrate recorded her statement and that too in a very short form and there was other corroboration to such statement, *held*, such statement could be relied on for basing conviction thereon: A.I.R. 1972 S.C. 945: 1972 Cr.L.J. 532.

Where the bed-head ticket in the hospital contained the endorsement that as per the patient, he was injured by somebody who shot at him and it was admittedly not a dying declaration which was later on recorded by an Executive Magistrate and which categorically averred that he saw the three persons at the scene out of whom the accused only had shot at him without exhortation of his companions, the deceased's bitter enemies, *held*, the declaration is not a result of tutoring; it is true and voluntary; conviction upheld: A.I.R. 1992 S.C. 948: 1992 Cr.L.J. 1290: 1992 All.L.J. 1122.

Where the deceased had stated to his co-villagers that he identified two accused amongst the dacoits and this was written down on a paper and was signed by some of the villagers and there was also a reference to the said statement in the F.I.R. and the witnesses also deposed in the Court about the said statement having been made by the deceased, *held*, merely because there was no mention in the F.I.R. that the said dying declaration was made in writing, no adverse inference could be drawn: A.I.R. 1988 S.C. 912: 1988 Cr.L.J. 936.

Where even though there was some enmity between the deceased and the accused—his son, *held*, if the son was not the real assailant, it was most unlikely that his father would, in his dying moment, try to falsely implicate his own son; this circumstance was sufficient guarantee of the truth of the dying declaration made by the deceased. [A.I.R. 1972 S.C. 1776, Foll.]: A.I.R. 1978 S.C. 519: 1978 U.J. (S.C.) 108: (1978) 1 S.C.C. 622.

Where the condition of the deceased, a boy of 12 years of age, was very serious when his dying declaration was recorded by the Investigating Officer and a person who bore enmity with the accused was all along with the deceased and accompanied him from the place of incident to the hospital, *held*, there being suspicious circumstances, said dying declaration could not be relied upon without corroboration: A.I.R. 1974 S.C. 332: (1974) 4 S.C.C. 264: 1974 Cr.L.J. 361.

Where the injured's 2 paged statement recorded under S. 161 of the Code of Criminal Procedure was very detailed and extremely coherent but not signed by him or any witness and neither the Doctor nor a Magistrate was called to record it and the injured had been given no first aid and the Doctor had opined that the injured was likely to enter semi-comatic stage in an hour or two, *held*, the dying declaration was a concoction and fabrication liable to be rejected: 1991 Cr.L.J. (N.O.C.) 22 (Ori.) (D.B.).

Where the *gupti*, the weapon of murder, recovered with the accused's assistance otherwise not possible, was stained with blood for which the accused had no reasonable explanation and the deceased, knowing the accused very well, told his own brother aged 14 years, the name of his assailant and died within half an hour of the assault, and the nature of injuries and eye-witnesses corroborated murder by the accused, *held*, the evidence of the dying declaration given by the deceased's brother, who had also seen the occurrence, could not be dubbed as tutored merely because of his tender years; the dying declaration stood proved; conviction upheld: A.I.R. 1993 S.C. 65: (1993) 1 An.L.T. (Cr.) 1: 1992 Cr.L.J. 3704: (1992) 4 S.C.C. 225.

If a dying declaration is made in circumstances in which there arises a suspicion that the deceased might have been prompted by the friends or sympathisers to drop out some of the culprits and to substitute or add other, then it must be used with the greatest possible caution. At the same time, it may be remarked that imaginary suspicion should not be created and dying declaration should not be thrown out without good reasons. For instance, where a person is assaulted by only one or two persons and if his dying declaration is properly recorded, and if there is no circumstance to doubt his statement, his dying declaration should not be discarded simply on an imaginary suspicion that he might have substituted another person for the real culprit. Mere presence of relative cannot be considered to be a ground for suspicion, because it is but natural that friends and near relatives must reach the injured person as soon as information is received: 1956 Raj. L.W. 178: 1957 Cr.L.J. 240.

Dying declaration made to a relative by the deceased cannot be discarded on that ground: 1992 Cr.L.J. 2294: 1992 All.L.J. 749 (All.) (D.B.).

A dying declaration cannot be disbelieved merely because relatives of the deceased were

present at the time of recording of his dying declaration: (1981) 22 Guj.L.R. 426: 1981 Cr.L.R. 288 (D.B.).

Mere fact that relatives of victim carried him to the hospital would not warrant inference of tutoring of victim: 1983 Cr.L.J. 1916 (All.) (D.B.).

Where the injured was taken to the hospital by her mother and two brothers, *held*, the possibility of her mother and brothers, inimical to the accused as they were, influencing her cannot be ruled out: 1986 Cr.L.R. 501 (Mah.).

Where right from the place of incident till the hospital, where the deceased's statement was recorded by the Magistrate, he was surrounded by his friends, well-wishers and brothers, *held*, it was quite likely that those persons availed every possible opportunity to tutor and brain-wash the deceased and in these circumstances, it could not be said that the statement was an untutored version given by the deceased; no reliance could be placed upon such dying declaration: 1993 Cr.L.J. 86 (All.) (D.B.).

Where dying declaration was recorded in the presence of the deceased's brother, *held*, as possibility of tutoring could not be ruled out, no conviction could be based thereon: 1990 Cr.L.J. (N.O.C.) 107 (Madh. Pra.) (D.B.).

Where the deceased before giving his declaration was practically in the midst of his friends and admirers right from the time of the incident till all of them were asked to clear the emergency ward evidently for the purpose of recording the dying declaration, *held*, it could not be relied on: A.I.R. 1994 S.C. 129: 1994 Cr.L.J. 617.

Where the deceased, on his own, did not bear any enmity or hostility to the accused and none of the persons who were in the company of the deceased, after he was assaulted, had any particular animus for implicating the accused falsely, *held*, the fact that after the attack, the deceased was all along accompanied by a large number of persons was not enough to conclude that he was tutored; thus, his dying declaration could be relied on: A.I.R. 1976 S.C. 2199: (1976) 3 S.C.C. 104: 1976 Cr.L.J. 1717.

Great weight must naturally and necessarily be attached to the dying declaration, recorded shortly after the occurrence; merely because some friends and relatives happened to be with the deceased before his statement was recorded, the statement cannot be thrown out as tutored: A.I.R. 1979 S.C. 1181: 1979 Cr.L.J. 708.

Where the dying declaration was corroborated by the eye-witnesses and did not suffer from any inherent improbability or inconsistency, *held*, mere presence of relatives would not make it a tutored dying declaration: 1988 Cr.L.R. 705: 1988 W.L.N. (U.C.) 578 (Raj.).

Where the witnesses, who accompanied the injured, were present at the time of recording of dying declaration, *held*, as chances of influencing and tutoring could not be ruled out, such a dying declaration could not be relied upon: 1984 W.L.N. (U.C.) 557: 1984 Cr.L.R. 73 (Raj.). *See* also 1987 W.L.N. (U.C.) 560 (Raj.).

Where the deceased wife had made two oral dying declarations, one to her sister and the other to a Police Sub-Inspector, and her third statement was recorded by the Executive Magistrate without certificate of fitness from the Doctor but neither in Hindi which she understood nor in question-answer form but in English, the language she was not well versed with, and all this after she had first been shifted to her father's and then to her maternal grand mother's house and then to the Hospital, having all along been with her near relations, for almost 12 hours, *held*, her dying declaration was naturally influenced by her relatives and tutored; it was not safe to rely upon it: (1992) 1 Hindu L.R. 107: 1992 Cr.L.J. 616: (1991) 3 Crimes 709 (Del.) (D.B.).

Deceased assaulted and strangulated by accused—Dying shrieks of deceased, naming wife and son, deposed to by wholly independent, natural and reliable witnesses—Admissibility—Evidence of such witnesses consistent—Witnesses neighbours, having no animus against accused—Neighbours enquiring about shrieks duped by accused by explaining deceased to have been drunk—Morning after the incident, younger children sent to school as usual—Brother of deceased also told on that morning that deceased was still asleep—No explanation given at any stage by accused—Blood-stained rope recovered at instance of son—Motive for offence proved—Case is not precisely of circumstantial evidence alone—Dying shrieks of deceased are direct testimony and given hint regarding motive—Such shrieks are dying declarations and each gravely and conclusively incriminates *qua* the two accused—Conduct of accused is added circumstance against them—Recovery of rope is strong link in prosecution evidence against son—Failure of son to furnish any explanation and patent falsity of explanation of wife are additional factors against them—In case of circumstantial evidence non-explanation and false explanation

are certainly factors from which adverse inference can be raised against accused—Evidence in the case is consistent only with guilt of accused wife and son and inconsistent with any other rational explanation—Hence, accused are guilty under Ss. 302 and 34, I.P.Code: (1969) 71 Punj.L.R. 280.

Where there was history of deep-rooted enmity between the accused and the victim as the accused had earlier kidnapped the victim's sister and the accused had lodged a case for attempt to murder against the victim, the accused stabbed the victim in the abdomen and made good his escape. Two of his dying declarations were recorded in the Municipal dispensary: (*1*) by the Sub-Inspector called there in the presence of the Medical Officer; and (2) by the Executive Magistrate in the presence of the Medical Officer and also attested by another Medical Officer; the victim expired within hours of stabbing. The evidence of the eye-witnesses was consistent and convincingly established the accused's guilt. *Held*, merely because there were some insignificant discrepancies as to whether the deceased was taken to the dispensary on foot or a cycle or whether the knife was lying on the road or carried away by the accused, is no ground to acquit the accused; acquittal set aside: A.I.R. 1994 S.C. 475: 1994 Cr.L.J. 145.

Where the dying declaration recorded by the Magistrate in question and answer form was certified by the Doctor to have been made when the deceased was in a good and conscious mental state and was amply corroborated by evidence of witnesses whose presence at the spot was proved by the injuries suffered by them in the same occurrence, *held*, it could not be rendered inadmissible merely because of some incorrect particulars of the accused's motive mentioned therein; conviction sustained: A.I.R. 1994 S.C. 1607: 1994 Cr.L.J. 2191.

On instructions of casualty Medical Officer, a House Surgeon recorded dying declaration as Magistrate was not available—Such statement, in which victim had named his assailants, was read over to him who affirmed it to be correct and put his thumb impression thereon—Accused challenged such declaration relying on an entry in injury certificate where it was stated that somebody had stabbed the injured—*Held*, such entry in the injury certificate did not necessarily amount to a statement and the Doctor being highly independent witness, there was no reason whatsoever for him to speak falsehood and when there was ample corroboration to the dying declaration, conviction was justified: 1993 Cr.L.J. 3547 (S.C.).

Where the only piece of evidence was the dying declaration wherein the deceased had implicated four accused persons but two accused were discharged by the trial Court, *held*, the case of the other two accused was not distinguishable or separable from that of the two discharged accused; so, the entire prosecution case had to be discarded: 1990 Cr.L.J. 1333 (Gau.) (D.B.).

Where a dying declaration was made at the earliest opportunity and the deceased named his brothers as his assailants but nothing on record indicated that the deceased had consulted other relations before naming his brothers and the declaration read as a whole had a substratum of truth, *held*, the deceased struggling between life and death could not be said to have falsely implicated his brothers even if he had strained relations with them: 1979 Raj.L.W. 267: 1979 W.L.N. 384 (D.B.). *See* also 1992 Cr.L.R. 591 (Raj.).

Ss. 32 and 158—Murder—Deceased beaten by the three assailants and stating names of assailants—Deceased in statement 5 years back stating that his vision was poor and blurred—*Held*, his previous statement was admissible in evidence.

Held, on facts, that the identity of the assailants could not be fixed by the testimony of the three eye-witnesses of the occurrence and hence in the circumstances it was not safe to convict them under S. 302 read with S. 34, Penal Code merely on the basis of a dying declaration made by a person who had admittedly borne enmity towards the respondents and whose eye-sight was poor and vision blurred. The first information report dictated by the deceased was admissible in evidence under S. 32(1) and could be read as the dying declaration of the deceased. Further the statement made by the deceased 5 years back was also admissible in evidence under S. 158: 1965 All.W.R. (H.C.) 4: 1965 All.Cr.R. 34: 1964 All.L.J. 1134.

Where a dying declaration recorded during investigations by Police, by and large true, had also mentioned the accused having injured two persons, which could not then be in the knowledge of the injured, *held*, the declaration is rendered a bit doubtful; it is safe to leave it out of consideration: A.I.R. 1979 S.C. 1173: 1979 Cr.L.J. 700.

Where the language of the dying declaration was amenable to two interpretations regarding the accused being one of the assailants and the High Court adopted the

interpretation favouring the accused, *held*, it is not proper for the Supreme Court in appeal to take the other possible view: A.I.R. 1978 S.C. 315: (1978) 1 S.C.C. 130: 1978 Cr.L.J. 347.

Where the deceased was on evidence fully conscious when her dying declaration was recorded by the Police and she had named her assailants as also how the occurrence took place but the High Court disbelieved her without reasons whereby the evidence of most of the prosecution witnesses including Doctors stood rejected and disbelieved for no valid reason, *held*, the acquittal order of the High Court was liable to be set aside: A.I.R. 1989 S.C. 1543: 1989 Cr.L.J. 1785: (1989) 2 S.C.C. 425: (1989) 2 Crimes 13.

Where the Executive Magistrate recorded the dying declaration in narrative form and not in question and answer form and there was Doctor's endorsement that patient was fully conscious and in fit condition to make the statement and though the Magistrate deposed that Doctor was present at the time of recording, the Doctor denied it, *held*, no reliance could be placed on that dying declaration and history of patient recorded in Medico-legal register could not be regarded as dying declaration : 1978 Cr.L.J. 1017: 1977 Cr.L.R. (Mah.) 122 (D.B.).

Where the dying declaration of a wife set afire by her husband and in-laws was recorded about 3 weeks before her death by the Sub-Divisional Magistrate in her very words in the absence of any interested persons when the Doctor was present and certified that she was fully conscious and in a fit condition to speak—the Doctor and the Magistrate also testifying thereto in the Court as well, *held*, the dying declaration was not rendered inadmissible merely because it was not made in question-answer form or her friends and relations were with her prior to the recording of the declaration; the declaration coupled with the medical evidence alone were sufficient to sustain conviction: 1995 Cr.L.J. 312 (All.) (D.B.).

Where dying declaration as a whole was recorded in the circumstances which were free from suspicion though it contained a recital which was untrue but which could be separated from the declaration, *held*, dying declaration could be relied upon: 1988 Cr.L.J. 1313: (1987) 89 Bom.L.R. 370: 1987 Mah.L.J. 820: (1987) 3 Bom.C.R. 1339 (D.B.).

Where the accused had stabbed his co-tenant to death by knife which was recovered pursuant to his disclosure statement and his conviction was based also on medical evidence as well as a dying declaration of the deceased made to the landlord and the landlord's wife as also on evidence of the neighbours, *held*, the conviction could not be set aside merely because there were some discrepancies as to who first came to the scene: (1990) 41 Del.L.T. (S.N.) 1.

Where the Magistrate recorded the dying declaration of the victim in the Medical College Hospital after complying with all requisite formalities wherein she stated that her husband's sister had struck her on the back-side of her head whereupon she fell down immediately and when regained consciousness, she was engulfed in flames and smelt kerosene and she suspected, on asking, that she must have been set to fire by her sister-in-law, *held*, merely because in another dying declaration she had said that her sister-in-law had struck her by a firewood would not make them mutually contradictory; the dying declaration recorded by the Magistrate could be relied on. [A.I.R. 1976 S.C. 1994, Foll.]: 1995 Cr.L.J. 1711 (Ker.) (D.B.).

Where on the dying declaration, recorded by the Doctor, there was no attestations of the persons present there and it was not in the exact language used by the declarant and certificate of the Doctor was not produced in evidence, *held*, such a dying declaration could not be relied on: (1990) 40 Del.L.T. 238: 1990 Cr.L.J. (N.O.C) 170.

Where the victim brought in the hospital was kept under sedation but her statement recorded by the Investigating Officer was neither attested by any Doctor or nurse nor by any relations of the deceased or the accused though admittedly available and the statement was also not recorded in question-answer form, *held*, no reliance could be placed on the dying declaration: 1989 Cr.L.J. 157: (1987) 33 Del.L.T. 254: (1987) 3 Crimes 747 (D.B.).

Merely because the Investigating Officer had first narrated the facts as to how he reached the spot and what he had seen there and thereafter recorded the dying declaration in the narrative form as spoken to by the deceased and put under inverted commas, *held*, is not by itself sufficient to doubt the veracity of the declaration; more so when the dagger, weapon of the offence, recovered pursuant to the accused's disclosure statement had human blood-stains of the deceased's blood group: 1989 Cr.L.J. 1106 (Del.).

Where though it was admitted case that the deceased was lying injured in an open place and neighbours had gathered there, no one from them appeared to support the fact of

making any dying declaration, *held*, the story of making dying declaration to his father at the spot could not be believed when in the First Information Report there was no hint of making such declaration and when the medical certificate showed that there was loss of consciousness immediately after receiving such injuries and, thus, it was very doubtful that the deceased could have made any such declaration: 1992 Cr.L.J. 3674: (1992) 2 Crimes 769 (Del.) (D.B.).

Where the deceased, a boy of 12 years, had made a statement to his classmate that he was going with his cousin brother on scooter, *held*, as the prosecution failed to prove that the deceased had no other cousin except the accused, said statement was not admissible under S. 32: 1981 Raj.L.W. 370: 1981 Cr.L.J. 1244 (D.B.).

Where deceased in his dying declaration just before his death had clearly stated that he was assaulted by the accused by means of axe and lathi on the previous night and thereafter he became unconscious and motive of the crime was stated by the prosecution to be that the deceased had developed illicit relationship with the mother of the accused, *held*, said evidence, such as dying declaration and motive for incident, could be relied upon for connecting the accused with the crime: 1992 Cr.L.J. 1751 (Ori.) (D.B.).

In a murder case, in the dying declaration, even though the same was incomplete by reason of the deceased not being able to answer further questions in his then condition the statements so far as they went to implicate the accused in the affair were quite categoric in character and they definitely indicated that it was the accused who had shot the deceased. There was also corroboration for the dying declaration. *Held*, that the statement in regard to the accused having shot the deceased was complete in itself and it could not be said that any further questions would have elicited any information which would run counter to the same. Under the circumstances, the dying declaration, though incomplete otherwise was complete so far as the accused having shot the deceased was concerned and could certainly be relied upon by the prosecution. The corroboration of the dying declaration invested it with a stamp of truth which went a long way towards inculpating the accused: 1956 Cr.L.J. 334: A.I.R. 1956 S.C. 168.

Where the deceased, for want of sufficient light, could not have identified the accused; he was surrounded by interested witnesses who might possibly have tutored the deceased; where use of different inks in recording the declaration remained unexplained; there was mention of the presence of a witness in the declaration who was indeed not present at the scene; *held*, even if recorded in the presence of an independent and respectable Government servant, the declaration could not be made, in the absence of other acceptable evidence, a sole basis to enter conviction: 1980 M.L.J. (Cr.) 301 (Karn.) (D.B.).

Statement of the deceased was recorded after the assault not in his words but only in the form of a memorandum—Deceased dying after several days—Though incident alleged to have been occurred in the presence of several villagers, no witness was produced by prosecution to corroborate deceased's statement, *held*, even if said statement was admissible as dying declaration under S. 32, it was wholly insufficient for upholding the conviction of the accused: A.I.R. 1971 All. 482: 1971 All.W.R. (H.C.) 365: 1971 Cr.L.J. 1562.

Where the infirmities alleged in the dying declaration were fairly explained away from the facts and circumstances appearing on record, *held*, it can provide foundation for recording a finding of guilt against the accused: 1988 Mah.L.J. 147: (1988) 1 Bom.C.R. 234 (D.B.).

Where a wife and the child were said to have been administered fatal doses of poison by the husband and the wife's dying declaration was recorded neither by a Magistrate nor by a Doctor and there was no recorded version of the dying declaration or corroboration thereof, and the wife too had a disoriented mind, *held*, there was no proper dying declaration: (1983-84) 88 Cal.W.N. 238.

Where the deceased had ample opportunity to observe and identify his assailants as the incident took place in broad daylight and assailants happened to be his close neighbours and Doctor opined that the deceased might remain conscious and might also be in a position to speak and there was no scope for tutoring because the statement implicating the accused was made by the deceased immediately after he recovered from the initial shock, *held*, the dying declaration was reliable: 1988 Cr.L.J. 1614 (Cal.) (D.B.).

Where the dying declaration recorded by the Investigating Officer was not recorded in presence of two or more credible witnesses as required by para 742(2)(*c*) of M.P. Police Regulations and though it named the accused it did not give the father's name or residential address, and mentioned the weapon used to injure the deceased wrongly and there was no

trustworthy evidence showing that the deceased was capable of talking or that he infact talked, *held*, conviction could not be based solely on such a dying declaration: 1990 Cr.L.J. 2407: 1990 M.P.L.J. 770: 1990 Jab.L.J. 329 (D.B.).

Where the deceased asleep at night was hit by a gun shot, was bleeding profusely and in great agony and he named the accused having shot him, and the bullet taken out from his body was not sent to the forensic laboratory, *held*, no reliance could be placed upon such a dying declaration: 1994 Cr.L.J. 958 (Madh. Pra.) (D.B.).

It is wrong to think that the dying declaration becomes less credible if several persons are named as assailants, though the Court has to scrutinize the evidence in respect of each of the accused: 1985 Cr.L.J. 336: (1985) 1 An.W.R. 354: (1984) 2 An.L.T. 69 (N.R.C.) (D.B.).

Where the injured was quite conscious while stating in his dying declaration as to how his own eldest son had inflicted injuries on him, he had made the statement voluntarily and there was no scope for tutoring or prompting him by anybody to falsely implicate his eldest son, *held*, the dying declaration was both truthful and reliable: 1994 Cr.L.J. 1146 (Andh. Pra.) (D.B.).

Where in her dying declaration deceased stated that accused attempted to commit rape on her and next day he set her on fire but brother of deceased and neighbours of accused did not depose anything about attempted rape and though in her dying declaration deceased stated that after she had been set on fire in court-yard she rushed to her room and the accused bolted it from outside but the prosecution witness did not say anything about deceased rushing into the room and further the doctor who had testified about fitness of the deceased to make impugned statement was not asked to make his endorsement in the declaration even though he was present at the time of recording of statement, *held*, impugned dying declaration did not inspire confidence and it could not be relied upon for convicting the accused: A.I.R. 1995 S.C. 135.

Where no explanation was given as to why the Judicial Magistrate at place where the hospital was situated was not requisitioned for recording the dying declaration when neither the Executive Magistrate had attempted to ascertain the deceased's mental condition or the Doctor present there had certified that the deceased was conscious and fit to give the statement which was voluntary and uninfluenced, *held*, the dying declaration could not be acted upon where there were discrepancies therein and there was no direct evidence of the accused-husband having set her on fire: 1994 Cr.L.J. 1242 (Andh. Pra.) (D.B.).

Where the case for the prosecution depends upon the deathbed statement of a man who was admittedly kept back from hospital in order to be instructed about his statement and it is also shown that his statement regarding witnesses to the occurrence was false, his declaration cannot be relied upon for convicting the accused named by him: 1930 Mad.W.N. 1211. *See* also 32 Mad.L.W. 940: A.I.R. 1931 Mad. 180: 59 M.L.J. 876 [A dying declaration is relevant evidence under S. 32, but it is not entitled to any peculiar credit].

Two dying declarations made by minor—Answers given by her to questions put by Doctor making it evident that age did not handicap her in making the statement—Both declarations consistently stating that accused caused her the injury—Fact that she made inconsistent statements regarding the name of another who she said was also injured cannot minimise importance of that statement and make the declaration completely ineffective against the accused—So also the interested statements of prosecution witnesses who had turned hostile cannot weaken the dying declarations: (1965) 1 Cr.L.J. 4: A.I.R. 1965 All. 40.

Where a wife, burnt by her husband, made a dying declaration in a village hospital in the presence of witnesses; she was fit to make the statement though she could speak only in a low voice; the Sub-Inspector had questioned her and on his dictation, the Assistant Sub-Inspector had recorded her statement; she could not sign or thumb-mark her statement because, as noted thereon, both her hands had been burnt; the time of recording the statement was not mentioned on the declaration yet the Court could fairly gather it from other evidence on record; the Doctor being on leave, his certificate of fitness of the deceased for making the statement could not be obtained; the declaration was not recorded by a Magistrate because none was available within 74 Kms. of the hospital; and the hospital compounder corroborated and proved the contents of the dying declaration; *held*, the dying declaration was true and validly recorded: 1985 Cr.L.J. 1988 (Sikkim).

Where a dying declaration was recorded by a Doctor in the presence of two other Doctors wherein the bride had stated that she had brought no money from her parents when

she was married two years ago and, therefore, was set on fire after her husband and mother-in-law sprinkled kerosene as she was lying with her infant child who died on the spot, and another dying declaration said to have been made by her to a person and attested by a Sarpanch who were not examined in the Court, but which was shown to the Police Inspector in his cross-examination by the defence, *held*, the first declaration satisfies all the necessary tests and requirements of a dying declaration; it cannot be discarded because of the other suspicious and unproved document: A.I.R. 1993 S.C. 819: 1993 Cr.L.J. 75: (1992) 2 D.M.C. 506: (1993) 1 Hindu L.R. 2: (1992) 3 Crimes 758. *See* also 1975 All.W.C. 34.

Where a married girl, pressurised by her husband and the in-laws to bring money from her parents was burnt by them and suffered serious burn injuries and two Doctors who examined her found her fit to make the statement and died two days after the occurrence, *held*, her dying declaration could not be discarded merely because there were serious burn injuries on her body: A.I.R. 1993 S.C. 138: 1992 Cr.L.J. 3935: (1993)1 An.W.R. 81: (1992) 2 D.M.C. 353 : (1992) 4 S.C.C. 212: (1992) 3 Crimes 581.

Where in her dying declaration made to a responsible Judicial Officer, the deceased had stated that she caught fire while preparing tea and her husband and other family members came to her rescue and the said officer had deposed in the Court that he was satisfied that the deceased made the statement voluntarily without any fear, persuasion or pressure, *held*, acquittal of the husband and other family members was proper: A.I.R. 1990 S.C. 1357: 1990 Cr.L.J. 1500 : (1990-2) 10 Guj.L.H. 178.

Where the Courts below had concurrently found the mother-in-law as well as the husband not guilty of the wife's murder by burning because she had involved only the mother-in-law in one dying declaration and husband as well in another dying declaration and rejecting them as not credible, *held*, the inconsistency suggested the possibility of false implication of both the accused; possibility of suicide also not ruled out; acquittal upheld: A.I.R. 1994 S.C. 1641.

Where the Medical Officer who had treated and recorded the deceased's dying declaration in the presence of disinterested and independent witnesses having no special reason to falsely implicate the accused to the effect that she was assaulted by her husband by a geda, *held*, her dying declaration must be accepted as voluntary and true and sufficient to convict the accused. [1985 Cr.L.J. 248 (Ori.); 1986 Cr.L.J. 836 (S.C.); 1987 Cr.L.J. 1065 (S.C.) and (1989) 1 Ori.L.R. 224, Foll.]: 1990 Cr.L.J. (N.O.C.) 47 (Ori.) (D.B.).

Where the wife-victim's declaration was taken by the Sub-Inspector in the hospital and was registered as an F.I.R. without either obtaining her signature or thumb impression and without certificate from a Doctor of her being fit to make the statement, and though the Tehsildar had claimed to be the recorder of the declaration he had in fact merely certified the declarant to be conscious, *held*, in the absence of any other evidence, her husband could not be convicted for having caused her death by burning; in the circumstances, the recorder had not performed his duty to record the declaration in the presence of the Doctor and obtain from him the certificate of the victim's fitness: A.I.R. 1994 S.C. 840: 1994 Cr.L.J. 946.

Bride-burning—In the earlier stages the deceased not implicating the accused—Only at a later stage she implicating the accused—Weight to be given to such dying declaration. *See* A.I.R. 1990 S.C. 1379: 1990 Cr.L.J. 1462; 1992 Cr.L.J. 972 (Cal.) (D.B.).

A statement of the deceased that even if she was dying having been burnt, her husband should not be beaten, *held*, could not be converted into one exculpative of the accused-husband: A.I.R. 1980 S.C. 1270: 1980 Cr.L.J. 1009: 1980 U.J. (S.C.) 571.

Accused pouring oil on clothes of wife and setting fire—Wife dying of burns—Conviction under S. 302, I. P. Code. based solely on her dying declaration—*Held*, correct. (Majority view): (1962) 2 S.C.R. 775: A.I.R. 1962 S.C. 130.

Where the deceased in her dying declaration stated that her mother-in-law brought kerosene in a canister and poured it over her but no canister was recovered and though the deceased had told numerous people about the manner of receiving the burn injuries but never had assigned them to her mother-in-law; probability is that she must have made the dying declaration as tutored by her relatives; further, there was every probability of the deceased having committed suicide; *held*, the mother-in-law could not be convicted: 1994 Cr.L.J. 691 (Raj.) (D.B.).

According to the prosecution, the victim was set on fire by her husband and she after tearing off her clothes ran towards a nallah, jumped into it and then went to the Police Station in utter panic at about 12. 45 A.M. and got her report recorded in daily diary of Police

Station and thereafter made statement to Investigating Officer in hospital after being declared fit to make a statement and there were no inconsistencies in two statements of the deceased. *Held*, the later statement did not suffer from any infirmity and S. 32 was attracted: 1994 Cr.L.J. 1398 (Him. Pra.) (D.B.).

An Executive Magistrate, called by the Police, recorded the dying declaration of the wife, then fully conscious and able to speak as testified to by the Doctor who was also present. The declaration faithfully and correctly recorded her statement that her husband had set her clothes to fire and such statement was read over to, and accepted as correct by, her. *Held*, the declaration had a high evidentiary value: 1978 Mah.L.J. 324 (D.B.).

Where the deceased in her earlier dying declaration mentioned the accused as having set her on fire but later on she stated that the accused was amongst those who tried to extinguish the flames, *held*, the material question was whether the accused had set the deceased on fire; what happened thereafter was secondary; the dying declaration was reliable: 1994 Cr.L.J. 2035: (1994) 1 Bom.C.R. 702 (D.B.).

Where the victim-wife on admission to the Hospital stated, on being asked by the Doctor, that she had been burnt by accidental bursting of the kitchen stove which was recorded in her medical history sheet; there were several other dying declarations, mostly implicating her father-in-law, the accused, having set her to fire after pouring kerosene as she was lying asleep; but nothing was indicated in any of the declarations as to what was the accused's motive; other prosecution evidence also suffered from several infirmities and inadequacies; *held*, the accused's conviction set aside: (1983) 2 Bom.C.R. 414 (D.B.).

Where accused was alleged to have murdered his wife and prosecution sought to rely upon dying declaration of the deceased but there was no evidence connecting death with the injury and there was no proof that the deceased had subscribed to said dying declaration or that it contained her version, *held*, said dying declaration was inadmissible: 1995 Cr.L.J. 17 (Madh. Pra.) (D.B.).

Where in a remote village in the interior a woman set on fire by her husband was on her way to report it to the Chowkidar when she fell in a shallow brook and her dying declaration by way of abundant caution was recorded in the question and answer form by a Head Constable as there was no medical aid within 30 kilometers therefrom and she was to be taken there on a bullock cart and her declaration was corroborated from her oral statements by three witnesses who had asked her, when she was on her way to the Chowkidar, as to what had happened, *held*, the recorded dying declaration corroborated by three oral declarations of the deceased was sufficient to record conviction. [A.I.R. 1979 S.C. 1173, Rel. on]: 1987 M.P.L.J. 382 (D.B.).

Where in her alleged dying declaration, the deceased had mentioned that she did not give any statement that her husband set her ablaze and an interpolation was made in dying declaration by the Investigating Officer and further the dying declaration was not recorded in question-answer form, *held*, the alleged dying declaration was not correctly and faithfully recorded by the Investigating Officer and thus, mere mention in the dying declaration that on the day of occurrence, the accused-husband had quarrelled with the deceased and latter's mother-in-law too had harassed her would not *per se* be sufficient to hold that the accused had adequate motive to commit the murder of his wife: 1992 Cr.L.J. 2192 (P.&H.) (D.B.).

Where the Police Officer reached the hospital 6 hours after receiving the information to record the dying declaration, and while the Doctor deposed that glucose was being then administered to the deceased but he was not sure whether deceased's statement was recorded by the Police Officer himself or at his dictation and the Police Officer deposed that no glucose was then being administered, and the deceased-girl's parents were also then present in the Hospital, *held*, in the circumstances and when the possibility of her relations prompting the deceased could not be ruled out, the dying declaration could not be relied on: A.I.R. 1983 P.&H. 305: 1983 Cr.L.J. 1093: (1983) 2 Crimes 547: (1983) 85 Punj.L.R. 763 (F.B.).

Where a wife sustaining burn injuries and admitted to hospital made a statement before the Investigating Officer that she caught fire accidentally in the kitchen due to non-switching off cooking gas, but later on she stated in her dying declaration recorded by the Judicial Magistrate that she had committed suicide by pouring kerosene oil and setting herself on fire after latching herself in the bath-room due to taunts, physical beatings and demands for more dowry by her mother-in-law and it was found that her judicial confession was consistent with what was found in the bath-room and that her first declaration of accidental fire was more likely to be a result of threats by her husband, *held*, her mother-in-law's

conviction could not be set aside; first declaration was rightly discarded: 1984 Hindu L.R. 317 (P.&H.).

Where the deceased dying of burn injuries stated in her dying declaration that she committed suicide due to ill-treatment and beating by her husband, which found corroboration from the evidence of her mother and brother, and which was duly certified by the Doctor that the victim was conscious and fit to make the statement, *held*, her husband's conviction under Ss. 306 and 498-A of the Indian Penal Code was justified: 1994 Cr.L.J. 1418 (Andh. Pra.).

Where no dying declaration was made by the deceased at the earliest opportunity and during her journey to the hospital in the taxi she made a dying declaration where she categorically stated that the cause of her injuries was accidental in nature but for the first time after arrival of the Police on the next day, she accused her husband of having set fire to her body and before her dying declaration was recorded her parents, grand-father and grandmother had met her and, thus, there was ample scope for tutoring, *held*, dying declaration could not be relied upon to implicate the accused husband: 1988 Cr.L.J. 1818 (Cal.) (D.B.).

Where deceased in her dying declarations gave a fair and vivid account of pouring of the kerosene oil and her being set on fire by the accused and in addition to that there was circumstantial evidence regarding the demand of dowry and harassment and torture inflicted on deceased by the accused, *held*, accused was liable to be convicted: 1994 Cr.L.J. 2043 (Del.) (D.B.).

Where the wife had made a declaration in the Hospital to the Investigating Officer in the presence of the Doctor that her husband had beaten her with *belan*, poured kerosene on her and pushed her on the stove whereby she caught fire and the oral and medical evidence corroborated it and her declaration was also found to be reliable and truthful, *held*, merely because another Doctor in his cross-examination had stated—with nothing in writing to support—that the wife had told him that she was burnt by stove while working and cooking was not sufficient to discard the recorded declaration; the Doctor, busy as he was, could not have remembered after such long time as to what was told to him by a patient: (1990) 41 Del.L.T. 42 (D.B.).

Where a bride in the medico-legal reports had stated to the Doctor that it was her husband who had poured petrol over her and set her to fire which was relied upon by the prosecution and proved, in the absence of the Doctor who had left service and whose whereabouts were not known, by record clerk who had in normal course of duty seen the Doctor writing and signing but finding that in other declarations she had assigned this role to her husband's brother and the prosecution to uphold conviction in appeal, desired to disown the first declaration as not having been properly proved, *held*, the prosecution could not be allowed to wriggle out of it to exclude the evidence of inconsistency of dying declarations; conviction set aside: 1991 Cr.L.J. 310: (1990) 42 Del.L.T. 299 (D.B.).

27. Clause (2).—Cl. (2) of S. 32 is subject to the main part of the section which presupposes that there must, in the first place, be proof that the statement in question was of the person who is dead or who cannot be found, etc. That means that the statement must be proved to have been written by the person alleged. The primary evidence would be of that person but since his whereabouts are unknown or his presence cannot be obtained without an unreasonable amount of delay or expense, the letter could be proved by several modes of proof of handwriting laid down by the Evidence Act. If there is no such proof at all, the contents of the letter would not be admissible as written by the person: A.I.R. 1955 Sau. 68: 1955 Cr.L.J. 1208.

'Course of business' meaning of. *See* 4 Bur.L.T. 185: 11 I.C. 854; (1908-09) 13 Cal.W.N. 71: 5 I.C. 376. *See* also A.I.R. 1941 Cal. 193.

The expression 'in the course of business' in S. 32(2) means in the way that business (which may be of a purely private or even trivial nature) is conducted. It has no connection with a course of business, which suggests a series of acts of business; the section would therefore, apply to an act or acts of a simple and private nature: 44 Mad.L.W. 681: A.I.R. 1937 Mad. 19.

The expression means a statement made during the course not of any particular transaction of an exceptional kind, but of business or professional employment, in which the deceased was ordinarily or habitually engaged: 65 Cal.L.J. 603: A.I.R. 1938 Cal. 150.

The entries in a diary maintained in a Solicitor's office amount to a contemporaneou

record maintained in the ordinary course of business and may be admissible under S. 32, Evidence Act. They may also become admissible under S. 157 as corroborative factor to other evidence. The entries however would not be admissible for showing the truth of the contents of those entries: (1966) 68 Bom.L.R. 228: I.L.R. (1966) Bom. 420: A.I.R. 1968 Bom. 112.

In a Limited Company books and papers kept in the usual course of business are the best evidence: (1953-54) 58 Cal.W.N. 227: A.I.R. 1954 Cal. 233.

Where it is proved that a writer of some accounts kept in the regular course of business is absconding and cannot be found the entries in the accounts are relevant evidence under S. 32 and sufficient to charge a person with liability: 1 Mad.L.W. 136: 22 I.C. 627.

Where the writers of the account books produced by a plaintiff are alive and in his service, but are not examined by him, the books cannot be said to have been duly proved as required by law, and are inadmissible in evidence: 11 O.W.N. 1323: A.I.R. 1935 Oudh 160.

The Court is not bound to believe the accounts which are relevant under S. 32(2) without corroboration, especially when the witness examined to prove the account books says that he has no personal knowledge of any of the transactions which figure in them: I.L.R. (1946) Nag. 707: A.I.R. 1947 Nag. 106.

Suit for accounts—Accounts genuine—Entries made in regular course of business showing debt due to third party—Defendant claiming credit for discharging the debt—Burden to prove that creditor was not fictitious does not lie on defendant: (1964) 1 M.L.J. 103: A.I.R. 1964 Mad. 205.

Copies of entries in cash book maintained in regular course of business, *held*, are of no evidentiary value, when cash book itself was not produced and scribe thereof was not examined: 1972 Cur.L.J. 203.

Where statement of a deceased was made in the ordinary course of business and in particular it consists of an entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty or the statement relates to the existence of any relationship between persons as to whose relationship the deceased had special means of knowledge and such statement was made before the question in dispute was raised such statement is admissible and relevant under sub-Cls. (2) and (5) of S. 32.

Held, on circumstances, that the entries in Jaimani book of the Panda of Mathura was admissible to prove the name of the grandfather of the deceased through whom parties to the suit claimed title: A.I.R. 1963 Pat. 390.

Entry in Rokad made by deceased admissible, but decree cannot be passed unless transaction is proved: 1961 M.P.L.J. (Notes) 287.

The words 'in the ordinary course of business' in S. 32(2) should be given a broad and liberal connotation. An important event in the history of a family communicated by either the husband to his wife or by an elder to a younger even in the ordinary course of conversation at a time when there is no controversy about it may well be held to be a statement made in the ordinary course of business: A.I.R. 1961 Him. Pra. 10.

In case of death of attestators written statement of deceased bond-writer as to signing by attestators is admissible. *See* (1914-15) 19 Cal.W.N. 1148: 22 I.C. 654.

Collection papers—Admissibility of. *See* 6 I.C. 369. Value of an incomplete record of a deposition. *See* 22 M.L.J. 453.

An endorsement on the cover of a registered letter that the cover had been tendered to the addressee on a certain date and had been refused by him is at best a record of statement by the peon and would be admissible either under S. 32(2) or S. 33, if the requirements of those sections are complied with. Otherwise the post peon must be called to prove the facts relied on as being evidence of the endorsement: (1914-15) 19 Cal.W.N. 489: 26 I.C. 962.

Proof of contents of letter—Person writing letters dead—Letter written in ordinary course of business—Competency of writer to give opinion contained in letters not shown—Opinion expressed in letter held not admissible under S. 32(2): (1960-61) 65 Cal.W.N. 1206.

Applicability—Contract of sale—Inspection of goods by representative of purchaser and reporting to purchaser—Statement of representative on such inspection admissible—[Sale of Goods Act (1930), S. 5].

Per *A. N. Ray, J.*:—Where a representative of the purchaser under a contract of sales goes in the ordinary course of business for inspection of the goods and also reports to the purchaser, the statement of that representative on such inspection is admissible under S. 32 of Evidence Act: A.I.R. 1969 Cal. 496.

S. 32—Entries in Jamabandi—Evidentiary value. The entries in the Jamabandi do not constitute conclusive evidence of title to the property in favour of the person recorded therein. All the best, a presumption of correctness attaches to such entries, and that presumption is clearly rebuttable. It is for the reason that the Jamabandis are primarily prepared by the Government for fiscal purposes and so they cannot create any title. The weight to be attached to the entries in such documents will depend on the circumstances of each case: A.I.R. 1970 Manipur 50.

A deposition made by a Patwari of a village in the course of the enquiry relating to the Revenue Settlement under the Bengal Regulation does not come under the provisions of S. 32 and is consequently inadmissible in evidence: 9 Pat.L.T. 679: A.I.R. 1928 Pat. 429.

Applicability—Statements before Registrar—S. 32(2) does not apply to statements made before Registrar: A.I.R. 1958 Manipur 7.

Where Jama Wasil Baki papers were proved to be 45 years old, the Court might presume that the writer was dead at the time they were produced and that the same might be admissible in evidence under S. 32(2): I.L.R. 55 Cal. 1216; A.I.R. 1929 Cal. 110. *See* also A.I.R. 1941 Cal. 541; A.I.R. 1940 Cal. 524: I.L.R. (1940) 2 Cal. 559.

The Zamindari papers can be used as independent evidence, provided they are brought within S. 32(2) by showing that the persons who prepared them are dead or cannot be found, but the weight to be attached to them must depend on circumstances: I.L.R. 11 Pat. 701: A.I.R. 1933 Pat. 6.

Chowhuddibandi or boundary papers of Zamindaries were filed by the Zamindars in 1799 in pursuance of a duty. They are, therefore, admissible under S. 32(2), the persons making the statements contained in them being dead: (1939-40) 44 Cal.W.N. 935: A.I.R. 1941 Cal. 193.

A receipt executed by a deceased person who stood in the relation of cousin to the parties gave the boundaries of an adjacent plot. *Held*, that the document was admissible under S. 32 as a statement made by a deceased person in the ordinary course of his business: 5 O.W.N. 174: A.I.R. 1928 Oudh 248.

Settlement entries—Presumption of correctness attaches to them—They are also evidence of conduct of persons at whose instance the entries were made: I.L.R. (1961) Cut. 635.

Entries made by the Amin in the Khatian and Chitta must be taken to have been made in the ordinary course of business and admissible under S. 32, sub-S. (2): I.L.R. 55 Cal. 1070: A.I.R. 1928 Cal. 448. Report submitted by a process peon who is dead regarding service of notice is admissible: I.L.R. 13 Pat. 86: A.I.R. 1933 Pat. 658. Evidence recorded under 'Fugitive Offenders' Act is admissible: 112 I.C. 673: A.I.R. 1928 Sind 161.

Where in a proceedings for fixation of fair rent under S. 14 of the Mysore Rent Control Act, 1961, the question in issue was whether the building had been constructed prior to 1-4-1947, *held*, counter foils were admissible under S. 32(2) to prove the same: A.I.R. 1972 Mys. 143: (1971) 2 Mys.L.J. 635.

Panjis are maintained by Panjikars who are professional genealogists and they systematically maintain pedigree tables in the community of Naithal Brahmins. They go from place to place and periodically ascertain the genealogies of their clients and enter them in Panjis (palm leaf manuscripts of genealogy) and add to them such fresh additions as occur in the family from time to time. They are considered important in this community because questions of marriage (who may marry whom) and relationship and caste turn on them. It is the business of these Panjikars to collect this information about pedigrees and presumably they endeavour to collect correct information because what they put down about one man will affect a whole family and the families of those who marry into it. Also, there are checks and counter checks as information pours in from different members and branches of the family. They would, consequently, fall into disrepute if their books contained glaring inaccuracies. Statements about pedigree are not, therefore, lightly made. Plaintiffs in a suit claimed as reversioners or the propositus and put in evidence, Exs. 4(*a*), 4(*b*), 4(*d*) and 4(*e*), the Panjis written by their family Panjikars. The witness who proved Exs. 4 and 4(*a*) deposed that the latter was written by his father

and the former by a brother of his grandfather and that they were taken from the collection of Panjis which were in the handwriting of his father, grandfather, great grandfather and great granduncle. He also stated that he saw Ex. 4(*a*) long before the question in dispute arose. As regards Ex. 4 it was evident that it had been written long before Ex. 4(*a*) was written by the witness's father. The witness who proved Ex. 4(*b*) stated that it was written by his grandfather who died long ago and that he saw that before the dispute arose. As regards Exs. 4(*d*) and 4(*e*), the evidence of a witness who had been examined in a previous case stated that the former was written partly by his father, and partly by an ancestor whose writing he was unable to identify because they were written before he was born. As regards the earliest entries in Ex. 4 (*e*), it stated that the witness was not clear but presumed they had been written by his father. His father was dead long before the dispute in the suit in question arose. *Held*, (*i*) exhibit 4(*a*) was admissible under S. 32(2) and also under S. 32(6), (*ii*) exhibit 4 was admissible under S. 32(6) but even if it was written after the dispute arose it would also be admissible under S. 32(2) because that sub-section did not impose the limitation that the entry should have been made before the dispute arose, (*iii*) that the entries in Ex. 4(*b*) were made before the dispute arose [S. 32(6)] and were in any case admissible under S. 32(2), (*iv*) that Panjis, Exs. 4(*d*) and 4(*e*) were ancient and had come from proper custody and also were admissible under S. 32(2) and S. 32(6), (*v*) that the evidence of the witness who proved Exs. 4(*d*) and 4(*e*) was admissible under S. 33: A.I.R. 1954 S.C. 601. Prosecution under Excise law for possession of illicit liquor—Report of Sub-Inspector of Police—Admissibility. *See* A.I.R. 1954 All. 214: 1953 All.L.J. 686.

Statement of the deceased's grandfather as to age — Admissibility of. *See* (1911) 2 Mad.W.N. 383: 12 I.C. 551. *See* also 20 Cal.L.J. 302: 27 I.C. 30.

Statement of deceased—Admissibility—Statement of deceased to Doctor regarding his age—Deceased not examined by Doctor from age point of view—Effect: I.L.R. (1960) 2 All. 580: 1960 All.L.J. 770: 1960 All.W.R. (H.C.) 584: A.I.R. 1961 All. 14.

A statement made by a father before a Government Tahsildar as to the age of his son is relevant to prove the age of the son: 9 M.L.T. 220: 9 I.C. 324. [I.L.R. 25 Mad. 183; I.L.R. 20 Cal. 758, Foll.].

Where the injury report prepared by the Medical Officer is proved by his compounder, it is admissible under S. 32 (2) if the attendance of the Medical Officer cannot be procured without delay and expense: 1953 All.L.J. 416: A.I.R. 1953 All. 520.

If a Medical Officer, available in the Court, is not examined, his medical certificate will not be admissible in evidence for the simple reason that it can be made use of only for corroboration or contradiction or refreshing memory; but if the Doctor is dead or is not available for examination in the course of trial, his medical certificate would be admissible and relevant. But the weight it would carry is altogether a different matter. [I.L.R. 9 Cal. 455; A.I.R. 1936 All. 363; A.I.R. 1936 Mad. 426, Disting.; (1958) 24 Cut.L.T. 495, Dissent. from]: 1971 Cr.L.J. 1816 (Raj.).

The general rule is that injury or post mortem reports are not substantive evidence; they are only reports prepared by the Doctor examining the victims; they become evidence only when the Doctor is examined or cross-examined in the Court and testifies that he had prepared the reports after having examined the victim or his dead body. S. 32 provides an exception to the general rule: (1990-1) 38 B.L.J.R. 462 (D.B.).

A post mortem report is no substantive evidence; unless proved by the Doctor as a witness, it is not admissible. However, if the Doctor is dead or is otherwise not available in the circumstances mentioned in S. 32, the report is rendered relevant and admissible; its probative value would, however, depend on the peculiar circumstances of the case itself: (1976-77) 81 Cal.W.N. 724 (D.B.); 1988 C.Cr.L.R. 98 (Cal.). *See* also (1990) 1 Crimes 28: 1989 Cr.L.J. 193 (Pat.).

When the accused admitted genuineness of the post mortem report filed by the prosecution, *held*, it can be read as substantive evidence. [1979 Cr.L.J. 236 (All.), Overruled; 1980 Cr.L.J. 853 (Bom.), Dissent. from]: 1981 Cr.L.J. 379 (All.) (F.B.).

Where in a case of rape, the Lady Doctor who had examined the prosecutrix and prepared in duplicate, in performance of her duty, the medical certificate, and who had gone on long leave on giving birth to a child and could not be examined without undue

delay, the Court permitted the prosecution to prove carbon copy of the certificate, the original where of had been lost, by another Doctor associated with the Lady Doctor for about two years, *held*, the copy of the certificate is admissible under S. 32 as well as under S. 62 as primary evidence: A.I.R. 1989 S.C. 702: 1989 B.L.J.R. (N.O.C.) 8: 1989 Cr.L.J. 841: (1989) 1 S.C.C. 432: (1989) 1 Crimes 384.

Post mortem report—Admissibility—Not substantive evidence—Admissible under S. 32, Evidence Act—Court can come to independent conclusion from other evidence without medical evidence: 1966 Cr.L.J. 45: A.I.R. 1966 Ori. 21.

Statements and entries made in ordinary course of business—Medical Officer performing post mortem not easily available—Report prepared by him is admissible in evidence: (1964) 1 Cr.L.J. 214: A.I.R. 1964 Pat. 62.

Where in a dispute over standing crop the complainant was assaulted by the petitioner and was prosecuted for the same offence, he contended that the injury report of the complainant had not been legally proved and the same could not be admitted in evidence. The prosecution contended that since the Doctor who prepared the report could not be produced without undue delay, the report should be allowed to be proved by his compounder, who was present when it was made.

Held, that the injury report was prepared during the ordinary course of business in discharge of his official duty and since the Doctor could not be produced without undue delay, the report could be proved by secondary evidence, namely by the compounder who was present when the report was prepared: 1967 All.Cr. R. 271: 1967 All.W.R. (H.C.) 395.

Applicability—Murder case—Non-examination of Medical Officer who conducted autopsy—Evidence of Doctor could not be procured without an amount of delay of expense—Documents duly proved—No prejudice to accused—Documents held admissible under S. 32(2)—S. 32(2) relates to relevancy of evidence and not to manner of proof and before relevant statement is admitted, its authority must be proved in same way as any other document or fact: 1969 Cr.L.J. 1157 (Andh. Pra.).

Where the original dying declaration was lost and the Magistrate had deposed on oath that he gave original dying declaration to the Head Constable but the Head Constable said that after making a copy thereof, he gave it back to the Magistrate, *held*, the prosecution was entitled to give secondary evidence which consisted of the statement of the Magistrate as also of the Head Constable who had made a copy from the original and testified that the copy was a correct one: A.I.R. 1979 S.C. 1567: 1979 Cr.L.J. 108: 1979 U.J. (S.C.) 536.

The record prepared by a Magistrate of proceedings at an identification parade conducted by him cannot be regarded as a statement made by him in the ordinary course of business, and as such a document cannot be admitted under S. 32(2) and treated as a substantive piece of evidence and the proceedings of parades can only be proved by the oral deposition of the Magistrate who held them or perhaps, by the deposition of some other person in authority who was present when the parade was held. Admittedly Magistrates are called on occasionally to hold identification parades as part of their duty but this is a special form of duty, and seeing that liberty or even the lives of accused persons may depend on the result of such evidence, it is highly important that the proceedings in an identification parade should be properly proved by the deposition of the Magistrate who could then be subjected to cross-examination: A.I.R. 1925 All. 413, Considered: I.L.R. (1956) Punj. 140: 1957 Cr.L.J. 678.

Statement in Police diary can be brought into evidence in terms of S. 32(2) of the Indian Evidence Act, 1872: (1993) 1 Crimes 258 (Ori.).

28. Clause (2) and section 34.—The term 'book' as used in S. 32(2) and S. 34 implies a collective unity of sheets even at the time when the entries are made therein. It connotes an intention that it should serve as a permanent record. But beyond these two ideas, it is not necessary that it should consist of a particular number of sheets or that it should be bound in a particular way. A number of sheets of paper stitched into a book before the entries have begun to be made, each entry covering both the sheets, *i.e.*, the entry beginning on the left page and running on into the right page, and kept by a creditor as an account of his cash receipts and disbursements is a 'book within the meaning of Ss. 32 and 34', judged by the standards prevailing amongst not meant for trade purposes. Entries in such a book are admissible in evidence under S. 32(2); and the entries to be admissible need not necessarily

be against the pecuniary interest of the persons making the entries: 44 Mad.L.W. 467: A.I.R. 1936 Mad. 871.

Where an entry appears in a book of account it comes both under S. 32, Cl. (2) and S. 34. The only material difference as between an entry relevant under S. 32(2) and one under S. 34 is that in the former case the person who made the entry may be available as a witness while in the latter case he is not: I.L.R. 55 Cal. 1167: (1927-28) 32 Cal.W.N. 580.

When the entries in account books are relevant not only under S. 34 but also under S. 32(2), they are sufficient evidence in themselves and the law does not, as in the case of accounts admissible only under S. 34, require any corroboration. But the Judge is not bound to act on them without corroboration; that is a matter on which he must exercise his judicial discretion as a Judge of fact: A.I.R. 1960 Andh. Pra. 331.

29. Clause (3)—Statement against interest.—What is, and its admissibility. *See* (1911) 1 Mad.W.N. 363; 11 I.C. 380: 45 Cal.L.J. 138: A.I.R. 1927 Cal. 918. *See* also 29 I.C. 607; I.L.R. 36 Mad. 19; A.I.R. 1929 Nag. 131.

In order to be admissible under S. 32(3), the statement must be of (*1*) a relevant fact, and (*2*) against the proprietary interest of its maker to his knowledge. [A.I.R. 1935 Pat. 167 (F.B.); A.I.R. 1950 P.C. 1, Foll.]: A.I.R. 1976 Karn. 75: (1975) 2 Karn.L.J. 468.

S. 32 comes into play only after it is found or assumed as a fact that a particular statement was made by its purported maker; the expression 'if true' used in S. 32(3) refers not to the factum of the statement having been made by its maker but the truth of its contents which expose him to a criminal prosecution or a civil suit for damages; that would necessarily require corroboration by the independent evidence or attending circumstances: 1984 Mah.L.J. 709.

Statement of a deceased when not against his pecuniary or proprietary interest, *held*, is not admissible: (1982) 1 Cal.L.J. 279.

The interest that is predicated in S. 32(3) must be one which relates to the pecuniary or proprietary interest of the person making it. It is not a kind of interest which a man may feel about a friend or a relation and it is in no sense sufficient to say that there may be some future contingency that may be affected by the statement. It must be the present pecuniary or proprietary interest of the person making the statement that must be affected by the statement, in order that the same may be admissible: 19 Cut.L.T. 354: A.I.R. 1954 Ori. 52.

The sanctity attaching to a statement by a person who is dead on the ground that it was against his interest to make it must depend upon the measure of that interest, and when it appears that the statement was probably to the immediate interest of the person who made it, the fact that more remotely it was against his interest does not afford much guarantee of its truth: I.L.R. (1939) Kar. 573: A.I.R. 1939 Sind 145.

The principle upon which hearsay evidence is admitted under S. 32(3) is that a man is not likely to make a statement against his own interest unless true, but this sanction does not arise unless the party knows the statement to be against his interest: 76 I.A. 255: (1950) 1 M.L.J. 163: A.I.R. 1950 P.C. 1.

Where independent evidence is available and the recitals in the document which are against the evidence led cannot, in all cases, outweigh the evidence adduced, the recitals in the documents are at best to be taken as an item of evidence and their correctness or otherwise have to be judged in the context of other surrounding circumstances and in the light of the other evidence adduced: (1977) 2 Cut.W.R. 935.

The previous statement of dead person could also be one contained in a letter or other statement in the possession of private party: A.I.R. 1981 Andh. Pra. 34 (D.B.).

Under S. 32(3), in order to determine whether a certain statement is against the pecuniary or proprietary interest of the person making it, we must look to the statement itself and not to the nature of the transaction in the course of which the statement is made. An assertion in a deed of gift by the donor that the subject-matter of the gift is his property can by no strength of reasoning be held to be a statement against the pecuniary or proprietary interest of the donor: 20 Pat.L.T. 877: A.I.R. 1940 Pat. 16. *See* also A.I.R. 1941 Mad. 666: (1941) 1 M.L.J. 754.

Merely because under S. 90 the documents are presumed to be duly executed if they are more than 30 years old, there is no presumption about the contents of these documents being true. But once the execution of the

document more than 30 years old is presumed, it will show that the party's predecessor-in-title who was the signatory to the document had executed the same. Once that is established, it would amount to an admission, on the part of the executant about the truth of the statements mentioned therein. This document can also go in evidence under the provisions of S. 32(3) as it is a statement made against the proprietary interest of a person who is now dead: A.I.R. 1981 Guj. 142: (1981) 22 Guj.L.R. 389.

The statements made in a gift deed by a Hindu widow that the properties mentioned therein were already gifted away by her father-in law and her husband attract the terms of S. 32, sub-Ss. (3) and (7) as they are against her proprietary interest and relate to a transaction as is mentioned in S. 13. When the validity of the document is challenged after 50 years or more and the parties to the document are all dead and when it is not possible for the alienees to produce better evidence, the recital acquires importance. In such a case the recital, being consistent with probability and the circumstances of the case, is binding on him who is taken in adoption by the widow. No evidence aliunde is necessary: 1961 An.L.T. 150: A.I.R. 1961 Andh. Pra. 435.

A statement in a sale-deed by the executant that he was liable for a particular amount is a statement made against the pecuniary or proprietary interest: 30 Nag.L.R. 192: A.I.R. 1934 Nag. 106.

The statement in a sale deed by the deed vendor that he had received the consideration, is against his own pecuniary interest and is good evidence in support of passing of consideration. [A.I.R. 1967 Ori. 55; (1973) 2 Cut.W.R. 1759, Rel. on]: (1977) 44 Cut.L.T. 552: A.I.R. 1977 N.O.C. 301.

Where the deceased predecessor-in-interest of a party admitted passing of consideration under a document, it is not open to the party to allege to the contrary because it binds him as being against the pecuniary and proprietary interest of the predecessor-in-interest under S. 32(3): A.I.R. 1967 Ori. 55: 32 Cut.L.T. 510: I.L.R. (1966) Cut. 571.

Where out of two executants of a sale deed, one was already dead and the contents of said document showed that he admitted receipt of consideration, *held*, this admission is admissible under S. 32(3) and is a good piece of evidence in support of passing of consideration: A.I.R. 1977 Ori. 178: (1977) 44 Cut.L.T. 37.

Where in a suit for possession of certain land adjacent to plaintiff's house on basis of sale deed in favour of the plaintiff, the defendant a neighbour of the plaintiff wanted to file sale deed in his favour indicating that the property, land in question, belonged to the defendant, it could not be said that the other deed was inadmissible or irrelevant in evidence although the weight to be attached to the boundaries of land given therein was a different matter; the sale deed was admissible in evidence as a relevant piece of evidence: 1983 All.L.J. 226.

The statements of a particular person that he is separated from a joint family, of which he was a coparcener, and that he has no further interest in the joint family property or claim to any assets left by his father would be statements made against the interest of such a person, and after such a person is dead, they would be relevant under S. 32(3) of the Evidence Act. The assertion that there was separation not only in respect of himself but amongst all the coparceners would be admissible as a connected matter and an integral part of the same statement. It is not merely the precise fact which is against interest that is admissible, but all matters that are involved in it and knit up with the statement: A.I.R. 1969 Ori. 18: I.L.R. (1969) Cut. 146; A.I.R. 1952 S.C. 72: 1951 S.C.R. 603; A.I.R. 1959 Andh. Pra. 407.

Will by son of one of the members of the joint family—Will is admissible under S. 32(3) to show that there was a partition in the family: 1961 Jab.L.J. 616: 1961 M.P.L.J. 463.

Where in a cancelled will the testator has made a statement in the interests of other persons, his sons, against his own interest, it is admissible under S. 32(3): 1939 Nag.L.J. 421: A.I.R. 1939 Nag. 274.

On the question as to the rule of inheritance followed in the family the testimony, touching the said question, of the deceased father of a party to the present suit and given in the previous case is admissible under S. 32(3) of the Evidence Act: 1959 M.P.L.J. 415: A.I.R. 1959 Madh. Pra. 212. Affidavit containing admission against interest of deponent—Affidavit would be admissible in evidence: A.I.R. 1955 Ajmer 28.

Where a conveyance was executed by the *karta* of a Hindu Joint Family but he was no longer alive, *held*, the averments made in the recitals of the deed are admissible in evidence under S. 32(3): (1990) 40 Del.L.T. 82 (D.B.).

A registered deed of mortgage containing statements of boundaries is not admissible under S. 32(3), Evidence Act in a suit between strangers to the deed unless the statements therein are of relevant facts and affect the pecuniary or proprietary interest of the persons making it: I.L.R. (1961) Cut. 249: A.I.R. 1962 Ori. 40.

Statement of a third party made in a document executed in favour of defendant about the boundaries of land in suit—Such third party not proved to be dead nor examined in the case—Statement is inadmissible in law against the plaintiff: 1962 B.L.J.R. 11: A.I.R. 1962 Pat. 273.

As to admissibility of recitals in documents between strangers regarding boundaries of lands, *see* 45 Cal.L.J. 55: A.I.R. 1926 Cal. 948; 44 Cal.L.J. 582: A.I.R. 1927 Cal. 230 and cases cited therein: A.I.R. 1928 Cal. 63; A.I.R. 1933 Pat. 636: 145 I.C. 944; 152 I.C. 829: A.I.R. 1934 Pat. 617; 30 Mad.L.W. 422 (not admissible).

A recital of a boundary in a document between third parties is not ordinarily admissible to prove possession or title as against a person who is not a party to the document. This rule is subject to exceptions. Since statement can, for instance, be admitted under S. 32(3), when it is contained in a document against the proprietary interest of the person making it, when the executant of the document is dead. So also when the executant of the document containing the recital as to boundary is himself a witness in the case, it can be admitted as a contemporaneous statement to corroborate his evidence under S. 157: 51 Mad.L.W. 509: A.I.R. 1940 Mad. 450; 1979 Rev.L.R. 500.

Recitals as to boundaries in documents not *inter partes* are inadmissible in evidence under Ss. 11, 13(*a*) and 32(3) and (5); they can be admitted in evidence by testimony in Court of the document's executants. [A.I.R. 1915 Mad. 746, Foll.; A.I.R. 1956 Mad. 226, Overruled]: A.I.R. 1972 Mad. 154: (1971) 84 Mad. L.W. 691: (1972) 1 M.L.J. 317 (D.B.).

Recital of boundaries in sale-deed executed by third parties—Recital cannot be said to be statement made in ordinary course of business or statement made against pecuniary or proprietary interest—Recital is inadmissible in evidence: 1966 B.L.J.R. 706: I.L.R. 45 Pat. 314.

Statement of boundary contained in the sale deed executed by a third party is not admissible in evidence: A.I.R. 1973 Pat. 215: 1973 Pat.L.J.R. 393 (D.B.).

A document between strangers wherein one of the parties to the suit or its predecessor is shown holding land on the boundaries of the executant's land, is inadmissible as it is under S. 11(2); it is also inadmissible (if its executants are not alive) under S. 32(3) as well: A.I.R. 1971 P.&H. 9.

Recitals in documents relating not to suit land but to neighbouring land—Not admissible: 8 I.C. 268: 1910 Mad.W.N. 668; (1911-12) 16 Cal.W.N. 262: 12 I.C. 149; 11 All.L.J. 139: 18 I.C. 752. *See* also 99 I.C. 910: A.I.R. 1927 Cal. 234.

A person who is the 16 annas owner of a property cannot be expected under any circumstances to say that his interest therein was only 8 annas and that the remaining 8 annas right belonged to his brother's widow. Such a statement by an adult person, being against his own interest is admissible in evidence under S. 32(3), Evidence Act: 32 Cut.L.T. 343.

Assertion of right by husband of plaintiff in written statement in previous suit—Written statement held admissible in partition suit filed after husband's death: A.I.R. 1966 Pat. 110.

Under S. 32(3) of the Evidence Act, a statement of a person who is dead is admissible when the statement is against the pecuniary or proprietary interest of the person making it, or when if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages. In order the statement may be admissible, the person making the statement must know that it was against his interest and the question whether the statement was made consciously with the knowledge that it was against the person making it would be a question of fact in each case and would depend in most cases on the circumstances in which the statement was made, except when the statement is categorical in terms. There can hardly be any direct evidence to show that the person making the statement in fact knew that the statement was

against his interest and so in most cases knowledge would have to be inferred from the surrounding circumstances. In a suit filed by plaintiffs for declaration and in the alternative for possession of certain properties question arose whether one *B.N.* (plaintiff's uncle's son) died before or after the death of his father (plaintiff's uncle). Plaintiff's case was that *B.N.* predeceased his father and, therefore, on the death of plaintiff's uncle his share came to them and that *B.N.*'s widow and daughter had no right over them. The suit was filed against the widow who was living on the date of suit and *B.N.*'s daughter. *B.N.*'s widow died during pendency of suit and *B.N.*'s contended that her grandfather died before her father's death and, therefore, she became entitled his share. *B.N.*'s widow who was a party to the suit had made a statement in a prior proceeding that her husband's father went away one month after her husband's death, thereby indicating that *B.N.* predeceased his father. Therefore, it became necessary to consider the admissibility of this statement as well as the value to be attached to it under S. 32(3) of the Evidence Act. *Held*, on the facts of the case, it was held that the statement of *B.N.*'s widow was admissible as that statement was against her proprietary interest and that *B.N.* died before the death of his father: (1967) 1 S.C.R. 153: A.I.R. 1967 S.C. 1134.

A statement made by deceased in the proceedings before the settlement officer, an authority competent to record evidence, against his own interest, *held*, was clearly admissible under S. 32(3) and could be proved by producing a certified copy thereof: A.I.R. 1981 Andh. Pra. 34 (D.B.).

Applicability—Statements against pecuniary or proprietary interest of person making it or when, if true, would expose him to prosecution—Statement by another person that he had lent money to the accused is not relevant under S. 32(3): 1970 Cr.L.J. 812: A.I.R. 1970 Manipur 40.

Prior statement by mother that she was the concubine of alleged father—Admissibility in evidence: 10 I.C. 188. Admission of one co-plaintiff or co-defendant, evidence against other: A.I.R. 1917 P.C. 12: 33 M.L.J. 180: 44 I.A. 201: I.L.R. 40 All. 159 (P.C.).

The principle upon which a statement made by a dead person against his pecuniary or proprietary interest is regarded as admissible in evidence is that in the ordinary course of affairs a person is not likely to make a statement to his own detriment unless it is true. But a statement made by the deceased widow in proceedings to obtain mutation of names in the register in favour of the adopted boy was not against her pecuniary or proprietary interest and was not admissible under S. 32(3) of the Evidence Act: 57 I.A. 14: I.L.R. 52 All. 1: A.I.R. 1930 P.C. 79: 58 M.L.J. 446 (P.C.). *See* also I.L.R. 14 Rang. 11: A.I.R. 1936 Rang. 5.

A statement by a deceased member of an undivided Hindu family resident in Bengal that he is governed by the Mitakshara School of Hindu Law is admissible in evidence under S. 32(3), being a statement against his proprietary interest in properties possessed by him. It necessarily implies that his rights were limited by the rights of the other coparceners and that he had not the free and unrestricted power of disposal: (1938-39) 43 Cal.W.N. 395. *See* also A.I.R. 1939 Sind 145: I.L.R. (1939) Kar. 573 (Statement as to the status in the will of the deceased).

Assertion of private right to negative public right—Statement made by great grandson's son of original grantee in inam proceedings—Question whether grant was to temple or named person—Statement must be given great weight as one made after *ante litem motam* although it is in the interest of the maker: A.I.R. 1958 Andh. Pra. 8.

An isolated piece of paper or memorandum made by a person who is dead, for his own information, about his property, which is not made by him in the ordinary course of business and which is not one of a continuous series of acts, and which contains nothing against his pecuniary interest and does not expose him to a criminal prosecution or a civil suit, is not admissible under S. 32: I.L.R. (1940) Kar. 334: A.I.R. 1940 Sind 173.

Part of statement against pecuniary interest—Entire statement, admissible: (1937-38) 42 Cal.W.N. 359.

A road-cess return filed by a Hindu widow under S. 95 of the Bengal Cess Act is admissible under this section: 18 Cal.L.J. 633: 22 I.C. 594.

Where in some documents deceased had described the plaintiff as his adopted son, *held*, such documents were admissible in evidence under S. 32(3) as he had made a statement against his own pecuniary and proprietary interest as the plaintiff would get a share

in his property: A.I.R. 1974 Ori. 120: (1973) 1 Cut.W.R. 809 (D.B.).

Where the owner of the house-stead land had died leaving behind his widow and daughter and the agnatic brother of the deceased sued the widow for declaration that he was an adopted son of the deceased which was decreed as compromised wherein the widow admitted that the agnatic brother was adopted by the deceased as a son who had also performed as such the deceased's obsequial ceremonies; *held*, in the subsequent suit by the widow against the adopted son for declaration that she was the owner of the property left by her husband and the earlier compromise decree was vitiated by fraud, her admission on the compromise petition was admissible under S. 32(3) as it affects her pecuniary and proprietary interest as it amounted to her disinheritance rendering her only a maintenance holder; it is, however, not admissible under S. 32(5) as, though the widow had special means of knowledge about the adoption, it was not raised before the controversy about adoption had been raised: A.I.R. 1972 Ori 148: (1971) 2 Cut.W.R. 814 (D.B.).

Where the deed of adoption mentions conferment of the authority to adopt on the widow of the deceased, *held*, the deed is admissible under S. 32(3) and (5) both: A.I.R. 1972 Pat. 325: 1972 B.L.J.R. 842 (D.B.).

Even the statements made several years after the date of transaction are admissible under Ss. 21 and 32(3) for deciding whether the transaction was or not a *benami* transaction when such statements were against the proprietary interest of their maker: A.I.R. 1980 S.C. 727: (1980) 3 S.C.C. 72: (1980) 93 Mad.L.W. 42 (S.N.): (1980) 2 Karn.L.J. 1 (S.N.).

According to S. 32(3) the statement of a deceased person which exposes him to a criminal prosecution or a suit for damages is admissible. Where a deceased has made statements to a witness as to the receipt of certain documents from a person accused of criminal breach of trust in respect of them and also as to his anxiety to ascertain their contents to find out how they could be useful to him, they are admissible as they expose him to a prosecution for abetting criminal breach of trust or for himself misappropriating the documents: A.I.R. 1950 Kutch 52: 51 Cr.L.J. 1139.

The principle underlying S. 32(3) is that when a person makes a statement rendering him liable to criminal prosecution, the statement is likely to be a true statement. But when there is already against him evidence which would inevitably lead to his prosecution and conviction, a statement made by him cannot be admitted in evidence under S. 32(3). The section does not apply in such a case: I.L.R. 25 Pat. 347: A.I.R. 1947 Pat. 90.

S. 32(3) cannot be stretched or extended so as to cover a statement made by a deceased person after proceedings have been instituted against him. As soon as criminal proceedings have been started against the person making the statement, the words of S. 32(3) cease to apply and cease to have force: A.I.R. 1947 Sind 122: 48 Cr.L.J. 74: I.L.R. (1948) Kar. 79.

There are serious reservations about the authenticity, genuineness and accuracy of hearsay evidence because it is not tested by oath or cross-examination. That test is inapplicable to statements contemplated under S. 32. Having been made against the interest of their maker, they also expose him to criminal prosecution or to a suit for damages; they, thus, carry a measure of guarantee of truthfulness and accuracy for it is improbable that such statement would be made unless they are true; that is the reason to presume that they must have been true and accurate. Use of such statement against other accused no doubt would to some extent cause inconvenience and prejudice to the co-accused but if not so used it would cause inconvenience and prejudice to the prosecution in establishing the truth; the law, thus, choses the lesser evil of making those statements admissible in evidence. But whether such statements were indeed against the interest of their maker would have to be determined by the Court as a question of fact. [A.I.R. 1950 P.C. 1; A.I.R. 1967 S.C. 1134, Rel. on]: 1983 M.L.J. (Cr.) 161: 1983 Ker.L.T. 156: 1984 Cr.L.J. 753.

Confession of a deceased co-accused, *held*, is relevant both under Ss. 30 and 32(3) as it is a confession which, if true, would have exposed him to criminal prosecution: I.L.R. (1979) Bom. 380 (D.B.). *See* also 1972 Raj.L.W. 675.

Although under S. 32(3) a confession made by a deceased conspirator after he had rendered himself liable to criminal prosecution is not admissible, yet when general evidence of the existence of a conspiracy of which the deceased was a member has been given, such a statement is admissible under S. 10: (1933-34) 38 Cal.W.N. 1015: A.I.R. 1935 Cal. 26.

Charge of murder—Statement by wife of deceased made to Village Munsif charging accused—Deponent subsequently committing suicide—Statement not admissible against accused: A.I.R. 1942 Mad. 450: (1942) 1 M.L.J. 503.

Where in a murder case one of the eye-witnesses had made a statement to the Police and other persons which included a confession that he had, under duress, taken away the dead body and burried it in the river bed—an offence under S. 202 of the Indian Penal Code—as also his eye witness account of the murder committed by the accused and thereafter that witness being taunted for his failure to protect the deceased—the Headmaster of the School where the witness was employer—committed suicide, *held*, being a statement under S. 32(3) exposing him to prosecution and damages, it did not fall under S. 32(1) which relates to the cause of death; it was a weak type of evidence standing on a different footing; though admissible in evidence, it would nevertheless be extremely hazardous to implicitly accept such statement without corroboration to convict the accused named by the said witness: 1984 Mah.L.J. 709.

Joint trial—Death of co-accused before pronouncement of judgment—*Held*, confession of deceased—Co-accused was relevant under S. 30 read with S. 32(3) of Evidence Act: 1968 Cr.L.J. 1017: A.I.R. 1968 S.C. 832.

Where the accused's mother in a case for murder of the accused's wife had stated, before she herself died, that her son had gone to his bed room at 10, at night, bolted the door from within, came out in the morning and ran away and she found her daughter-in-law lying dead in the bed room, *held*, since nothing in her statement indicated that the mother was aware or even suspicious of murder or that she herself was guilty of any offence or violation of law which would expose her to any prosecution or damages, the statement did not fall under S. 32(3); it was not admissible in evidence. [A.I.R. 1950 P.C. 1; A.I.R. 1967 S.C. 1134, Foll.]: 1984 Cr.L.J. 753: 1983 M.L.J. (Cr.) 161: 1983 Ker.L.T. 156.

On trial for forgery one of the accused who had made a statement before the enquiring Magistrate died before the commencement of the trial. The statement was admitted by the Sessions Judge under S. 32, Cl. (3). *Held*, that the statement was inadmissible since its maker had already rendered himself liable to criminal prosecution at the time it was made: (1923) 25 Bom.L.R. 248.

Where in an attempt to commit a dacoity one member of the gang received gunshot wounds at the hands of a villager and when other members of the gang had run away, he disclosed the names of the companions to the villagers before he died. *Held*, that the statement of the deceased implicating himself as well as his companions was admissible in evidence under S. 32(3) and could be used against other accomplices named by him: 1960 All.L.J. 567: 1960 All.Cr. R. 297: (1961) 1 Cr.L.J. 591.

In a divorce suit filed in India by the husband on the ground of adultery, a letter written to him by the co-respondent who lives in England admitting adultery with the respondent, is admissible in evidence, as the admission of adultery would have exposed him to a criminal prosecution: I.L.R. 56 All. 570: A.I.R. 1934 All. 618 (S.B.).

30. Clause (4).—S. 32(4) allows evidence of opinion in respect of any matter of public or general interest, the test being whether the deceased person expressing the opinion was likely to have had knowledge. In the case of Mahants, even if they may have had knowledge by means of oral tradition handed down from Mahant to Chela, the opinion would be relevant but not particular facts: I.L.R. 12 Lah. 497: A.I.R. 1931 Lah. 161.

S. 32(4) of the Evidence Act will apply only when it is a public right or custom or a matter of general interest. When the paper or statement or recital does not state what exactly were the rights or customary privileges, etc., S. 32(4) is of no avail: A.I.R. 1952 Vindh. Pra. 36. *See* also I.L.R. 16 Pat. 258: A.I.R. 1937 P.C. 69: (1937) 2 M.L.J. 631 (P.C.) [Question of limits of a particular revenue mahal not a matter of public right or general interest within S. 32 (4)].

The recitals in the boundaries of plots covered by a document do not constitute the opinion of the executant of the deed on any matter whatsoever and hence the recitals in the boundaries of place covered by certain documents are not admissible in evidence under S. 32(4) of the Evidence Act, to prove any public right or custom: 92 Cal.L.J. 72: A.I.R. 1954 Cal. 125.

Where the question related to the local usage relating to the deep stream boundary

rule, one of the witnesses who was the Zilladar for 36 years stated that such custom prevailed from time immemorial that he was told about it by the former Sarabarakar and a tenant, both of them, since dead. *Held*, that such evidence was admissible under S. 32(4): 146 I.C. 795: A.I.R. 1933 All. 376. *See* also 1937 Pat.W.N. 446: A.I.R. 1937 Pat. 463 (Custom of land tenure).

Ss. 32(4), 43 and 48—Customary right—Claim for—Facts to be taken into consideration—Mode of proof—Ss. 13, 32(4), 43 and 48 of Evidence Act (1872) are relevant: 1965 Raj. L.W. 242: A.I.R. 1965 Raj. 217.

Statements of deceased persons as to the existence of a family custom are admissible in evidence under S. 32(4): I.L.R. 8 Luck. 445: A.I.R. 1933 Oudh 246. Statement of deceased as to custom—Family custom made after controversy—Admissibility of: 41 I.A. 275: I.L.R. 42 Cal. 582: 27 M.L.J. 373 (P.C.).

Where witnesses examined to prove a custom in the parties community permitting marriage between the children of a brother and sister or two sisters had deposed about solemnisation of such marriages in their own families, *held*, theirs was direct evidence based on the personal knowledge about the relationship between the two spouses; it need not conform to the requirements of S. 32; the witnesses had direct knowledge of the birth of the persons concerned; theirs was not opinion evidence under S. 32: A.I.R. 1982 P.&H. 221: 1982 Hindu L.R. 26: (1982) 1 D.M.C. 176.

A statement in a gift deed executed by a third person in favour of the suit mosque as early as 1903 stating that the mosque was constructed by certain person as a matter of charity is relevant and admissible under S. 32(4) of the Evidence Act, 1872, when the question in issue is whether the mosque in question was constructed with the private funds of a particular person or from the public funds collected by a particular sect: A.I.R. 1955 Andhra 209: 1955 An.W.R. 1.

Where the question as to who is the founder of a religious endowment is in dispute, a recital in a deed executed by a Mahant, who was for sometime connected with the management of the religious endowment, mentioning the founder of the endowment is admissible in evidence under S. 32(4), though the Mahant is dead and though the endowment was not founded in his lifetime: I.L.R. (1963) Cut. 257: (1963) 5 Ori.J.D. 241.

Where the question was whether certain property was dedicated to a wakf and certain documents which related to the neighbouring lands and which contained recitals as to the character of the suit property were put in: *Held*, that they were admissible in evidence under S. 32(4): (1928-29) 33 Cal.W.N. 439: A.I.R. 1929 Cal. 533.

Where the question was whether the letting of certain premises was for the immoral purpose of carrying on prostitution and running a brothel, the facts (*1*) that the lessor herself was a woman of the town, (*2*) that the defendant (lessee) was also a woman of the town and a prostitute, (*3*) that the general reputation of the particular house was one of ill-fame and a brothel, and finally (*4*) that the locality where the premises were situate was the notorious quarters of the city where it was said in evidence that all the houses in the street were brothels, were all relevant and compelling facts and cogent circumstances leading to the only possible conclusion that the letting was for immoral purposes of prostitution and for keeping a brothel. The evidence of a family physician on a point which turns on the reputation of the locality and of the persons concerned is of great weight and cannot be lightly dismissed. Knowing the inmates of a brothel by name is not necessarily the only qualification to speak on the fact whether a particular house is a brothel or not. The evidence of reputation of a house by a person who resides in a part of the very same house as a shopkeeper saying what type of people visits such house is not only admissible but cogent and relevant. His incapacity to name the prostitutes or their paramours does not discredit the testimony of such a witness. An independent and responsible witness, who lived in the vicinity of the premises ever since his boyhood, is entitled to speak of the reputation of the premises as quarters for prostitution and brothel keeping. His evidence cannot be considered as unsatisfactory merely because it was only once he actually went inside the house. The importance of this evidence lies in the fact that it was the evidence of reputation under S. 32(4) of the Evidence Act coming from a man of the locality and its vicinity who spoke of the house and locality covering a time which went back to the period not only when it was let but even prior thereto: A.I.R. 1958 Cal. 713.

Applicability—Statements made after dispute had arisen—Admissibility: A.I.R. 1958 Manipur 7.

31. Clause (5).—Four conditions must be fulfilled for the application of sub-S. (5) of S. 32; firstly, the statements, written or verbal, of relevant facts must have been made by a person who is dead or cannot be found, etc., as mentioned in the initial part of the section; secondly, the statements must relate to the existence of any relationship by blood, marriage or adoption; thirdly, the person making the statement must have special means of knowledge as to the relationship in question; and lastly, the statements must have been made before the question in dispute was raised: A.I.R. 1959 S.C. 914; A.I.R. 1978 Mad. 42: 91 Mad.L.W. 4: (1978) 1 M.L.J. 460.

Statements after dispute arose are not admissible. *See* 25 All.L.J. 861: A.I.R. 1927 All. 818. On this clause, *see* also I.L.R. 46 All. 665: A.I.R. 1924 All. 575; A.I.R. 1958 Manipur 7.

Statements are admissible under S. 32(5) and (6) only when they are made before the question in dispute was raised. Where the documents containing the statements as to relationship of the parties had come into existence after the dispute as to succession to certain jagir had been raised, S. 32(5) and (6) could not apply and the documents are not admissible under these clauses: A.I.R. 1955 Raj. 46: 1955 Raj.L.W. 338. *See* also 1982 M.P.W.N. 60.

S. 32(5), embraces every statement made by a deceased person as to relationship if (*1*) he had special means of knowledge; and (2) it was made *ante litem motam*. These are the only pre-requisites to its admission and it does not affect its admissibility whether it was made in a judicial proceeding or otherwise. [A.I.R. 1937 P.C. 101, Rel. on]: A.I.R. 1949 Him. Pra. 11.

The expression 'question in dispute' in S. 32(5), must be interpreted as meaning that the dispute raised in the latter suit must be identical, or in substance the same as in the former suit. It is not enough that the question was merely in dispute in the former litigation, but it must have been also directly in dispute. Even if the dispute has been raised collaterally, it does not matter: 53 Mys.H.C.R. 473.

The statement on which reliance is placed must have been made before the question in dispute was raised and the words "before the question in issue was raised" do not merely mean before the commencement of the particular legal proceedings in which such a statement is produced in evidence but even before the actual controversy regarding the subject-matter of the declaration has arisen. [A.I.R. 1968 S.C. 947, Foll.]: A.I.R. 1976 Raj. 40: 1976 Raj.L.W. 14: I.L.R. (1976) 26 Raj. 200: 1975 W.L.N. 931; A.I.R. 1972 Ori. 148: (1971) 2 Cut.W.R. 814 (D.B.).

The condition of *ante litem motam* involves the idea that the dispute, if any, on the former occasion must not be the same in substance as the dispute in the later suit; and the statement now sought to be used will not be excluded if it merely related to some matter foreign or collateral to the matter in controversy on the former occasion. The mere existence of the situation out of which the dispute subsequently arises does not render a declaration inadmissible nor on the other hand is actual litigation necessary to exclude it. But so soon as a controversy has actually arisen which would naturally create a bias in the mind of one standing in the relation of the declarant all subsequent declarations become inadmissible. The previous controversy, to render the declaration inadmissible, must have been on precisely the same point: A.I.R. 1952 Ori. 75.

S. 32(5) only requires that the statement tendered must be made by a person who had special means of knowing the relationship to which it relates, and that it must have been made *ante litem motam*. It is not further necessary that the statement in question should also be relevant to the matter in issue in respect of which it was made. It is also immaterial whether it was made in a judical proceeding or otherwise : 64 I.A. 92: A.I.R. 1937 P.C. 101: (1937) 1 M.L.J. 646 (P.C.). *See* also A.I.R. 1939 All. 61.

It is well settled that statements or declarations made before persons of competent knowledge made *ante litem motam* are admissible to prove ancient rights of a public or general nature; but their value is considerably weakened if they pertain not to public but purely private rights. It is equally well settled that declarations or statements made *post litem motam* would not be admissible as they have the element of bias and may as well be concoctions. However, *ante litem motam* statements to be admissible must have been made not only before the actual existence of the controversy but also before the commencement of the legal proceedings: A.I.R. 1983 S.C. 684:

(1983) 3 S.C.C. 118: (1983) 96 Mad.L.W. 93 (S.N.).

Illustration(*k*) to S. 32 shows that the relationship which may be proved by the statement of a deceased person may be relationship of the person making the statement: 25 M.L.J. 373. *See* also 163 I.C. 770: A.I.R. 1936 Oudh 340.

In order to be admissible under S. 32(5) or (6), the statement of the dead person must have been made *ante litem motam*, that is before the commencement of the controversy, actual or legal, on the same point; the words 'before the question in issue was raised' do not necessarily mean before it was raised in the proceedings wherein the statement is sought to be adduced; as stated in Halsbury's Laws of England, they mean before even the existence of any actual controversy on the point even prior to the litigation: (1986) 34 B.L.J.R. 569: 1986 B.B.C.J. 743.

Statements of witnesses in a prior suit regarding the adoption of a party cannot be admitted in evidence in the subsequent suit in respect of the same question of adoption as they cannot be said to have been made before the question in dispute was raised: I.L.R. 55 Mad. 40: A.I.R. 1932 Mad. 198: 62 M.L.J. 116; A.I.R. 1939 Mad. 446: (1939) 1 M.L.J. 227.

A statement of a deceased person relating to the existence of relationship by blood made in a suit not *inter partes* at a time when there was no dispute, is relevant under S. 32(5): 225 I.C. 8: A.I.R. 1947 Lah. 54.

There can be direct evidence about the relationship by blood. A witness may depose that he knows a particular relationship between some persons and his evidence may be from this knowledge; but if the witness has no direct knowledge he can give evidence about the statements relating to the existence of any relationship by blood between two or more persons, heard by him from persons who made such statements provided those persons had special means of knowledge about such relationship and such statements were made before the question in dispute was raised. Evidence about such statements only becomes relevant if persons making such statements are dead or cannot be found or have become incapable of giving evidence or their attendance cannot be procured without any unreasonable delay and expenses. It is only in those limited cases that a witness having no direct knowledge about the relationship by blood can give evidence of statements known by him from other persons about such relationship. This is what is clearly stated in S. 32 (5) of the Evidence Act. A witness can also give his opinion in evidence as to the relationship of one person to another that is in controversy before a Court, provided that opinion is expressed by his conduct and if he as a member of that family or otherwise has special means of knowledge of that relationship. That is according to the provisions under S. 50 of the Evidence Act, subject to the limitations as stated above, the statement or the opinion deposed to by a witness on the question of relationship of one person to another will be relevant. It is in this light that the depositions of the witnesses will have to be looked into, where none of them had any direct knowledge about the relationship between parties with reference to the common ancestor: 1964 B.L.J.R. 152: A.I.R. 1964 Pat. 187.

Where question of a lady being wedded wife of a person and, consequently, her being entitled to the grant of succession certificate to his estate had admittedly become disputed prior to the date on which an affidavit was purported to have been sworn by a pandit who allegedly performed the marriage, *held*, as the said statement in the affidavit of the deceased pandit was given after the dispute had already arisen, same was not a relevant statement and, thus, the affidavit was not admissible in evidence: A.I.R. 1988 Del. 368.

Where the witnesses speaking to an alleged relationship depose to their having known of the said relationship from both the parties who are dead and alive, their evidence cannot be discarded as inadmissible: 1948 All.W.R. (Rev.) 54: 1948 R.D. 111.

Where the statement in question was made by an aged relation of the family, it was *held* that it was doubtful whether it was necessary for him to depose to any particular source of knowledge so as to render his statement admissible under S. 32(5) because he might, as a relation, be presumed to have been well acquainted with the pedigree of his ancestors: A.I.R. 1943 Oudh 91. Recital in deeds how far evidence: 25 M.L.J. 373: 19 I.C. 740.

Statements of deceased mortgagor in mortgage deed admissible to prove relationship: 29 I.C. 974.

Witnesses should not be permitted by Court to give their testimony as to matters which could not be within their own knowledge

without first stating the source of their information. They should be required to prove the statements relied upon with proper particularity and with due attention to the requirements that the person making the statement had special means of knowledge. The evidence of a family bard as to the relationship of parties is *prima facie* inadmissible if it relates to events long before his birth as it is hearsay: 176 I.C. 464: (1938) 40 Punj.L.R. 162: A.I.R. 1938 Lah. 303. *See* also A.I.R. 1939 Mad. 446: (1939) 1 M.L.J. 227.

To prove the existence of relationship between persons deceased, evidence of the kind described in S. 32, Cls. (5), (6), (7) and S. 50 of the Evidence Act should be put forward whenever the question is in issue. There is no express provision in the Evidence Act making evidence of general reputations admissible as proof of relationship. The witnesses to prove the relationship should first be asked by the parties producing them to state the source of their information about the relationship sought to be proved. As observed by the Privy Council in A.I.R. 1937 P.C. 201 "it cannot be left to time or chance or cross-examination to disclose whether a statement has any basis which could give it value or admissibility": A.I.R. 1952 Madh. Bh. 12. But *see infra*.

There is nothing in the language of S. 32 which would bar a statement on the ground of hearsay if the statement is otherwise admissible under the provisions of that section. Where, therefore, *A* had gone to consult *B* about the position of stars at the time of the birth of *A*'s daughter, the entry made by *B* in his panchang was admissible in evidence after his death, since the question of age is a question of relationship by blood and *B* had special means of knowledge of the fact: I.L.R. (1952) Raj. 775: A.I.R. 1954 Raj. 38.

When a family migrated from one province to another years ago it is not possible to have in all cases anything but hearsay evidence which could be obtained from those having special means of knowledge (their ancestors) regarding the migration. Statements made to members of family by their ancestors are, thus, admissible in evidence to prove their relationship and their original place of residence where that relationship arose: I.L.R. (1943) Nag. 979: A.I.R. 1943 Nag. 253.

A statement prepared and signed soon after a marriage ceremony, by the priest who officiated at the ceremony, that he performed the marriage according to rites prescribed by religious scriptures and that the essential ceremonies constituting a valid Hindu marriage were performed, does not fall within the ambit of S. 32(5) of the Evidence Act. Such a statement relates to the performance of the marriage ceremonies and not to the existence of any relationship by marriage and, hence, not relevant under S. 32(5): (1943) 45 Bom.L.R. 924: A.I.R. 1944 Bom. 29.

Where the evidence of the plaintiff is that his deceased mother gave the names in the pedigree attached to the plaint for performing religious ceremony and the fact that she so gave the names to the plaintiff is not independently proved, the evidence of the plaintiff is only hearsay evidence and is not the statement of the deceased falling within the scope of S. 32(5): (1968) 81 Mad.L.W. 421: (1968) 2 M.L.J. 487.

Whether under S. 32(5) only statements of relevant facts are admissible and not statements of facts in issue. *See* (1943) 45 Bom.L.R. 924: A.I.R. 1944 Bom. 29.

Where the question at issue is whether a certain person died issueless, a statement of a deceased that that person died issueless amounts to a statement relating to the existence of a relationship by blood, because the question whether that person left a son involves the question whether there is any blood relationship between him and the person who claims to be his son. The existence of any relationship within the meaning of S. 32(5) includes the non-existence of such relationship. If a statement relating to the existence of such relationship is evidence under that sub-section, any statement which implies that there is no existence of such relationship between two persons also comes under that sub-section: 191 I.C. 674: A.I.R. 1941 Pat. 205.

A reference made in the order of mutation giving effect to a gift to the relationship of the donee with the donor's husband is admissible in evidence under S. 32(5) although there is no such reference in any statement made by the donor before the Revenue Officer. In mutation proceedings, it is not the practice to record the statements of the persons appearing before the Revenue Officer in the way in which statements of parties or witnesses are usually recorded in civil or other proceedings. What happens is that the Revenue Officer concerned puts questions to the parties or other persons present before him and embodies the answers

elicited in the order recorded by him: A.I.R. 1948 Lah. 113. A statement by a deceased person that there was a marriage between him and a certain woman is admissible in evidence for the purpose of proving the legitimacy of his children under the provisions of S. 32, sub-S. (5) as a statement as to marriage. The doctrine of Mohammedan Law do not exclude evidence of this nature and the Evidence Act applies: I.L.R. 55 All. 139: A.I.R. 1933 All. 329.

Statement of deceased that his consent to adoption was purchased, how far evidence: I.L.R. 36 Mad. 19: 18 I.C. 989; 160 I.C. 332: A.I.R. 1936 Cal. 1. Statement of deceased members of a family regarding family history and seniority of members is admissible: 1 Luck. Cases 97: A.I.R. 1927 Oudh 278. *See* also 1941 Rang.L.R. 445: A.I.R. 1941 Rang. 276 (Statement by a Burman Buddhist that his property would go to a particular person).

Evidence of a mirasi, who is a hereditary family bard, is admissible to prove pedigree: 58 I.A. 188: I.L.R. 12 Lah. 336: A.I.R. 1931 P.C. 45: 60 M.L.J. 583 (P.C.). So also the evidence of a Hardwar purohit: 133 I.C. 874: (1930) 32 Punj.L.R. 696: A.I.R. 1932 Lah. 722. *See* also 176 I.C. 464: (1938) 40 Punj.L.R. 162: A.I.R. 1938 Lah. 303.

Entries in the books of the priests at a place of pilgrimage should be accepted with care. The production of books before the trial Court is essential, and the probative value of such entries is considerably reduced, if they are not placed before the trial Judge: 151 I.C. 622: A.I.R. 1934 Pesh. 78. *See* also I.L.R. 18 Lah. 732: (1937) 39 Punj.L.R. 370: A.I.R. 1937 Lah. 599.

A statement whether an ancestor of the person making the statement was related to him as an elder uncle or a younger uncle or an elder brother or a younger brother or an elder son or a younger son is a statement as to relationship within the meaning of S. 32(5): I.L.R. 20 Luck. 108: 1944 O.W.N. 83: A.I.R. 1944 Oudh 162.

Statement as to commencement of relationship—If, and when can be admitted: (1915-16) 20 Cal.W.N. 122: 21 Cal.L.J. 96; I.L.R. (1941) Lah. 872: A.I.R. 1941 Lah. 73.

'Statement'—Meaning of: (1959) 1 M.L.J. (S.C.) 101: A.I.R. 1959 S.C. 356.

Assertion of private right to negative public right—Statement made by great grandson's son of original grantee in inam proceedings—Question whether grant was to temple or named person—Statement must be given great weight as one made *ante litem motam* although it is in the interest of the maker: A.I.R. 1958 Andh. Pra. 8.

Statements made by a person who is dead as to the name of her mother and other relations (except her husband) are admissible under S. 32(5), in a charge under S. 368, I.P.Code 120 I.C. 81: A.I.R. 1929 Sind 250. A recital in a testator's father's will mentioning the age of the testator is admissible to prove the age of the testator: A.I.R. 1929 Sind 250. *See* also 1936 O.W.N. 1167: A.I.R. 1936 Oudh 179. But *see* 4 Sind L.R. 225: 10 I.C. 967.

A statement by a deceased person as to the existence of relationship, the person having special means of knowledge, and the statement being made before the legitimacy of a certain person was called in question, is admissible in evidence: I.L.R. 3 Luck. 416: A.I.R. 1928 Oudh 233; I.L.R. 3 Luck. 326: A.I.R. 1928 Oudh 397. *See* also A.I.R. 1939 Sind 145.

Statements of deceased relatives, servants and dependants are admissible, for proving family relationship. In every case it is a question of fact if the person who made the statement had special means of knowledge: I.L.R. 55 Mad. 40.

As to relevancy of entries in purohit's books to prove date of death, *see* (1924) 26 Bom.L.R. 563: 46 M.L.J. 541 (P.C.).

Where the plaintiff's own real mother stated that he was her son from her first husband, *held*, no reliance could be placed by him on *kutumb* register and voters' list where he was shown as son of his mother's second husband: 1983 All.W.C. 87 (Rev.).

Statements regarding legitimacy made after dispute about existence of relationship had arisen—Not admissible in evidence under S. 32(5): A.I.R. 1965 Him. Pra. 32.

Where the question was as to whether *'A'* was legally wedded wife of deceased and *'B'* their daughter and there was record of hospital where *'A'* was got admitted at the time of birth of *'B'* wherein deceased was shown as her husband and at the time of admission of *'B'* in school the deceased declared himself as her father and he also got an account opened with a Bank wherein he declared *'B'* as her daughter and himself as father and natural

guardian, *held*, these statements made by the deceased were relevant and material under S. 32(5): A.I.R. 1982 Del. 143: 1981 Rajdhani L.R. 82: I.L.R. (1981) 2 Del. 997.

Adoption—Evidence—Documents, describing plaintiff as adopted son, on dates subsequent to the date his adoption was disputed by other members of the family—Have not much evidentiary value: A.I.R. 1964 Ori. 174.

Relationship by adoption—Factum of adoption—Proof—Statement by adoptive father in an earlier revenue case that plaintiff was his adopted son—Adoptive father subsequently becoming infirm and incapable of giving evidence—Suit by plaintiff against trespassers on property on the basis of adoption—Statement of adoptive father, *held*, admissible to prove factum of adoption: (1963) 2 An.W.R. 307: (1963) 2 An.L.T. 442: A.I.R. 1964 Andh. Pra. 53.

Application and statement before Tahsildar requesting him to enter the name of the person adopted in the revenue accounts in place of applicant—*Held*, certified copies of such documents which were in the custody of Government satisfied requirements of S. 32(5) and documents were admissible in evidence: I.L.R. (1963) Andh. Pra. 1085.

Deed of adoption forming part of transaction of adoption—Statement therein by deceased adoptive mother about relationship by adoption—Relevant under S. 6—Admissibility under S. 32(5): (1961) 63 Bom.L.R. 726: A.I.R. 1962 Bom. 175.

The time of one's birth relates to the commencement of one's relationship by blood and a statement, therefore, of one's age made by a person having special means of knowledge, relates to the existence of such relationship as that referred to in S. 32(5). Hence, entry of the date of birth in a school register made on the statement of the mother of a boy would be admissible under S. 32(5): A.I.R. 1961 Pat. 21.

Sub-S. (5) cannot be construed literally and statement regarding age of person concerned cannot be said to be not one relating to existence of any relationship by blood or marriage or adoption: (1968) 2 M.L.J. (S.C.) 75: (1968) 2 S.C.R. 292: A.I.R. 1968 S.C. 947.

The question of age is a question of blood relationship; thus, a person's age mentioned in recitals, *held*, is admissible under S. 32(5): 1977 W.L.N. (U.C.) 102 (Raj.) (D.B.).

Under S. 32(5) a statement relating to the existence of any relationship (by blood, marriage or adoption) is admissible to prove the facts mentioned in the statement. As the question as to existence of any relationship also includes the question as to the commencement of that relationship, declarations of deceased competent declarants are admissible to prove a person's date of birth and consequently his age, minority or majority or the order in which the members of the family were born. Such declarations are admissible to prove parentage, names of relations or the date of death of a member of the family, as death implies the termination of relationship just as birth implies its commencement: I.L.R. (1946) All. 649: A.I.R. 1947 All. 161.

Fosterage is not relationship within this section. Hearsay evidence of fosterage is not admissible under the section to prove the case of fosterage: 24 I.C. 643. A horoscope prepared *ante litem motam* by an astrologer, dead at the time of suit, whose handwriting had been proved by a near relation of his and who used to prepare horoscopes for others in the village and consequently must be taken to have special means of knowledge of the date of birth of a party is admissible: (1931-32) 36 Cal.W.N. 838: A.I.R. 1933 Cal. 51. *See* also 174 I.C. 756: A.I.R. 1938 Cal. 43.

The petitioner applied for rectification of his age in the Lekhpal's Register on the basis of a horoscope but he did not explain as to why he gave the wrong date of birth at the time of the entry in the register.

Held, that in the circumstances no importance could be attached to the horoscope. It was the duty of the petitioner to explain to the Court why he gave 26th June, 1898 as his date of birth in the first instance. The Court would then have been in a position to compare the basis of his first information with the evidence now produced in favour of correction: 1959 All.W.R. (H.C.) 140.

A horoscope can be used to help in proving the date of birth stated in it only under S. 159 or S. 160 and that of course only if the person who wrote it or a person who read it soon after it was written, is examined as a witness; no part of S. 32 can make any statement of a date in such a document, a relevant fact: A.I.R. 1986 Madh. Pra. 218: 1986 M.P.L.J. 25: (1986) 2 Hindu L.R. 213.

A horoscope which is not spoken to either by its writer or by one who had special means

of knowledge as to its correctness is inadmissible in evidence: I.L.R. 38 Mad. 166: 24 M.L.J. 517; 174 I.C. 756: A.I.R. 1938 Cal. 43. The horoscope by itself has very little evidentiary value. The date of birth as entered in such a document cannot be accepted as true and correct unless the person who prepared it or who caused it to be prepared is able to testify to the correctness of the date of birth as given in that document. In fact, the acceptance of the correctness of the date of birth as given in such a document, depends entirely on the reliability of the evidence of the person who prepared the document or who caused it to be prepared and who may be in a position to swear to the exact date of birth of the person concerned: I.L.R. (1957) Ker. 367: A.I.R. 1957 Ker. 103.

Statement as to child's age by father then deceased—Statement is admissible in evidence: 1966 B.L.J.R. 406: A.I.R. 1967 Pat. 172.

The statement contained in the admission register of the School as to the age of an individual on information supplied to the School authorities by the deceased father of the student is admissible in evidence under S. 32(5): I.L.R. (1964) 14 Raj. 26: A.I.R. 1964 Raj. 126.

The entry of age of a person in the School Register is relevant piece of evidence and slight evidence to the contrary may displace them and in such a case non-production of parents might have serious effect: A.I.R. 1971 P.&H. 65: I.L.R. (1971) 1 Punj. 637.

An entry in the Scholars' Register made by the father, since deceased, as to his son's age would be admissible: 5 O.W.N. 1111: A.I.R. 1929 Oudh 113; 165 I.C. 523: A.I.R. 1936 Oudh 170. So also statements of deceased father as to approximate date of birth of his son: I.L.R. 12 Luck. 606: A.I.R. 1936 Oudh 170.

Where the author of a document, a Teva (Janma Patri) speaking of relationship of a father and a daughter was not traceable and hence could not be brought in witness box to prove the document, and where the witness (the father) was not knowing the language and, therefore, the execution of the document could not be proved, it was held that the document did not support the oral evidence of the witness: 1964 Raj. L.W. 606: (1965) 1 Cr.L.J. 483: I.L.R. (1965) 15 Raj. 6: A.I.R. 1965 Raj. 90.

The words "relating to the existence of any relationship" are wide enough to include statements about the birth and death of relatives which events either commence or terminate the relationship. A statement in a guardianship petition made by a person's aunt that he was born on a certain day and that she was his aunt is admissible in evidence as it relates to the existence of relationship: 21 Cal.L.J. 621: 28 I.C. 595.

A recital of the date of birth in an application for appointment of a guardian is not by itself admissible in evidence upon mere production of the document but may be rendered admissible under certain circumstances. If the conditions, recited in S. 32(5) are satisfied, that is, a person who had made this statement had special means of knowledge and he is now dead or cannot be found such statement in the application will be admissible: A.I.R. 1950 Cal. 533.

Date of birth certificate of guardianship is not admissible: 38 Cal.L.J. 186: A.I.R. 1924 Cal. 526.

It is only a member of the family of the accused who can give evidence about his age. A person wholly disinterested and disconnected with him can have no knowledge of his date of birth. Therefore, it is no reasonable ground to reject the evidence of a family member as being that of an interested witness: 1969 All.Cr.R. 41: 1969 All.W.R. (H.C.) 41.

Statements as to age of adopted son by adoptive mother—Admissibility: I.L.R. 56 All. 766: 1934 All.L.J. 318: A.I.R. 1934 All. 406 (F.B.).

Where the age of a witness is given in the paper containing the deposition of the witness and appears to have been recorded by the presiding officer, there is no reason either to presume that the presiding officer instead of following the usual course of asking age of the witness should have put down the age merely by guesswork. Similarly the entries in the registration endorsements are made by the Sub-Registrar himself and the presumption is that he also would follow the correct course of asking persons their age instead of guessing it: 1938 O.W.N. 1267: A.I.R. 1939 Oudh 17. A statement put in during the inam enquiry by a vakil on behalf of certain inamdars, though not signed by them, may be presumed to be authorised and is admissible as evidence of the genealogical table contained therein: I.L.R. 55 Mad. 40: A.I.R. 1932 Mad. 198: 62 M.L.J. 116.

Where the statement of a witness giving the pedigree is found to be inadmissible under S. 32(5), but he deposes to facts which established such treatment as is contemplated by S. 50, it should be admitted to that extent: 151 I.C. 338: A.I.R. 1934 All. 117. Statement made in a suit in which the issue was the same. *See* I.L.R. 7 Pat. 90: A.I.R. 1928 Pat. 113. Though a person cannot claim a title under an unprobated will, he can rely upon a statement contained therein indicating the relationship of the parties: I.L.R. 7 Pat. 733: A.I.R. 1928 Pat. 459.

Statement of defendant's mother that plaintiff was not her son made after dispute has arisen between parties—Statement would not be admissible under S. 32(5): 1965 All.W.R. (H.C.) 772: 1966 All.L.J. 318.

A member of a family can depose about what he has learnt about his own ancestors, provided it is an expression of his own independent opinion (even if based on hearsay derived from the dead); it is not merely the repetition of hearsay opinion of others, provided the opinion is expressed by conduct; thus, where a member of the family deposed that he had heard the names of his ancestors being mentioned at the *fateha*, *held*, the offering of *fateha* together with mentioning of the ancestors' names is certainly admissible. [A.I.R. 1954 S.C. 601, Rel. on]: A.I.R. 1972 Mad. 228: (1972) 85 Mad.L.W. 225: (1972) 1 M.L.J. 491 (D.B.).

Where in some documents deceased had described the plaintiff as his adopted son, *held*, the statement was admissible under S. 32(5) as the statement related to the existence of relationship between the plaintiff and the deceased by adoption and the deceased had special means of knowledge of knowing it and the statement was made before the question in dispute was raised: A.I.R. 1974 Ori. 120: (1973) 1 Cut.W.R. 809 (D.B.). *See* also A.I.R. 1972 Ori. 148: (1971) 2 Cut.W.R. 814 (D.B.) and A.I.R. 1972 Pat. 325: 1972 B.L.J.R. 842 (D.B.), cited under Note 29, *supra*.

Statements contained in an unregistered will executed subsequent to the arising of dispute, *held*, could not be admitted under S. 32(5): A.I.R. 1973 Andh. Pra. 149: (1972) 2 An.W.R. 346 (D.B.).

In finding out whether a lady is wife of a person now deceased, statement contained in a gift deed executed by such person admitting her to be so, *held*, is admissible under S. 32 unless it is proved to be a document obtained by undue influence: A.I.R. 1971 Ori. 49.

If a statement relates to marriage or adoption between persons deceased and is made in any will or it refers to the affairs of the family and it was made before the question in dispute was raised, *held*, under S. 32(6), it becomes a relevant piece of evidence: (1986) 99 Mad.L.W. 921 (D.B.).

The statement made by the testator in the will about the adoption is certainly a piece of admissible evidence but there is no rule of law or prudence laying down the principle that such a statement must be regarded as conclusive: A.I.R. 1980 S.C. 419: (1980) 1 S.C.C. 349: 1980 U.J. (S.C.) 110.

While evidence of general reputation as proof of relationship is not admissible in evidence, opinion expressed by conduct as to the existence of such relationship is relevant when it is given by any person, who either as a member of the family or otherwise had special means of knowledge of the subject. Such evidence is relevant under sub-S. (5) of S. 32: 1961 Jab.L.J. 238: 1961 M.P.L.J. 253.

S. 60 of the Evidence Act, only bars hearsay evidence given by means of oral evidence. Statements under S. 32 may be brought on record either by means of writing which are documentary evidence, or by means of oral evidence. All that S. 32 requires is that statement sought to be admitted must be of a dead person or of a person otherwise not available as a witness. If such statement falls within S. 32, Cl. (5) it becomes admissible irrespective of, whether the information given by a person, possessing 'special means of knowledge' was based upon hearsay or upon direct personal knowledge. There is no bar in S. 32, Cl. (5) against any particular source of information. The statement would be inadmissible if it was not based on special means of knowledge possessed by the maker or if it was not made before the question in dispute arose. The whole principle underlying exclusion of statements which are not *ante litem motam* is that the presence of a particular dispute may induce them to make tendentious statements intended to support a particular claimant. If a statement is not made when the person making it is likely to suffer from a tendency to support one party or the other, which is presumed to exist after the particular question has become a subject-matter of controversy,

the statement is admissible. This is the principle underlying admissibility of even hearsay statements under S. 32, Cl. (5), provided all the conditions of that provision are satisfied. A letter written by Sanskrit teacher in High School who was specially interested in preparing and keeping genealogical tables of Uniyal Brahmins stating about relationship on basis of information received from the deceased and an agreement between all reversioners of the deceased when there was no dispute regarding descent from common ancestor, the statements in the letter and agreement were held admissible as they were made both *ante litem motam* and by persons who had special means of knowledge though they were not by persons having direct or personal knowledge: 1965 All.W.R. (H.C.) 75.

S. 90 no doubt raises some presumptions about the authorship of a writing if a document is 30 years old and if produced from proper custody but that is only a manner of proof. Whether the statements made in that document would be relevant will depend upon the fulfilment of the conditions laid down in Cl. (5) of S. 32. The writer must be shown to have special means of knowledge about relationship. If it does not become relevant, S. 90 will not be called for: 1964 B.L.J.R. 152: A.I.R. 1964 Pat. 187; (1987) 35 B.L.J.R. 265: 1987 B.B.C.J. 122: 1987 Pat.L.J.R. (N.O.C.) 25.

Where the deceased vendor had described the vendee's husband as son of a particular person in the deed more than 30 years old, *held*, in the absence of any proof that the vendor had any special means of knowledge about the relationship, the statement made in the deed was not admissible under S. 32(5): (1987) 35 B.L.J.R. 265: 1987 B.B.C.J. 122: 1987 Pat.L.J.R. (N.O.C.) 25.

Girdawar Qanungo appointed to hold enquiry about relationship of parties—Report made 70 years back—It can be presumed that he must have died by now—Objection that the maker of the report has not been put in the witness-box nor have the defendants made any effort to prove that he is dead or he cannot be put in the witness-box any other reason is not insurmountable: I.L.R. (1953) Patiala 187: A.I.R. 1954 Pepsu 14.

Ss. 32 and 33—Use of admission of one accused against the other accused—Penal Code (XLV of 1860), Ss. 494 and 495—Proof.

Held: What is required by law, to sustain a conviction under S. 494 of the Indian Penal Code, as laid down by the Supreme Court in (1966) 1 M.L.J. (S.C.) 92: A.I.R. 1965 S.C. 1564, is that the prosecution must establish that the essential ceremonies for a valid marriage were gone through by the accused on a date on which either party to the marriage had a spouse living.

To invoke S. 32(5) the statement should be one which should have been made before the question in dispute was raised. In the present case, the complaint of the appellant was filed in 1963, while the complaint of accused No. 3 was filed in January 1964. Therefore, S. 32(5) is not attracted. It follows that the statement about the existence of relationship by marriage was made after the dispute about the matter had arisen between the parties. As regards the use of the statement under S. 33, one of the essential requirements is, as provided by the second clause of the proviso, that the adverse party in the first proceeding had the right and opportunity to cross-examine. The statement that is sought to be used is the statement of verification. Though accused No. 1 was an accused in that case, he had neither the right nor opportunity to cross-examine the complaint in that case. We are, therefore, of the opinion that even if the verification statement is admitted in evidence, the admissions therein cannot be used against any of the accused in this case: 1967 M.L.J. (Cr.) 526: (1967) 10 Law Rep. 196: (1967) 1 Mys.L.J. 553.

32. Clauses (5) and (6)—Pedigrees.—Genealogical evidence may be of two kinds: firstly, direct that is of the persons who have the knowledge of the facts or acts that constitute the relationship; and secondly, traditional evidence. The latter consists of verbal or written declarations of various kinds mentioned in S. 32(5) and (6) of the Evidence Act. To ensure the testimonial trustworthiness of such statements, it has been made a condition precedent to their acceptance that they must have been made in circumstances ensuring freedom from plan, design, motive or self-interest on the part of the declarants, and they must have been made before the question in dispute was raised. In other words, the declarations must have been made *ante litem motam*: A.I.R. 1952 Ori. 75; A.I.R. 1959 S.C. 914.

A statement in a family pedigree made long before disputes arose by a person who was aware of the relationship of a deceased person would be admissible both under

sub-Ss. (5) and (6) of S. 32, Evidence Act: A.I.R. 1951 Kutch 85.

As ordinarily understood, a pedigree is an ancient family record handed down from generation to generation and added to, as a member of the family dies or is born; but a statement drawn upon a particular occasion, for a specific purpose, by a member of the family, is not a pedigree in the sense in which it is used in S. 32 (6) and has to be treated as a mere declaration made by the person who made or adopted it: 16 Mys.L.J. 137: 43 Mys.H.C.R. 21.

On the question of pedigree, the statements of deceased members of the family made *ante litem motam* before there was anything to throw doubt upon them are evidence to prove pedigree. And such statements by deceased members of the family may be proved not only by showing that they actually made the statements, but by showing that they acted upon them, or assented to them, or did anything that amounted to showing that they recognized them. If any member of the family, as a person who presumably would know all about the family, had stated such and such a pedigree, that evidence would be receivable its weight depending upon other circumstances. A statement made *ante litem motam* as to relationship of persons, by those who have special means of knowledge of such relationship is clearly admissible. Thus, it is not necessary to prove pedigree tables, such as pedigree tables prepared at the time of settlement, by direct testimony of witnesses having personal knowledge: (1961) 63 Punj.L.R. 177: A.I.R. 1961 Punj. 251.

Genealogies admitted or proved to be old and relied on in previous cases are relevant, and sometimes even conclusive; but before accepting or relying on them, the Courts must consider (*a*) their source and dependability; (*b*) their admissibility as evidence; (*c*) their proper use in earlier decisions or judgments relied upon; (*d*) their age; and (*e*) earlier litigations where they were accepted or rejected : A.I.R. 1983 S.C. 684: (1983) 3 S.C.C. 118: (1983) 96 Mad.L.W. 93 (S.N.).

In considering the oral evidence regarding a pedigree, a purely mathematical approach is of no avail where a long line of descent, spreading over a century, is to be proved; obviously witnesses deposing as to genealogy have to depend on their special means of knowledge obtained by them through their ancestors; but there is also a great risk in relying solely on the evidence given from pure memory for, may be, they are interested witnesses having a tendency to draw more from their imagination or turn and twist the facts they may have heard from their ancestors. To appreciate evidence of such witnesses, the following considerations should be kept in mind: (*1*) the relationship or connection, however close it may be, of the witness with the persons whose pedigree is sought to be proved; (2) the nature and character of the special means of knowledge of the witness about the pedigree; (3) the interested nature of the witness; (*4*) the precaution which must be taken to rule out any false statement made by the witness *post litem motam* or which is based not on his special knowledge but is purely based on his imagination; and (5) the evidence of the witness must be substantially corroborated as far as time and memory admit: A.I.R. 1983 S.C. 684: (1983) 3 S.C.C. 118: (1983) 96 Mad.L.W. 93 (S.N.).

Evidence regarding the tribe of a person taken from public records for a series of years and recorded in accordance with the requirements of the law, cannot in a pedigree case be disregarded for the reason that a particular link in the chain is not found, especially when there is no suggestion that entries in the records were false or that there was an existing reason why deliberately false entries should have been made. Statements in public documents are receivable to prove the facts stated on the general grounds that they were made by the authorised agents of the public in the course of official duty: (1960) 62 Punj.L.R. 425.

While proving relationship by genealogical tables, every link in the chain has to be proved; a weak link of relationship would weaken the chain of relationship: A.I.R. 1972 Mad. 228: (1972) 85 Mad.L.W. 225: (1972) 1 M.L.J. 491 (D.B.).

Where genealogy is the very basis of a suit, the interested party would tend to establish its claim by concocting, fabricating or procuring a false genealogy; the Courts should, therefore, try to do justice on the materials on record, uninfluenced by extraneous circumstances: A.I.R. 1983 S.C. 684: (1983) 3 S.C.C. 118: (1983) 96 Mad.L.W. 93 (S.N.).

A woman made a statement on her own behalf and on behalf of her three sons, as to a pedigree. The woman was dead and so was one of the brothers. *Held*, that the statement was as much a statement of the woman and

one of the brothers who were dead, as a statement of brothers who were alive and was admissible under S. 32(5), if it was made *ante litem motam*: A.I.R. 1959 S.C. 914.

It is the duty of the party producing a witness on the question of pedigree to elicit from him, if it is a fact, that he heard from a person deceased so as to fulfil the requirements of S. 32(5): A.I.R. 1934 All. 117: 151 I.C. 338.

A pedigree in a Settlement Court is admissible in evidence upon proof that the person making the statement contained in the pedigree was dead and had special means of knowledge: 10 I.C. 199; 8 I.C. 727. *See* also 25 I.C. 823; 105 I.C. 26: I.L.R. (1941) Lah. 872: A.I.R. 1941 Lah. 73.

A pedigree filed for purposes of preparation of khewat more than 30 years before, when there was no controversy in respect of it, is admissible under S. 32(5) when all the signatories to it are dead: 148 I.C. 1041: A.I.R. 1934 Oudh 210.

Pedigree table relied on in a suit of 1864 was held to be not admissible under S. 32: I.L.R. 15 Lah. 688: A.I.R. 1934 Lah. 283(2).

The foot note of the pedigree table is good evidence to prove the partition: 1976 Punj.L.J. 77.

A pedigree or horoscope certainly fall under S. 32(5) if other conditions are satisfied; they need not have been made at the time of birth so long as they are made prior to the arising of the controversy sought to be resolved through them; however, their evidentiary value is little: A.I.R. 1978 Mad. 42: (1978) 91 Mad.L.W. 4: (1978) 1 M.L.J. 460

Ss. 32(5) and (6), 74—Panda's Bahis and horoscopes—Panda's Bahis and horoscopes are not public documents—Entries in them cannot be regarded to be so conclusive or decisive as to turn scales in favour of one party or the other: A.I.R. 1965 Him. Pra. 32.

Entries in Panda's Register or Note Books are admissible in evidence upon a question of family pedigree but they should be received with caution and subjected to severe scrutiny in order to guard against the possibility of fabrication: 15 I.C. 625. *See* also 178 I.C. 950: 1938 O.W.N. 1267: A.I.R. 1939 Oudh 17. Pandah's Bahis are admissible under S. 32(5) and (6) and S. 90 only if evidence is led to prove the identity, signature and hand-writing of the writer. The mere fact that such Bahi is old is no justification for admitting it either under S. 32(5) and (6) or under S. 90: 190 I.C. 597: A.I.R. 1940 Lah. 245.

Panda's Bahis which have got no index, in which several new pages have been added and in which it is not known as to who the writer of the particular entries was, are not admissible in evidence to prove the relationship of parties: A.I.R. 1952 Punj. 115. A purohit's statement regarding relationship is admissible only if it comes within the four corners of S. 32(5) and (6) or under S. 50 of the Act: 190 I.C. 597: A.I.R. 1940 Lah. 245.

Unless a family pedigree is shown to be a statement or some member of the family or maintained in the families of taluqdars governed by the custom, it is not admissible in evidence either under clause (5) or clause (6) of S. 32. The word 'family pedigree' in the Act should not be understood according to the standard adopted by Courts of law in England in regard to English pedigrees: I.L.R. 20 Luck. 108: A.I.R. 1944 Oudh 162. "Family pedigrees"—Meaning of: 1 Luck. Cases 700. Panjis, which are palm-leaf manuscripts of pedigree systematically maintained by panjiars (or genealogies) in the community of Maithil Brahmins are valuable evidence of pedigree, even though the person producing them is made to prove the handwriting of the same. It is not necessary that the party producing the same should prove by whom the panjis were written, having regard to the admitted system of maintaining panjis in Mithila, where regular records of pedigree of the Maithil Brahmins are maintained by the panjiars or pangikars who are under a duty to keep these records up-to-date, and go on regular tours and make inquiries, for the purpose. A family pedigree may be one kept by a member of the family or some other person on its behalf. Such a pedigree would be admissible in evidence of relationship, and it is not necessary for the purpose of admitting the same in evidence to show who made the statements made in the pedigree. When an ancient and genuine document purporting to be a family pedigree is produced in evidence by a person who states that he received the same from his father or grandfather, but is unable to prove the handwriting, it cannot be rejected as inadmissible, but it is admissible under S. 32(6) of the Evidence Act: I.L.R. 28 Pat. 447: A.I.R. 1951 Pat. 356. Pedigree—

Admissibility. *See* I.L.R. 30 All. 510: 5 All.L.J. 701: (1908-09) 13 Cal.W.N. 1 (P.C.). *See* also I.L.R. 37 All. 600; A.I.R. 1931 Oudh 177: 8 O.W.N. 349.

Endorser dead—Endorsement on document testified—Endorsement corroborating oral evidence—Genuineness of endorsement cannot be doubted: 1964 Raj.L.W. 606: (1965) 1 Cr.L.J. 483: I.L.R. (1965) 15 Raj. 6: A.I.R. 1965 Raj. 90.

The description of the transferee under a document as a son of a particular named person denoting the relationship between the two by birth is not admissible within the meaning of sub-S. (5) of S. 32 of the Evidence Act in absence of any material that either the executant or the scribe of that document had any special means of knowledge about that relationship. So also a statement about the relationship between two persons by another person who is not shown to have any special means of knowledge cannot be relevant: A.I.R. 1964 Pat. 301.

The only evidence to prove relationship which is receivable under the law is of the kind described in Cls. (5), (6) and (7) of Ss. 32 and 50 of the Evidence Act. When neither the parties nor the Court had kept in view the aforesaid provisions while the evidence on the question of relationship was tendered the case was remanded only for proof, in accordance with law, of the relationship: 1962 M.P.L.J. (Notes) 147.

A settlement pedigree can be admitted in evidence either under S. 32(5) or under S. 35. If the settlement pedigree is one signed by the members of the family it would be admissible under S. 32(5) as statements of deceased persons as to relationship since such statements would be considered to be of those persons, having special means of knowledge. It must, however, be proved that statements were made by them at a time when there was no dispute as to the pedigree set up. If, however, the pedigree is not signed by the members of the family, but is prepared by the settlement officer himself after proper enquiry and bears his signature, it can be admitted under S. 35, as an entry in a public record stating a fact in issue and made by a public servant in the discharge of his official duties: I.L.R. 4 Luck. 39: A.I.R. 1929 Oudh 129. *See* also (1937) 2 M.L.J. 772: A.I.R. 1937 P.C. 310; 65 Cal.L.J. 520: (1936-37) 41 Cal.W.N. 1103.

Before a pedigree or table of relationship can be admitted in evidence, it must be shown that it is a statement made by a person having special means of knowledge and made before the question in dispute had arisen: 43 Mys. H.C.R. 21: 16 Mys.L.J. 137.

Though Art. 187 of the Bihar and Orissa Education Code, 1928, has no greater sanction than an administrative order or rule, not being based on any statutory authority it has to be obeyed and followed by all the recognised Schools of the Education Department. The admission register is a public record maintained by the head of the institution, who is to maintain a register as required by the Education Code. The date of birth, as entered in such an official record, therefore, is a relevant fact, as contemplated by S. 35 and the same can be proved by production of that record. The question whether the person on whose statement the entry in the register is made had any special means of knowledge so as to make the entry relevant under S. 32(5), does not affect the admissibility of the entry under S. 35 though it may affect its value: A.I.R. 1961 Pat. 21.

A reversioner whether male or female who consents to an alienation (execution of settlement) by a widow or other limited heir made without legal necessity or to an invalid surrender and transferees from him, are precluded from disputing the validity of the alienation, though he may have received no consideration for his consent. It is immaterial that the alienation is by way of gift. In this case *K* who had not yet become entitled to the property, has lost the right to file a suit and recover possession by joining in the execution of the deed of settlement. Hence, S. 14 of the Hindu Succession Act did not affect the settlement deed. All that S. 32(5) of the Evidence Act states is that when the statement of the deceased person relates to the existence of any relationship by blood, marriage or adoption, the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised, such statement would be a relevant fact. Here, the plaintiff in his evidence had stated that his mother gave him the names in the pedigree and relationship for performing the ceremony. If it was proved independently of the evidence of the plaintiff that the mother of the plaintiff had made such a statement in respect of the relationship that statement may come within the scope of S. 32(5) of the

Evidence Act, but not the evidence of plaintiff as such. Consequently, the plaintiff's evidence being purely hearsay cannot constitute legal evidence: (1968) 81 Mad.L.W. 421: (1968) 2 M.L.J. 487.

The English Law with regard to evidence on matters of pedigree differs in some respects from the Indian Law. Under the Indian Law only such evidence will be admissible which consists of (1) statements by a deceased person regarding relationship who had special means of knowledge when the statements were made before the question in dispute was raised, and (2) like statements in a will or deed relating to the affairs of the family when made before the question in dispute was raised: 110 I.C. 428 (2): A.I.R. 1928 Pat. 539. *See* also 163 I.C. 770: A.I.R. 1936 Oudh 340.

Under the English law admission of hearsay evidence in pedigree cases is confined to the proof of the pedigree and does not apply to proof of the facts which constitute a pedigree, such as birth, death and marriage, when they have to be proved for other purposes. The Indian law as laid down in S. 32 is not so strict: I.L.R. 56 All. 766: 1934 All.L.J. 318: A.I.R. 1934 All. 406 (F.B.).

A pedigree prepared by a Mirasi, who is a hereditary family bard, is admissible under S. 32(5) of the Evidence Act. It is his business to acquaint himself with the relationship of his clients and the value of his evidence is not taken away by the fact that no documents were available to him and he spoke from hearsay: (1948) 50 Punj.L.R. 249: A.I.R. 1944 East Punj. 158.

A statement made by a deceased person in a proceeding for the correction of a pedigree table started not for the purpose of settling any dispute between any of the parties but for the purpose of avoiding a dispute that might arise in future, falls under S. 32 (5), Evidence Act, and is admissible: A.I.R. 1951 Pepsu 81.

Pedigree—Admissibility—Proof of—Person making the statement not known. *See* I.L.R. 37 All. 600. *See* also I.L.R. 30 All. 510 (P.C.): 8 I.C. 728; 21 I.C. 274; (1937) 2 M.L.J. 772 (P.C.).

The statement of a deceased person as to the family pedigree, which is admissible under S. 32, has little evidential value when it relates to matters which occurred before his birth or in early youth, if the source of his information is not disclosed: A.I.R. 1946 P.C. 59: (1946) 2 M.L.J. 98 (P.C.).

As to the presumption of genuineness of pedigree tables, *see* 105 I.C. 81: A.I.R. 1928 Nag. 20. In cases of families of taluqdars governed by the custom of lineal primogeniture importance is attached to seniority. Hence, where members of such a family give pedigrees and indicate the persons by number, it is natural to consider that the numbers are given for the purpose of showing the order in which each of the persons stated therein was born. When genealogical tables are made by members of such a family, there is a natural tendency to proceed from the eldest to the youngest, because such family members by tradition and by necessity develop the habit of stating the names in order of seniority. Where in addition, a number of genealogical tables are dictated by persons who have personal knowledge, at different times and for different purposes, and they consistently mention the names in one unvarying order, that order must be ascribed to a design or a plan to state the name in order of birth: A.I.R. 1944 Oudh 162: I.L.R. 20 Luck. 108. Where there are a number of pedigrees put in by the direct ancestors of parties to the case and they are always the same, a fact which cannot be due to chance; there is a design in the way they are prepared and that design can only have been to give the correct order: 1938 O.W.N. 1267: A.I.R. 1939 Oudh 17.

Where in a reversionary suit the opposing parties produced old pedigrees produced at the time of settlement and they were mutually contradictory. *Held*, that there is no authenticity lent to a pedigree by the mere fact of its being part of a settlement record; it is also incorrect to say that a latter pedigree is to be preferred to an older one. There is often a conflict between several pedigree tables prepared in the various settlements; the proper course to adopt in the case of such a conflict is, therefore, to decide each case on the merits on its own peculiar facts. Where if one of the pedigrees is true the party relying on it would be entitled to a share of properties mutated on the basis of the other pedigree and yet they were not allowed their share the other pedigree was preferred to be correct: A.I.R. 1952 Bilaspur 9.

Where in a contested succession certificate proceedings the question of who was the nearer heir was in dispute between the parties and the applicant gave the pedigree as given

to him by the *kula-guru* of the deceased and the objector caused the pedigree table to be produced into Court by the said *kula-guru* but the said *guru* could not state who wrote it or at whose instance, nor whether any person having special knowledge (dead since) had ever adopted the same. *Held*, that the evidence of the *kula-guru* under the said circumstances is valueless and the document too can have no value as evidence: I.L.R. (1952) Raj. 231: A.I.R. 1952 Raj. 167.

A and *B* were joined with a connecting line in pedigree table though their father's name was not mentioned—*Held*, that clearly showed that they were real brothers: 1990 Punj.L.J. 1.

33. Clause (7).—The object of S. 32(7) of the Evidence Act is that the statement must have been made in relation to a transaction where it was necessary to make the statement. The section aims at keeping out gratutious statements which were either not necessary to be made at the time and on the occasion when they were made or which it was not the duty of the party who made them to make: A.I.R. 1948 Pat. 426. Statements of facts contained in a will executed by a Hindu coparcener to the effect that the properties dealt with in the will are his self-acquired properties are admissible in evidence under S. 32 (7) to prove the character of the properties. But being a self-serving statement it will require and justify scrutiny in the light of other evidence in the case: I.L.R. (1937) Mad. 1012: A.I.R. 1937 Mad. 638. *See* also A.I.R. 1939 Sind 145.

Where the husband in his subsequently executed will had asserted his title to a property purchased from his own funds but in the name of his wife, *held*, S. 32(7) was attracted; the phrase 'which relates to any such transaction' would refer to the sale deed and the word 'statement' to the assertion of his right to the property in his will; the statements in the will fall within the purview of S. 13(*a*); the assertion of the right in the will, being a relevant fact, is admissible in evidence though not conclusive; but its probative value will depend on other facts and circumstances; in the absence of other evidence to the contrary, it would corroborate the plaintiff's testimony even if the will's execution was not proved as required under S. 63(*a*) of the Indian Succession Act: A.I.R. 1975 Mad. 141: (1974) 2 M.L.J. 442: (1974) 87 Mad.L.W. 119 (S.N.) (D.B.).

Ss. 32(7), 13(*a*)—Statement in will executed by deceased that certain property was joint property of three brothers held admissible under S. 32(7) read with S. 13(*a*), the deceased executor being disinterested person being a common aunt of three brothers: I.L.R. (1961) Cut. 635.

The recital in a will that the property dealt thereunder is property of the testator is relevant evidence. [(1916) 36 I.C. 852, Dissent. from; I.L.R. (1928) 56 Cal. 275, Rel. on]: A.I.R. 1950 Mad. 486: (1950) 1 M.L.J. 325.

The recital in the will can be taken as a statement made in the course of transaction under S. 13 of the Act: (1950) 1 M.L.J. 325: A.I.R. 1950 Mad. 486.

Statement by deceased person relating to purchase of shops by him in the name of someone else—*Held*, statement was admissible in evidence since it did contain assertion of right: (1967) 69 Punj.L.R. 119.

Land acquisition—Sales of other properties—Recitals in documents about price paid Evidence if relevant under S. 32: A.I.R. 1969 Ker. 265.

Sub-S. (7) of S. 32 makes relevant statements made in deeds, wills and such other documents which relate to transactions, by which a right or custom in question 'was created, claimed, modified, recognised, asserted or denied' (to add the words of Cl. (*a*) of S. 13). The clause does not allow introduction of parole evidence. Such parole evidence may be relevant under Cl. (5) of S. 32. But Cl. (5) requires that such a statement should have been made before the question in dispute was raised. The statements which were definitely made after the question in dispute in the suit had already arisen are not relevant: 1966 All.L.J. 129: (1965) 1 S.C.W.R. 947: A.I.R. 1965 S.C. 1549.

Words 'any right' in S. 13(*a*) include right to maintenance from joint family property—Statement in a will inconsistent with such right is admissible under S. 32(7): (1968) 1 An. W.R. 429.

The term 'transaction' in the realm of law bears the sense of 'any act affecting legal rights' which is not confined to a dealing with property between two persons *inter vivos* but can, without any strain of language, be taken to include a testamentary dealing with the property: A.I.R. 1950 Mad. 486: (1950) 1 M.L.J. 325.

The recital in a deed of gift to the effect that the executant and her husband have made a

33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.—Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

---

gift of certain properties to the daughters as stridhanam at the time of her marriage and that she was executing a formal conveyance in pursuance of the oral directions of her husband is admissible in proof of the earlier gift in a case covered by S. 32: A.I.R. 1932 Mad. 267: 61 M.L.J. 887. *See* also 162 I.C. 999: A.I.R. 1936 Pat. 315; 1940 Mad.W.N. 983: (1939) 52 Mad.L.W. 440 (Statement as to age of testator written in will by scribe at the instance of persons present at the time—and not by testator—not relevant).

Where the validity of an adoption made by a person who had two aurasa sons affected with leprosy is in question, the statement contained in the registered deed of adoption setting out that fact as the ground for the adoption is admissible in evidence under this clause: I.L.R. 54 Mad. 576: A.I.R. 1931 Mad. 264: 61 M.L.J. 19.

Where the adoption deed as well as the will of the deceased-lady contained statements that she had authority from her husband to adopt and also referred to factum of adoption, *held*, such statements were admissible under S. 13(*a*). As she was dead and her statements were contained in the aforesaid documents, the statements were admissible under S. 32(7): A.I.R. 1975 Ori. 24: I.L.R. (1974) Cut. 364 (D.B.).

Where the only evidence of wife's authority from her husband for executing the registered adoption deed was her own statement in the deed itself and she was dead and not available for cross-examination, *held*, though her statement in the deed was admissible, it was not sufficient to prove her authority: A.I.R. 1981 All. 274.

Where documents, even if relevant, are not sufficient to establish the necessary facts, *held*, their admissibility need not be gone into: (1973) 86 Mad.L.W. 815.

Statements made before the Sub-Registrar by the deceased attestators to a will are admissible under S. 32(7) taken with S. 158, but not under S. 33: 1933 Mad.W.N. 1148. As to statements before Registrar, *see* A.I.R. 1958 Manipur 7.

A statement of a deceased person contained in a deed of family settlement to the effect that after the death of his father a partition was effected amongst the brothers is a statement which is not admissible in evidence under S. 32(7) or under any other provision of the Act to prove separation. The statement is obviously in the interest of the person who made it, and he, if alive, could not have made use of such an admission in his favour, nor could his sons do so: 1936 O.W.N. 1203: A.I.R. 1937 Oudh 133.

S. 48 read with S. 60 requires that the person who holds the opinion should be called as a witness. Statements made by deceased persons after the controversy had arisen and, therefore, inadmissible under S. 32 are not admissible under S. 48 or under S. 32(7). Statements cannot be called instance: I.L.R. 8 Luck. 445: A.I.R. 1933 Oudh 246.

Where the permanent character of a tenancy is in issue and the tenancy would be transferable only if it meant it will require and justify scrutiny in a transfer will be relevant under S. 13(*a*) as a transaction by which such permanent right was asserted. Statements supporting such permanent right made by dead persons in the documents evidencing these transactions would, therefore, be admissible under S. 32(7): I.L.R. (1941) 2 Cal. 44: A.I.R. 1941 Cal. 541.

Section 33—Synopsis.

[*See* also Note 2 under S. 32].

1. Conditions of admissibility of evidence.
2. "Judicial proceedings".
3. "Expense".
4. Evidence taken in proceeding *coram non-judice*.
5. Evidence before Committal Court.
6. Evidence during *ex parte* proceedings.
7. Evidence in cross-case.

Provided—

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

---

8. Expert's evidence in earlier case.
9. Proviso (1).
10. Proviso (2).
11. Proviso (3).
12. *Explanation.*
13. Illustrative cases.

---

1. Conditions of admissibility of evidence.—S. 33 must be very strictly construed: 31 I.C. 354: (1915) 17 Bom.L.R. 590.

Before recourse can be had to S. 33 of the Evidence Act on the ground that a witness is incapable of giving evidence, that fact must be proved and proved strictly. The conditions laid down by the statute must be strictly proved: 51 Mys.H.C.R. 266: 25 Mys.L.J. 69. *See* also 54 Mys.H.C.R. 237; 16 Cut.L.T. 141: A.I.R. 1950 Ori. 202.

Temporary inability of witness is no ground to bring his previous statement on record under S. 33—Conditions of S. 33 must be strictly established: 1953 All.L.J. 318: A.I.R. 1953 All. 660.

When evidence given by a witness in a judicial proceeding is sought to be used under S. 33 in a subsequent judicial proceeding or at a later stage of the same judicial proceeding on the ground that the presence of the witness could not be obtained without an amount of delay or expense which under the circumstances of the case the Court considers to be unreasonable, that fact must be proved strictly: (1949) 51 Punj.L.R. 74: A.I.R. 1949 East Punj. 228.

S. 33 is an exception to the general rule and has, therefore, to be construed strictly and applied sparingly: 1975 Kash.L.J. 391.

S. 33 engrafts an extraordinary exception to the normal rule of examining witnesses embodied in S. 138; the Court must be greatly cautious when S. 33 is invoked; it must insist on direct proof of all the requisite conditions for admitting secondary evidence under the section: 1979 Sikkim L.J. 1: 1979 Cr.L.J. 610.

S. 33 contemplates (*i*) a subsequent judicial proceeding in which that person has to be examined as a witness or (*ii*) a subsequent stage at which that person has to be examined as a witness in the same judicial proceeding, as the case may be: 1984 M.P.L.J. 492 (D.B.). *See* also 1988 C.Cr.L.R. 1 (Cal.).

Applicability—Conditions precedent to. *See* 1972 Ker.L.T. 728: 1972 M.L.J. (Cr.) 680; (1980) 82 Punj.L.R. 427.

S. 33 deals with statement of persons who cannot be called as witnesses; it does not restrict or override the provisions as to admissibility of admissions. [(1968) 70 Punj.L.R. (Del.) 71, Reversed]: A.I.R. 1977 S.C. 409: (1977) 1 S.C.C. 60: (1977) 1 S.C.R. 967.

One of the essential requirements for attracting S. 33 is that "the witness is dead or cannot be found, or is incapable of giving evidence or is kept out of the way by the adverse party, or his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable"; such allegations, like any other fact, have to be proved according to law by the party invoking the section; merely because the accused had not challenged the report of the witness's death does not absolve the prosecution from its duty to prove the death; in criminal trials, the accused cannot waive the proof of death: 1984 M.P.L.J. 492 (D.B.). *See* also (1980) 2 M.P.W.N. 117.

The evidence given in an earlier proceeding is admissible in subsequent proceeding between the same parties, when they agree to that course, irrespective of the fact that whether or not conditions prescribed by S. 33 were satisfied: (1978) 19 Guj.L.R. 980.

It is the duty of the Court to satisfy itself that the presence of the witness cannot be obtained without an amount of delay or expense which it considers unreasonable before the statement of the witness in a previous judicial proceeding can be admitted. The mere statement of the Public Prosecutor to that effect is not sufficient. There must be independent evidence. *Prima facie* the consent of the accused or his Counsel is presumptive evidence of the absence of prejudice: 28 M.L.J. 329; I.L.R. 39 Mad. 449. *See* also A.I.R. 1930 Cal. 756; A.I.R. 1930 Lah. 1041; A.I.R. 1929 Lah. 542 (the consent of the accused's Counsel is immaterial).

A verbal application made by the Public Prosecutor for admission of evidence of a particular witness under S. 33, is not by itself a sufficient ground for admitting that evidence. It is necessary that under S. 33, the Judge must be satisfied that the evidence is admissible on the materials before him, namely, on the ground that the witness whose deposition is attempted to be put in was not or could not be found or was incapable of giving evidence: 10 J.&K. L.R. 1: A.I.R. 1954 J.&K. 19.

S. 33 does not enjoin upon the Court that the statement of a witness examined in the previous proceeding must be believed. This section only deals with relevancy. In other words, it only makes the statement of such a witness admissible in evidence. It would always be open to the person against whom the statement is produced to show that it should not be believed for reasons given by him: 1955 Raj.L.W. 434: A.I.R. 1955 Raj. 179.

Under S. 165 of the Evidence Act a judgment must be based upon facts declared by the Evidence Act to be relevant and to be duly proved. S. 60 provides that oral evidence must, in all cases whatever, be direct. If under the Evidence Act, two alternative modes of giving evidence are permitted and if before the second mode can be utilised, certain conditions must be fulfilled, it is open to the parties to admit that those conditions are fulfilled in which case the second manner of leading evidence is permitted under the Evidence Act. But the parties cannot admit by consent irrelevant evidence as relevant. (S. 5 of the Evidence Act). When the deposition given in a former judicial proceeding by one of the parties himself or that of a witness who is living is sought to be admitted, it is impossible to hold that the conditions stated in S. 33 are fulfilled. Therefore, the Purshis of the parties in such circumstances cannot be treated as an admission of the conditions requisite under S. 33 because on the record itself these conditions are not fulfilled: (1962) 3 Guj.L.R. 418: A.I.R. 1962 Guj. 68.

The provisions of this section are not in any way affected by S. 350 of the Cr.P.Code: I.L.R. 8 Lah. 570: A.I.R. 1927 Lah. 332.

Where evidence of a deceased witness had already been recorded under S. 231 of the Code of Criminal Procedure read with S. 137 of the Evidence Act during the Sessions trial and there was no subsequent stage for giving his evidence, *held*, there could be no occasion to resort to S. 33 for giving relevancy to the evidence already recorded: 1984 M.P.L.J. 492 (D.B.).

Before admitting evidence of witnesses in earlier trial the Court should record its finding of satisfaction that the circumstances of the case did indicate good and lawful grounds and justify its admissibility: 1972 B.L.J.R. 397 (D.B.).

The law is very clear about the deposition of a living witness in a previous litigation; it is not admissible under S. 33; particularly when the witness is not merely alive but is also a party to the subsequent litigation: (1990) 1 Bom.C.R. 677.

The deposition of a witness in a previous suit would not be admissible when he was not called as a witness in the subsequent suit and it was not shown that the person was either dead or otherwise not available: (1972) 1 Mys.L.J. 473 (D.B.).

The statement of a person in a previous suit in respect of a particular property may be used as his admission in a subsequent suit in respect of the same property; he may be confronted with the same: A.I.R. 1982 Cal. 294: (1982) 1 Cal.L.J. 256: (1982) 1 Cal.H.N. 206 (D.B.).

A statement of a witness cannot be admitted in evidence under S. 33 if it has not been proved that he could not be found, or that his presence could not be obtained without an amount of delay or expense which, under the circumstances was unreasonable. Where, all that is proved is that he has gone away to 'Disawar', that alone is not enough to prove that the witness could not be found: A.I.R. 1955 Raj. 45: I.L.R. (1955) Raj. 191. *See* also A.I.R. 1951 Him. Pra. 1: 52 Cr.L.J. 50.

It is well settled that in order that a statement of a witness may be received in evidence under S. 33 of the Evidence Act there must be proof that the witness was either dead or could not be found or incapable of giving evidence, or was being kept back by the other side or lastly that his presence cannot be obtained without an unreasonable delay or expense. Where no summons is taken out to a witness whose place of residence is known, it is not a case where his statement can be brought on record under S. 33, Evidence Act: 1951 All.L.J. 677.

Before the evidence of a person who cannot be found can be admitted under S. 33, there must be a finding by the Court that reasonable exertion had been made to find him. The mere report of the process-server that the witness cannot be traced is insufficient for enabling the Court to base its finding upon such evidence: 1939 M.L.R. 12 (Cr.). *See* also A.I.R. 1953 Madh. Bh. 262: 1954 Cr.L.J. 6.

Before evidence of a witness recorded in a judicial proceeding can be admitted in a subsequent judicial proceeding under S. 33, the Judge must be satisfied by proper materials that the attendance of such witnesses cannot be obtained within reasonable time. The fact that the summons is not served upon a witness particularly when his whereabouts are known is no ground for holding that he is incapable of attending the Court or his attendance cannot be procured. An oral application from the Public Prosecutor for admission of evidence of the witness is not by itself a sufficient ground for admitting that evidence. In civil cases the other side may waive proof of the circumstances under which such evidence may be admitted under S. 33. But in criminal cases the fact that no objection was taken to the reception of such evidence cannot dispense with the necessity of seeing that the requirements of that section are fulfilled. In criminal cases the conditions laid down by S. 33 must be proved by legal evidence before evidence recorded in another judicial proceedings is admitted: 7 Sau.L.R. 45: A.I.R. 1954 Sau. 159.

Service of summons on witness—Witness not found at address—His evidence cannot be brought on record under S. 33 without first making a diligent search for him: 1953 All.L.J. 318: A.I.R. 1953 All. 660.

Summons returned unserved with report that on account of floods, village where witness used to reside could not be approached—Finding cannot be recorded that witness was not found, merely because summons could not be served: (1969) 35 Cut.L.T. 301.

When a witness is incapable of giving evidence, as it was reported that he was too ill to appear in the Court, and when it was also shown that the adverse party in the first proceeding had the right and opportunity to cross-examine, the evidence given in the first proceeding can be accepted and read as evidence in the subsequent proceeding. [A.I.R. 1952 Mad. 165, Foll.; A.I.R. 1964 Lah. 75, Disting.]: 1972 Ker.L.J. 131: 1973 Ker.L.T. 28.

Where evidence of a witness already recorded is sought to be used by the prosecution under S. 33, alleging that the witness is seriously ill and incapable of giving evidence, the prosecution must prove these allegations. No admission by defence Counsel can relieve the prosecution of the duty of satisfying the Court by proper evidence that the witness is seriously ill. The law makes no provision for an admission by Counsel in a criminal case: A.I.R. 1950 Cal. 435: 86 Cal.L.J. 21.

A heavy responsibility is cast upon the Courts of law to satisfy themselves that there exist circumstances which make the previous deposition admissible under the section. The satisfaction of the Court is to be in the form of a proof. In other words, therefore, before a deposition can be admitted under S. 33, all the reasonable steps should be taken to secure the attendance of the witness. If the Court is informed by the Police or through any other agency that a witness has shifted to a particular station an attempt should be made to serve that witness at that station. The whereabouts of a person can be said to be unknown when he cannot be found at all the places which he had, or was informed to have, visited either permanently or for a temporary stay: 1956 Cr.L.J. 1290: A.I.R. 1956 Bhopal 52.

A mere statement of a Police Officer that a witness is a man of another district and cannot be found is not a sufficient ground for the reception of evidence under S. 33: I.L.R. 41 Cal. 601: 26 I.C. 161.

Incapable of giving evidence—Court cannot on its own judgment discharge witness as being incapable of giving evidence—Court fortifying itself by inviting Doctor's opinion in form of report and discharging witness—*Held* that witness was proved to be incapable

of giving evidence: I.L.R. (1952) Raj. 910: A.I.R. 1953 Raj. 66.

Where the interests are identical and the object of litigation is to advance a common claim, evidence given in former judicial proceedings can be received in evidence under this section in a subsequent proceeding even against persons not parties to the previous litigation: 28 M.L.J. 669: 24 I.C. 519. Suit to enforce registration of will—Judgment based on evidence adduced before the registering officer and treated as evidence in the suit by the consent of parties—Judgment sustainable: I.L.R. 43 Mad. 609 (F.B.), Overruling I.L.R. 41 Mad. 731: 34 M.L.J. 526. *See* also 35 M.L.J. 657: I.L.R. 42 Mad. 103.

Where in an earlier proceedings the will was proved by the attesting witness as well as the scribe who were dead and other conditions of S. 33 were satisfied and as declared by the Full Bench in a reference, a decision in the earlier suit under O. 22, R. 5 of the Code of Civil Procedure can never be *res judicata, held*, their evidence recorded in the earlier proceedings is admissible in the subsequent proceedings between the two parties: A.I.R. 1981 P.&H. 130: I.L.R. (1981) 1 P.&H. 259 (F.B.).

Admission under suspicious circumstances at the end of the trial of a case—Written statement not formally amended—Such admission has weak evidentiary value—Title cannot pass by mere admission: 1966 S.C.D. 485: (1966) 1 S.C.A. 35: A.I.R. 1966 S.C. 605.

Admission made by witness in other litigation is admissible against him alone and not against other defendants: (1966) 1 S.C.A. 35: A.I.R. 1966 S.C. 605: 1966 S.C.D. 485.

Plaintiff's documents, which are on the record, can be relied upon by the other side and by consent of both sides this evidence can be let in civil cases, though they might not be strictly admissible in evidence: 21 Cut.L.T. 423: A.I.R. 1955 Ori. 129.

Where the plaintiff's affidavits filed in an earlier suit in the High Court made certain admissions in regard to the ownership of a property as vesting in his brother's wife but in the subsequent suit he averred that she was a mere *benamidar, held*, the affidavits filed in the High Court were admissible in the subsequent suit under S. 33: A.I.R. 1982 Cal. 342: (1982) 1 Cal.L.J. 279: (1981-82) 86 Cal.W.N. 516 (D.B.).

There is nothing in the Evidence Act to show that in a civil case the parties cannot waive the benefits conferred by S. 33 by consent. In a civil case the parties always have the right to settle the matter by agreement just as they please and there being nothing illegal or against public policy in such a course there seems to be no reason why they cannot be permitted to adopt such a course. S. 33 exists for the protection of the parties but if they do not want to avail of that protection then in a civil matter they are certainly entitled to have the matter decided in the manner they agree. Even a guardian *ad litem* of the minor can waive the benefit of S. 33 and to assume that a guardian *ad litem* has no discretion to give up his witness or to admit a thing in a case would create a position which it is impossible to accept: A.I.R. 1957 Tripura 1.

Departmental enquiry—Procedure—Enquiring authority delegating its power to record evidence—Validity: I.L.R. (1963) Raj. 840: A.I.R. 1963 Raj. 203.

Neither the findings nor the evidence in ejectment proceedings in Revenue Court are admissible in a civil suit to recover possession by a person ejected in consequence of the proceedings in the Revenue Court: 106 I.C. 313: A.I.R. 1928 Lah. 43.

Suit for recovery of rent—Plaintiff filing certified copy of a written reply filed by defendant in previous proceedings before Rent Control and Eviction Officer—*Held*, the document was admissible as the former proceedings before the Rent Control and Eviction Officer were between the same parties—No objection also taken against admissibility of documents in the ground of appeal in High Court—*Held*, it could not be allowed to be raised at that stage: 1966 All.W.R.(H.C.) 196: 1966 All.L.J. 285.

Where entries made by a medical witness in a Register were allowed to be proved and admitted in evidence by the Sessions Judge, the reasons given for the absence of the witness being that he had gone to Delhi, but it was not made out that the witness could not come to Bangalore at the place of the trial for giving evidence or that his presence could not have been obtained without any amount of delay or expense, which under the circumstances, would have been unreasonable, *held*, that admission of the evidence relating to entries made by a medical witness was not at all justifiable as the fact of incapacity of the

witness to give evidence was not strictly proved: (1965) 2 Cr.L.J. 288 (Mys.).

Where the evidence of the Deputy Secretary was taken by the High Court itself by way of taking additional evidence which the Court in its Criminal Revisional Jurisdiction, had power to take, by virtue of S. 439, read with S. 428, Cr.P.Code, *held*, that the evidence of the Deputy Secretary was admissible in the criminal case. S. 33, Evidence Act had no relevance as the evidence was taken in the same proceedings: 27 Cut.L.T. 489: (1962) 2 Cr.L.J. 617: A.I.R. 1962 Ori. 197.

In the absence of proof of the circumstances mentioned in the section, the importing in bulk in a civil suit of depositions of witnesses recorded in a criminal trial is a serious irregularity: I.L.R. 39 Bom. 441: 29 M.L.J. 34: 42 I.A. 135 (P.C.). *See* also 106 P.R. 1915: 32 I.C. 18.

Evidence otherwise inadmissible cannot be made admissible by consent of parties: A.I.R. 1942 Mad. 528: (1942) 1 M.L.J. 485.

Consent of parties to treat evidence in another case as evidence in the case—Legality. *See* 1914 Mad.W.N. 931; A.I.R. 1927 Mad. 1107: 104 I.C. 518. *See* also (1912-13) 17 Cal.W.N. 230: 18 I.C. 406.

The fact that the Counsel for accused gave his consent does not make any difference: I.L.R. 10 Lah. 837: A.I.R. 1929 Lah. 542.

It is beyond dispute that under S. 33 of the Evidence Act a previous deposition of a witness cannot be admitted and marked unless the conditions for its admission are strictly made out. To admit such a deposition when the essential conditions are not made out on the ground that the Counsel for the accused waived his objection to it is highly irregular. There can be no waiver on the part of the accused in a criminal case as regards any statutory requirements. Though, no doubt, in a civil proceeding strict proof of the conditions may be waived, in a criminal case there is no room for proof by waiver: 16 Cut.L.T. 227: 52 Cr.L.J. 685: A.I.R. 1951 Ori. 245.

Consent of the Advocate appearing for the accused does not do away with the proof of the fact of the inability of the witness: A.I.R. 1954 Punj. 286: 56 Cr.L.J. 86.

A and *B* were jointly tried. The depositions of witnesses in previous criminal proceedings between *B* and the complainant are not admissible even with the consent of the accused's Counsel: A.I.R. 1928 Rang. 284.

Admission of accused—Effect of: 1966 Cr.L.J. 472: A.I.R. 1966 S.C. 614.

Modification of charge—Accused expressing intention under S. 231, Cr.P.Code to recross-examine prosecution witnesses—Main prosecution witness who had been examined and also cross-examined in detail before original charge was framed not produced for recross-examination on the ground that he could not be procured without unreasonable delay—Magistrate convicting accused—Sessions Judge, in appeal, directing Magistrate to call the witness for cross-examination, or, if he could not be found without delay to certify it—Magistrate failing to secure presence of witness, recording such evidence and certifying it—*Held* that, in the situation, the Sessions Judge was right in taking into consideration the previous evidence of the witness, under S. 33, Evidence Act: (1962) 64 Punj.L.R. 142.

Applicability—Criminal trial—Witness examined at inquiry dying before Sessions trial—Deposition of—Admissibility at Sessions trial—Proof of death of deponent: (1970) 2 S.C.J. 223: 1970 M.L.J. (Cr.) 521.

Evidence taken in trial for dacoity is not admissible in a trial under the Arms Act: 36 I.C. 480: 10 Bur.L.T. 121. As to statement made before enquiring Magistrate, *see* A.I.R. 1926 Pat. 58. *See* also (1933) 35 Punj.L.R. 75: A.I.R. 1934 Lah. 212; A.I.R. 1934 Cal. 766; I.L.R. (1944) 2 Cal. 76; (1946) 1 M.L.J. 125 (P.C.).

R. 142 of the Army Rules, 1954 lays down that proceedings of the Court of Inquiry or confessions, statements or answers to questions in those proceedings are not admissible to a person subject to the Army Act; no evidence regarding those proceedings can be given against such person except on his trial for wilfully giving evidence before the Court of Inquiry; such documents or evidence is, thus, not admissible under S. 33: (1990) 1 Hindu L.R. 639 (P.&H.).

Suit on ordinary original side of Calcutta High Court—Trial remaining incomplete by death of Judge—Both parties inviting Judge to use evidence already recorded—Evidence is admissible: A.I.R. 1970 Cal. 292: (1968-69) 73 Cal.W.N. 877.

Evidence recorded for the purpose of proceedings under the Fugitive Offenders Act is admissible under Ss. 32 and 33 in proceedings

under Penal Code against the same accused: A.I.R. 1928 Sind 161.

2. "Judicial proceedings".—S. 33 deals with the statement of a witness made in a judicial proceeding. *Held*, that the investigation made by the Junior Inspector of Mines was not a judicial proceeding as the other party at that time had no right or opportunity to cross-examine him: 1956 B.L.J.R. 288: A.I.R. 1956 Pat. 299.

Settlement proceedings before a Settlement Deputy Collector are not judicial proceedings and so statements made therein as to the existence of a custom are not admissible in a subsequent civil suit between the parties: I.L.R. 57 All. 588: A.I.R. 1935 All. 187.

The compromise filed cannot be held to be a part of judicial proceedings under S. 33. Thus, the compromise alleged to have been filed in the civil suit does not amount to an admission: 1972 R.D. 190.

S. 33 applies not only to evidence recorded in a previous judicial proceeding but also given before any authority empowered to record evidence; that is the effect of the use of the word 'or' in the very first clause of the section. Thus, a statement recorded by the Registrar under S. 75(4) of the Indian Registration Act is, other conditions under S. 33 being fulfilled, admissible in subsequent proceedings between the same parties as the Registrar is empowered to summon and record evidence of a witness while holding the enquiry: A.I.R. 1983 Andh. Pra. 257: (1982) 2 An.W.R. 212: (1982) 2 A.P.L.J. 25.

3. "Expense".—The 'expense' contemplated by S. 33 is the expense of obtaining the presence of the witness and not the expense that will be incurred for and during the actual examination of the witness in the box: (1948-49) 53 Cal.W.N. 569. The statement of a witness as recorded before the Committing Magistrate cannot be transferred to the Sessions file under S. 33 merely because it would be expensive to retain the assessors until that witness is served with a summons: (1943) 45 Punj.L.R. 151: A.I.R. 1943 Lah. 118.

4. Evidence taken in proceeding *coram non-judice*.—Evidence recorded by Magistrate not authorised—Use of—Permissibility. *See* A.I.R. 1950 Lah. 34. Evidence taken before Magistrate without jurisdiction is inadmissible in a subsequent trial before competent Magistrate: I.L.R. 7 Lah. 396: A.I.R. 1926 Lah. 582.

For attracting S. 33, the previous deposition must be a judicial proceeding; proceedings without jurisdiction are not judicial proceedings and the evidence of witness given in such a proceeding could not be used under S. 33 on a retrial before a competent Court. [A.I.R. 1931 Mad. 575; A.I.R. 1953 Cal. 339; I.L.R. 7 Lah. 396, Rel. on]: 1976 Ker.L.T. 893.

The proceeding before a Magistrate who holds that he has no jurisdiction to try the offence with which the accused is charged, becomes *coram non-judice* from the very outset, or, in other words all evidence recorded by him becomes void *ab initio* for the purposes of S. 33, and therefore, cannot be used under that section on a re-trial before a competent Court: A.I.R. 1949 Him. Pra. 15.

No proceeding is a 'judicial proceeding' within the meaning of the section if it is conducted by a Court which has no jurisdiction to undertake it: I.L.R. 54 Mad. 561: A.I.R. 1931 Mad. 575: 61 M.L.J. 120.

If a Court has no jurisdiction to try a suit then obviously it has no jurisdiction to record statement of witnesses and if any such statement has been recorded it could not be said to be a part of judicial proceeding within the meaning of S. 33 of the Evidence Act. Therefore, the statement of the defendant's mother recorded before the Revenue Court which had no jurisdiction to entertain the suit, would not be admissible in evidence. Even assuming that at the particular time when the statement was recorded the Court had jurisdiction but the Court was subsequently deprived of the jurisdiction which it had and had to return the plaint for presentation to the proper Court, the statement lost its value as a statement made before a competent Court and could not be said to have been made in a proper judicial proceeding within the meaning of S. 33: 1965 All.W.R. (H.C.) 772: 1966 All.L.J. 318.

Where the Munsiff, after the examination of a witness, returned the plaint as subject-matter was above his pecuniary jurisdiction, the evidence of the witness so examined is not admissible in evidence in the subsequent trial before the Sub-Judge even though the witness died in the interval and so could not be examined afresh: I.L.R. 54 Mad. 561: A.I.R. 1931 Mad. 575: 61 M.L.J. 120. Evidence given in judicial proceeding which had taken place without jurisdiction cannot be admitted in evidence under S. 33 of the Evidence Act. A proceeding before a Court which has no

jurisdiction to entertain it is not a 'judicial proceeding' within the meaning of that section. Where the entire trial had been declared by the High Court, to have been without jurisdiction, it cannot be said that the Magistrate who took deposition in such a trial was a Magistrate who was authorised by law to take deposition. [I.L.R. 3 Mad. 48; A.I.R. 1926 Lah. 582 and A.I.R. 1931 Mad. 575, Foll.]: (1951-52) 56 Cal.W.N. 835: A.I.R. 1953 Cal. 339.

Where there is no lack of inherent jurisdiction in the Court and the Court records the evidence of witnesses for the purposes of deciding whether it has or has no local jurisdiction to entertain the suit, and on deciding that it has no territorial jurisdiction returns the plaint for presentation to proper Court, the evidence so recorded is admissible in the proceedings of the latter Court if the witnesses become incapable of giving evidence. The proceedings in the latter Court must be regarded as a later stage of the same judicial proceedings within the meaning of S. 33: I.L.R. (1961) 1 Punj. 508.

5. Evidence before Committal Court.— When the statements of witnesses before the Committing Magistrate are admitted and brought on record before the Sessions Judge, the depositions should be transferred from the file of the Committing Court to that of the Sessions Judge and the depositions should be given an exhibit mark and placed amongst the documents proved and duly exhibited: 1956 Cr.L.J. 1290: A.I.R. 1956 Bhopal 52.

Per *May Oung, J.*—The power given by S. 33 required to be exercised with great care and the Court must insist on strict proof, before holding that the requisite conditions have been satisfied. The Court must also in the judgment or preferably in a separate order, record the reasons for doing so: I.L.R. 1 Rang. 512: A.I.R. 1924 Rang. 209; A.I.R. 1930 Cal. 756. *See* also A.I.R. 1922 Oudh 254; I.L.R. 10 Lah. 837: A.I.R. 1929 Lah. 542. The requirements of S. 33, must be carefully proved before the statement of a witness before the Committing Magistrate can be transferred to the sessions recorded under the section: (1944) 46 Punj.L.R. 69: A.I.R. 1944 Lah. 206. *See* also (1944) 46 Punj.L.R. 135: A.I.R. 1944 Lah. 377.

Before any evidence of a witness is admitted under S. 33, Evidence Act, the Court must give its decision on evidence legally taken and recorded that the witness cannot be traced. Where the statement of a witness before the Committal Court is, therefore, sought to be relied upon at the trial in the Sessions Court, mere statement of the prosecution that the witness cannot be traced is not enough, it must adduce evidence to show that attempts were made to trace the person out. The evidence, reasons and the conditions under which the evidence is admitted under S. 33 of the Evidence Act, must be on record. Admission of evidence under S. 33, without any such evidence is illegal: 1961 M.P.L.J. (Notes) 54.

As the power under S. 33 is an extraordinary one, it is essential that a Judge exercising the same should record his reasons for its exercise either in the judgment or in a separate order. In a murder case the prior deposition of a witness given before the Committing Magistrate was admitted by the Sessions Judge under S. 33 upon the statement made by Circle Inspector of Police who said that the witness was a military man and although a telegram was sent to the Commanding Officer of his unit, the same was replied to the effect that the witness could not be spared due to the exigencies of service. The accused had no Counsel before the Committing Magistrate, nor was the witness cross-examined when he gave the said deposition. The Sessions Judge had not adverted to the section particularly, and given his reasons to admit the previous statement in evidence. The deposition, however, was not the principal evidence and there was ample evidence to prove the guilt of the accused, *held*, that though the so-called reasons given by the Sessions Judge were not enough to satisfy the requirements of S. 33, conviction under S. 302, Penal Code, was to be affirmed as the other evidence was sufficient: I.L.R. (1962) 1 Ker. 486: 1962 Ker.L.T. 873: A.I.R. 1962 Ker. 320.

In criminal cases, particularly where a man is being tried for his life and the evidence sought to be accepted is of signal importance, the Court must insist on strict proof before holding that the conditions required by S. 33, Evidence Act for admitting former deposition have been satisfied. It is an elementary right of an accused person that a witness who is to testify against him should give evidence before the Court trying him and, thus, afford an opportunity to the Court to see the witness and observe his demeanour and form a better opinion as to his reliability than is possible from reading his statement. It is only in exceptional circumstances, which should be strictly

proved to exist that a previous deposition of a witness should be transferred in a serious case like murder. The prosecution should not easily be allowed to escape detailed cross-examination of its witnesses at the trial by taking up the plea of their non-availability and, thus, deprive the accused of the valuable right of being tried on *viva voce* testimony: I.L.R. (1953) Patiala 435: A.I.R. 1954 Pepsu 69.

Important witnesses in serious cases of murder or attempt to murder should be examined before the Sessions Judge so that he may be able to form his own opinion about their veracity by observing their behaviour in the witness-box. Courts should be loth to admit evidence under S. 33 by observing only formalities of law and the importance of examining witnesses before the Sessions Judge should, under no circumstances, be underrated. It is, however, difficult to lay down a hard and inflexible rule which should govern all cases in all matters. It is primarily for the Sessions Judge to satisfy himself that there are good and lawful grounds for admitting the evidence of witnesses examined earlier, under S. 33. Mere expense should not ordinarily be taken as a ground for refusing to summon a witness in a Sessions case. Consent of the accused to the admission of the evidence under S. 33 has practically no meaning. Consent given by an accused would not relieve the Court of the duty of examining the circumstances and coming to a decision as to whether or not the evidence was legally admissible. Consent can, however, lead to some inference on a point of fact, such as that a certain witness is seriously ill, or that the whereabouts of some witnesses are not known. (Statements held admitted on good grounds): 1954 Cr.L.J. 68: A.I.R. 1954 All. 59.

Where the Sessions Judge allowed the evidence of absent witnesses, already given in the Committing Magistrate's Court, to be tendered under S. 33 merely by acting on the Public Prosecutor's request without complying with the requisite formality and without satisfying himself that the presence of those witnesses could not be procured without an unreasonable delay or expense:

Held, that the evidence was improperly admitted, as merely acting on the statement of the Public Prosecutor was not sufficient. Under the Evidence Act the Judge has to satisfy himself that the presence of the witness cannot be obtained without an amount of delay or expense which he considers to be unreasonable. There must be independent evidence before him before he can exercise the powers given to him under the Evidence Act. Further, the Appellate Court may not be prepared to act upon representations which have satisfied the Trial Judge. It is, therefore, incumbent on the lower Court to have on record some legal evidence on which he could act. S. 33 sanctions admission of the evidence of an absent witness only on certain specified grounds. It is well established that before such evidence is let in, the Court must arrive at a finding, on evidence formally and regularly taken and recorded, that one or the other of the grounds specified in the section exists: 1964 B.L.J.R. 850.

S. 33 sanctions the admission of the evidence of an absent witness only on certain specified grounds. It is well established that before such evidence is let in, the Court must arrive at a finding, on evidence formally and regularly taken and recorded, that one or other of the grounds specified in the section exists. Accordingly, the admission in evidence of the deposition of a witness before a Committing Magistrate without such a finding is illegal, when such witness is not called to give evidence at the trial before the Sessions Judge: I.L.R. (1944) 2 Cal. 76: A.I.R. 1945 Cal. 137.

A Court making use of the provisions of S. 33 must place on record its satisfaction with the conditions laid down in that section which justify the admission of evidence taken before the Committing Magistrate. A bare statement that the witnesses whose evidence was put in under the section are Police Officers who have opted for India and their whereabouts are not known, cannot be regarded as sufficient: 1 D.R. 98.

The transfer of the statement of a witness as recorded by the Committing Magistrate to the Sessions record under S. 33 without examining him, is improper when summons was not issued for his attendance in good time as it is impossible in such circumstances to say that the witness could not be found or his presence could not be obtained without delay or expense: (1943) 45 Punj.L.R. 82: A.I.R. 1943 Lah. 89.

Where it is desired to have recourse to S. 33 on the ground that a witness is incapable of giving evidence that fact must be proved, and proved strictly. It cannot be laid down that in every case there must be evidence of a medical

man, where excuse is sought on the ground of physical incapacity. There may be many cases in which the facts are such that the incapacity can be proved by a lay witness. But the evidence of a Police Officer who served the witness with a summons thirteen days before the trial, that he found that the witness was ill is not sufficient to prove that the witness was incapable of giving evidence on the day of the trial as the officer was not a proper person to prove from what disease the witness was suffering. Great care must be exercised before admitting a statement made before the Committing Magistrate at the Sessions trial. In very many of these cases, the accused is not represented at that stage; so, while he has the opportunity to cross-examine, it is not often that this would be effectively done: 72 I.A. 270: A.I.R. 1946 P.C. 1: (1946) 1 M.L.J. 125 (P.C.).

Before the deposition of a witness in the Committing Magistrate's Court is treated as evidence at the trial, the reason for such a course being adopted should be strictly proved, and unless the Court is satisfied about it, it should not be allowed. In the absence of proper explanation for not securing the attendance of the witness at the trial it would not be proper to treat his deposition in the Committing Magistrate's Court as evidence at the trial: 54 Mys.H.C.R. 237.

The principal evidence against the accused in a Sessions trial on a charge of murder was the deposition of a witness in the Court of the Committing Magistrate. The deposition was admitted as direct evidence at the Sessions trial under S. 33 on the ground that the witness could not be served as he had joined the army and his address was not known. There was no evidence as to what steps had been taken by the prosecution to discover his address. Subsequently his address was also ascertained. *Held*, that in the circumstances of the case the Sessions Judge was not justified in applying S. 33 and that any delay or expense which might be involved in the case could not be said to be unreasonable having regard to the public interests involved in examining in the box and in the presence of the trial Judge and the assessors, the principal witness in so serious a charge as murder: I.L.R. (1944) Mad. 651: A.I.R. 1944 Mad. 319: (1944) 1 M.L.J. 137.

When evidence given by a witness in the Court of the Committing Magistrate is sought to be transferred under S. 33, Evidence Act to the Sessions record on the ground that the witness is incapable of giving the evidence that fact must be strictly proved. This proof must be all the more stringent where the witness was not cross-examined in the Committing Magistrate's Court by reason of the accused not having been represented by Counsel. The fact that the Counsel for the accused consented to the evidence of the witness being read under S. 33 of the Evidence Act in the Sessions Court, does not do away with the necessity of the Court being satisfied by proof that the witness was incapable of giving evidence: 5 D.R. 1 (F.B.).

Where in view of the fact that sole eye-witness could not be produced in the trial Court as his whereabouts were not known, his statement made in the Committal Court was brought on the record and he was convicted under S. 302, Indian Penal Code, *held*, when later on that witness had been traced and was available for recording her evidence, the proper course was to order re-trial: 1978 Cr.L.R. 521 (Mah.).

If the Public Prosecutor gives up a witness examined before the Committing Magistrate but the statement of that witness is transferred to the Sessions record at the request of the defence Counsel, that statement should be brought on the record not as that of a prosecution witness but as that of a defence witness or Court witness: (1944) 46 Punj.L.R. 69: A.I.R. 1944 Lah. 206.

The statement of a Doctor made before the Committing Magistrate was brought on record before the Sessions Judge under S. 33. At the trial the prosecution produced a Food Constable who deposed that he took the summons for this witness to the hospital where he was previously employed and the Superintendent of the hospital made a report that he was no longer in service and it was not known where he was. This witness also stated that 'from the inquiries made by me. I learnt that his whereabouts are not known'. In cross-examination he again stated that he made enquiries but he could not discover the whereabouts of this witness. After this statement, the Public Prosecutor made a statement that the Doctor's whereabouts were not known and prayed that his statement be transferred under S. 33 of the Evidence Act on the ground that there was no likelihood of the witness being available without unreasonable delay and expense and no objection was shown to have been taken by

the defence at that stage. Thereupon the Trial Judge ordered the statement to be transferred under S. 33 of the Evidence Act. *Held*, that though the Judge might have been well advised to give fuller reasons for making the order transferring the statement, it was clear that he transferred it on the ground of unreasonable delay and expense and that there was no infirmity in this order of transfer: A.I.R. 1957 S.C. 904: 1958 M.L.J. (Cr.) 38 (S.C.).

When the law empowers a Magistrate to convert a trial into an enquiry on his realisation that the case is triable exclusively by the Court of Sessions without rendering the proceeding in the trial illegal, that trial will not become illegal when the Sessions Judge on appeal came to an identical conclusion that the case was exclusively triable by it and should be committed. It is, therefore, clear that the deposition of the dead witness can be brought on record under S. 33 of the Evidence Act: 1972 Cr.L.J. 1223 (All.).

Where the evidence of a witness because of his death could not be recorded in the Sessions Court, his evidence recorded in the Committing Court, *held*, could be used as evidence in the Sessions Court not under S. 288 of the Code of Criminal Procedure as the High Court erroneously considered but under S. 33: A.I.R. 1974 S.C. 1797: (1973) 2 S.C.C. 458: 1974 Cr.L.J. 1265.

Witness available before Magistrate—Whereabouts not known at the Sessions trial—Evidence tendered before Magistrate can be taken into account: (1928-29) 33 Cal.W.N. 918: A.I.R. 1929 Cal. 765; (1930-31) 35 Cal.W.N. 143: A.I.R. 1931 Cal. 473 (witness absconding). *See* also (1943) 45 Punj.L.R. 82: A.I.R. 1943 Lah. 89.

Where in a Sessions trial under Ss. 366 and 367, Penal Code the only ground for admitting evidence under S. 33, Evidence Act was that the girls and their mother were not traceable and the Court while allowing the application advanced new grounds of unreasonable delay and expense in producing those witnesses, *held*, that the order admitting the evidence was not justified: 1959 Cr.L.J. 84: A.I.R. 1959 Raj. 21.

Applicability—Witness examined under S. 202, Cr.P.Code by Committing Magistrate—Cross-examination of such witness by accused not being possible at that stage of proceedings, his evidence should not be admitted under S. 33 by trial Judge: 1969 Cr.L.J. 1203: A.I.R. 1969 All. 489.

Applicability—Witness dying before Sessions trial began—*Held*, his evidence in Committing Court was admissible under S. 33: 35 Cut.L.T. 152: 1970 Cr.L.J. 1322.

Under S. 33 it is discretionary with the Sessions Judge to admit the statement of a witness who had been examined before the Committing Magistrate under S. 252, Cr.P.Code and the High Court cannot, and will not, interfere with the exercise of the discretion by him unless it was exercised arbitrarily or against the well established principles of law: 1956 Cr.L.J. 841: A.I.R. 1956 All. 385.

The depositions before the Magistrate of witnesses who are nomads and who could not be traced can on that ground be taken into evidence under S. 33 at the trial in the Sessions Court: A.I.R. 1950 Kutch 29 . A witness's evidence which has been recorded in committal proceedings cannot be admitted at the Sessions trial under S. 33 if the same witness has been partly examined in the Court of Sessions. Such evidence can be admitted only under the provisions of S. 288, Cr.P.Code: A.I.R. 1950 Assam 75.

Where a prosecution witness examined before the Committing Magistrate was not cross-examined by the accused's Counsel who preferred to cross-examine the witness at the Sessions trial and the witness, despite all reasonable steps including in the High Court to serve him during the hearing of appeal, could not be found, *held*, his statement before the Committing Magistrate had become admissible under S. 33 for being read as evidence in the Sessions Court: A.I.R. 1974 S.C. 1723: 1974 Cr.L.J. 1171.

Reservation by Committing Magistrate of cross-examination of witness *suo motu*—Evidence cannot be admitted in Sessions Court: A.I.R. 1930 Sind 54: 120 I.C. 534.

Where a witness examined in the Committing Court cannot be traced and in spite of the best efforts of the Police he could not be served with the summons to appear in the Sessions Court, that Court would be justified in admitting into evidence his previous statement under S. 33 of the Evidence Act: A.I.R. 1951 Ajmer 25; 1981 B.L.J.R. 50: 1981 B.L.J. (Rep.) 279 (D.B.).

The deposition recorded by the Committing Magistrate of a prosecution witness, stated to have died prior to the trial in the Sessions Court, but whose death is not proved, is not admissible in evidence under S. 33: (1963) 1 Cr.L.J. 385: (1962) 64 Punj.L.R. 583.

Witness examined and cross-examined in Committing Court, suffering from paralysis at the time of Sessions trial—Sessions Judge is justified in admitting his evidence under S. 33—S. 33 applies to the case as the witness is unable to give evidence: 30 Cut.L.T. 43.

6. Evidence during *ex parte* proceedings.—Where an *ex parte* decree was set aside, the proceedings taken including evidence recorded during the period the defendant remained *ex parte*, *held*, become *non est*; by reason and justice, they do not bind the defendant unless some law specifically permit it; as the testimony recorded during *ex parte* proceedings did not satisfy the requirements of S. 33, they remain inadmissible and cannot be read in evidence. [A.I.R. 1956 Mad. 633, Dissent. from]: A.I.R. 1974 Andh. Pra. 1: I.L.R. (1972) Andh. Pra. 421 (F.B.).

When the witnesses previously examined at the time of passing an *ex parte* decree for the first time have not again appeared before the Court and their evidence recorded, the Court cannot rely on their evidence recorded originally and pass an *ex parte* decree for the second time. [I.L.R. (1972) Andh. Pra. 421 (F.B.), Applied; 1974 A.P.L.J. (S.N.) 2, Rel. on]: (1975) 1 A.P.L.J. 200.

O. 9, R. 13 of the Code of Civil Procedure empowers the Court to set aside an *ex parte* decree on the necessary conditions being satisfied; the power of the Court is to set aside the *ex parte* decree which does not mean striking off from record the evidence already recorded; the legal effect of setting aside the decree is to relegate the defendant to the original position when the suit was heard *ex parte*, that is to do what he could have done if he was then present; the manifest object is to ensure that the defendant does not suffer any prejudice; that object can be achieved by affording him an opportunity to cross-examine the witnesses examined-in-chief *ex parte*; similarly, if an inadmissible document was exhibited *ex parte*, the defendant may get it de-exhibited; there is no warrant for the view that on *ex parte* decree being set aside the *ex parte* evidence becomes *non est* or non-existing in the eye of law. [A.I.R. 1974 Andh. Pra. 1 (F.B.) and A.I.R. 1962 All. 381, Dissent. from]: A.I.R. 1980 Guj. 51: (1980) 21 Guj.L.R. 141 (F.B.).

Where the defendants were proceeded against *ex parte* and after the order proceeding *ex parte* was set-aside, they again defaulted and had to be proceeded against *ex parte*, *held*, defendants could not be allowed to agitate subsequently that Judge while passing the preliminary decree relied on evidence of plaintiff recorded in the absence of defendant. [A.I.R. 1980 Guj. 51, Foll.]: A.I.R. 1995 Del. 22.

S. 33 stipulates in the proviso that (*1*) the earlier proceedings should have been between the same parties or their predecessors-in-interest; (2) the other party in the earlier proceedings had the right and opportunity to cross-examine the other witness; and (*3*) the question in issue between the two proceedings was substantially the same. Thus, where a will proved by an attesting witness in an earlier suit decided *ex parte* was sought to be proved in the subsequent proceedings which were not between the same parties nor was it shown that the other party in the earlier proceedings had any opportunity to cross-examine that attesting witness, *held*, the evidence recorded in the earlier proceedings was not admissible in the subsequent proceedings. [1976 Punj.L.J. 224, Affirmed]: A.I.R. 1980 P.&H. 122: 1980 Rev.L.R. 80 (D.B.).

7. Evidence in cross-case.—It is elementary that each case—even though it might be what is loosely called a cross-case—must be decided on evidence recorded in it and not on evidence recorded in another case; this cannot be done even in civil cases unless agreed to by the parties; much more so in criminal cases where it cannot be done even with the accused's consent. The High Court was, thus, clearly in error in deciding the appeal in taking into consideration the evidence recorded in the other cross-case; the High Court judgment set aside: A.I.R. 1975 S.C. 149: 1975 Cr.L.J. 236: (1975) 3 S.C.C. 529.

8. Expert's evidence in earlier case.—To invoke S. 33 to admit evidence of handwriting expert recorded earlier by the Rent Controller in the subsequent judicial proceedings before the same parties, the Court must first be satisfied that the presence of the expert could not be obtained without such delay or expense which in the circumstances the Court considers unreasonable; thus, where the Court admitted such evidence to avoid unnecessary delay and expense without any data or evidence placed on record by the party seeking admission of the expert's evidence, *held*, the admission of evidence being without the necessary supporting evidence, the Court's order is liable to be set aside in revision: A.I.R. 1976 Andh. Pra. 270: (1976) 1 An.W.R. 169.

9. Proviso (1).—A certified copy of the deposition of one of the brothers, regarding separation of some of them, as a witness in a previous mutation case where all the present defendants were also parties, though inadmissible on account of the non-fulfilment of the conditions of S. 32, may be admissible under S. 33. The deponent having died and the other conditions under the section having been fulfilled, the document cannot be taken to be inadmissible simply because the deponent and the present defendants were not arrayed as parties opposed to each other. In such a case the conditions of S. 33 will be deemed to have been fulfilled when all the present parties were also parties in the previous case and further the self same question of jointness and separation was required to be determined in the previous case where the deposition was taken and the witness was also cross-examined: I.L.R. (1954) Cut. 151: A.I.R. 1954 Ori. 176.

A statement of a deceased in a former judicial proceeding is not relevant in subsequent judicial proceeding when both the proceedings are not between the same parties: (1980) 17 Del.L.T. 225; 1982 M.P.W.N. 60.

First proviso to S. 33 covers not only cases of privity in estate and succession of title, but also cases where both the following conditions exist, *viz.*, (*1*) the interest of the relevant party to the second proceeding in the subject-matter of the first proceeding is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding, and (2) the interest of both in the answer to be given to the particular question in issue in the first proceeding is identical: 1955 An.W.R. 87; A.I.R. 1958 Andh. Pra. 22 (It is not necessary that all the questions in issue in the two proceedings should be substantially the same).

Deposition given in previous criminal trial, *held*, cannot be used in subsequent trial of absconding accused when he was not a party to previous trial: 1975 Cr.L.J. 285: (1975) 1 Karn.L.J. 193: 1975 M.L.J. (Cr.) 132: I.L.R. (1975) Karn. 355 (D.B.).

'Representatives-in-interest'.—Meaning of: 60 I.A. 336: A.I.R. 1933 P.C. 202: 65 M.L.J. 479 (P.C.). The term 'representatives-in-interest' includes persons having the same interest in the subject-matter of the litigation and comprises all persons on whose behalf, though not in their names or as representing them, the previous litigation was carried on: 16 Mys.L.J. 77: 43 Mys.H.C.R. 113.

Representatives-in-interest are persons who derive their title through or claim under them, or shortly, are their privies. S. 33 cannot be applied without any reference to the subject-matter of the two suits. The interests involved in each case must be the same or similar: 102 I.C. 713: A.I.R. 1927 Mad. 733; such as partners and joint contractors: I.L.R. 5 Pat. 777: A.I.R. 1927 Pat. 61.

The phrase may not for all purposes be synonymous with the expression 'persons claiming under' in S. 11 of the Civil Procedure Code: I.L.R. 55 Mad. 40: A.I.R. 1932 Mad. 198: 62 M.L.J. 116.

The admissibility of the evidence in favour of a party must be tested by its admissibility if tendered against him. It really does not matter by whom the evidence is tendered, the question in each case being whether a party's opposite number in the earlier proceeding can be said to be his representative-in-interest: A.I.R. 1958 Andh. Pra. 22.

In seeing whether a person is the legal representative under S. 33, regard must be had to the state of affairs when the evidence is sought to be admitted. Where the defendant in a subsequent suit was the natural son of the plaintiff in the previous suit and claimed in the subsequent suit not as the natural son of the plaintiff but as adopted son of a third person, *held*, the depositions in the previous suits were not admissible: I.L.R. 51 Mad. 893: A.I.R. 1928 Mad. 994: 55 M.L.J. 894 (F.B.).

10. Proviso (2).—The second proviso to S. 33 protects the right of the 'adverse party in the first proceeding' and not the right of the person who produces and examines the witness. The object of this proviso seems to protect those parties against whom the previous proceedings might have gone *ex parte*, or those who could have no right or opportunity to cross-examine them for some reasons. It would also protect co-plaintiffs or co-defendants who may not have the right or opportunity to cross-examine the witness produced from their own side: 1955 Raj.L.W. 434: A.I.R. 1955 Raj. 179.

The 'adverse party' referred to in the proviso is none other than the party against whom the evidence is sought to be adduced. If the adverse party referred to in the proviso is taken with reference to the witness examined in the previous proceeding, the effect of proviso itself is rendered otiose and proviso may not have any meaningful application to the section. Thus, where the evidence of the plaintiff's witness in the first proceeding is sought to be used against the plaintiff, *held*, the plaintiff is the adverse party and when he had no right or opportunity to cross-examine that witness, his evidence cannot be used under S. 33: (1995) 1 Karn.L.J. 1 (D.B.).

The expression 'adverse party' in S. 33 is used to distinguish that party from the party who calls the witness; the distinction has nothing to do with the nature of the evidence given by the witness. A party calling a witness does not become the 'adverse party' because the witness gives evidence which favours the adverse party or is hostile to the party calling the witness. 'Adverse party' in the proviso can only refer to the party who was the adverse party at the time when the deposition was recorded in the first proceeding: 49 Cr.L.J. 558: A.I.R. 1948 Sind 122.

A deposition on which there was no opportunity at all to cross-examine is not admissible: 39 Mad.L.W. 34: A.I.R. 1934 Mad. 100. But S. 33 does not require that the adverse party should have actually exercised his right to cross-examine the witness: I.L.R. 13 Pat. 735: 151 I.C. 683: A.I.R. 1934 Pat. 413.

Under S. 33 one of the conditions to be satisfied is 'that the adverse party in the first proceeding had the right and opportunity to cross-examine'. Two things must co-exist: right and opportunity. Whether the accused had the opportunity to exercise his right to cross-examine is a question of fact to be determined in each case. The condition will not be fulfilled merely because the accused was physically present in Police custody at the time of the examination of a witness. The object of the section is to afford a genuine opportunity which would be effectively availed of and not for show only: A.I.R. 1946 Lah. 275: (1946) 48 Punj.L.R. 39; I.L.R. (1943) 1 Cal. 405: A.I.R. 1943 Cal. 222.

What is contemplated by S. 33 of the Evidence Act is an opportunity to cross-examine the witness and not an effective exercise of that right. All that the Court would have to do in such cases is to exercise caution before admitting such a statement. It could not be postulated, that in every case where the accused is not represented by Counsel and could not submit the witness to a searching cross-examination, he had no opportunity to cross-examine and therefore, that the evidence of the witness should not be admitted under S. 33 of the Evidence Act. In the circumstances of the case, it was held that the deposition in the preliminary enquiry of the son of the deceased who was an eye-witness to the murder of his parents was properly admitted in evidence in the Sessions Court as the witness had disappeared and could not be traced and that such evidence could safely form the basis of the conviction of the accused: (1951) 1 M.L.J. 478: A.I.R. 1952 Mad. 165: 53 Cr.L.J. 344.

The true reading of S. 33 is that the adverse party in the first proceeding had both the right and the opportunity of cross-examining and not 'the right or opportunity to cross-examine': 57 I.A. 14: I.L.R. 52 All. 1: 58 M.L.J. 446: A.I.R. 1930 P.C. 79 (P.C.). *See* also (1975) 1 Karn.L.J. 193.

One of the requirements for application of S. 33 is that the adverse party in a proceeding should have the right and opportunity to cross-examine. It does not say that the opportunity should have been availed of or the right should have been exercised. If opportunity for cross-examination was offered, but the party did not avail himself of the right and opportunity, the deposition would be clearly admissible. Once the evidence is admissible what weight should be attached to that evidence is a different matter and must necessarily depend upon other facts and circumstances of the case. To say that the evidence of such a witness, who was not cross-examined in spite of the right and opportunity being there, should not be accepted without due corroboration, is to import into S. 33 a limitation which is not there.

There cannot be any objection to act on evidence of such witness alone, but when the accused persons are being tried on a serious charge like murder, the Court should seek for some corroboration to the evidence given by such single eye-witness: A.I.R. 1970 Ori. 100: 36 Cut.L.T. 823 (D.B.).

The word 'right' used in S. 33 means a right conferred by a statutory provision such as that contained in S. 138, Evidence Act and not a right accruing from mere permission granted by the Court. If a Court permits an accused to cross-examine a witness, it is nothing but giving him an opportunity of cross-examining him and S. 33 expressly requires a right in addition to an opportunity: 1956 Cr.L.J. 841: A.I.R. 1956 All. 385.

Opportunity to cross-examine must be full: 1984 M.P.L.J. 492 (D.B.).

Where in a criminal case, apart from the right of the accused to cross-examine a prosecution witness at a particular stage, he was in fact allowed to and in fact did, cross-examine that witness, S. 33 of the Evidence Act would apply to the statement of that witness and it can be brought on record when that witness is not available: A.I.R. 1950 All. 167: 1950 All.L.J. 155.

Affidavit of person who died subsequently and who was not subjected to cross-examination is not admissible: A.I.R. 1927 Mad. 507: 52 M.L.J. 477.

In a warrant case before a charge is framed the accused has certainly the opportunity to

cross-examine the witnesses, but at that stage, he has no right to cross-examine them within the meaning of the proviso to S. 33, Evidence Act: 86 Cal.L.J. 21: A.I.R. 1950 Cal. 435.

In a warrant case instituted otherwise than on a Police report, the accused has the statutory right to cross-examine the prosecution witness before the charge; the Magistrate cannot deny this right to the accused; it amounts to the right and opportunity of cross-examination envisaged in S. 33; whether or not the accused exercised that right or availed of that opportunity, the evidence of the witness before charge is admissible under that section: 1979 Sikkim L.J. 1: 1979 Cr.L.J. 610; 1981 Cr.L.J. 856 (Sikkim); 1989 C.Cr.L.R. 68 (Cal.).

In a warrant case until the stage provided for in S. 256 is reached the accused has no right to cross-examine and consequently the evidence of a witness given before framing the charge is not admissible: A.I.R. 1929 Cal. 822.

In order that the evidence of a witness in the earlier proceeding be admissible under S. 33, Evidence Act, one of the conditions is that the opposite party should have had right and opportunity to cross-examine him. On a consideration of the provisions of Chapters XVIII, XX, XXI and XXIII, it is clear that in a warrant case an accused has no right to cross-examine before charge. His right to cross-examine prosecution witnesses arises after charge. Where in a prosecution under S. 420, Penal Code, the complainant dies before charge after his examination but without being cross-examined it cannot be said that the opposite party had the right to cross-examine the complainant before he died. Therefore, the complainant's evidence given before charge is admissible under S. 33, Evidence Act: (1952-53) 57 Cal.W.N. 954: A.I.R. 1954 Cal. 395. But *see infra*. An accused has a right of cross-examination even when the witnesses have been examined under S. 252, Cr.P.Code, and it cannot be held that the accused has no right to cross-examine till the stage provided in S. 256, Cr.P.Code, is reached: A.I.R. 1953 Raj. 66: I.L.R. (1952) Raj. 910. *See* also 31 Nag.L.R. 276: A.I.R. 1935 Nag. 8.

S. 33, Evidence Act, does not require that for a deposition to be admissible the adverse party should have actually exercised his right to cross-examine the witness. It is enough if he had the opportunity to cross-examine on the occasion. And such an opportunity is available to the accused in the committing proceeding under Chapter XVIII of Cr.P.Code. For unlike as under S. 251-A in Chapter XXI where cross-examination is allowed only after the framing of the charge, in commitment proceedings (Chapter XVIII) the accused has the right to cross-examine the prosecution witnesses under sub-S. (2) of S. 208 before the proceeding has reached the stage in which it may be necessary to drop the charge: 25 Cut.L.T. 307.

Prosecution witness examined and his cross-examination reserved—In the absence of anything on the record to show that the Magistrate afforded an opportunity to the accused to cross-examine the witness before he framed a charge, S. 33 would have no application—The Magistrate is right in omitting from consideration such evidence: I.L.R. (1952) 4 Assam 439: A.I.R. 1953 Assam 176.

Where the witnesses for the prosecution are not recalled under S. 256 because they are dead or otherwise not available, the result of not recalling them for cross-examination is not that their previous evidence can be expunged. The evidence which they gave before the charge continues to be relevant with reference to S. 33, Evidence Act: 1956 Raj.L.W. 305: 1957 Cr.L.J. 232.

Where after a charge had been framed the accused had only a partial opportunity to cross-examine the witness but not full opportunity as the witness ceased to be available before cross-examination could be concluded, the second requirement of the proviso to S. 32 is not fulfilled: 86 Cal.L.J. 21: A.I.R. 1950 Cal. 435.

Death of witnesses before completion of cross-examination—Admissibility of deposition in evidence: I.L.R. 50 All. 113: A.I.R. 1928 All. 140. *See* also I.L.R. (1944) All. 241: A.I.R. 1944 All. 188; (1926-27) 31 Cal.W.N. 908: A.I.R. 1927 Cal. 679.

Where the prosecutrix in a rape case had been examined-in-chief and she died before her deferred cross-examination by the accused, *held*, her statement is inadmissible even though it satisfied all requirements of S. 33 except for its second proviso: (1975) 77 Punj.L.R. 594: (1975) 2 Cr.L.T. 328.

Where maker of statement was not proved to have died as a result of injuries received in the incident, *held*, such statement does not amount to dying declaration and if copies of such statement recorded by the Magistrate

were not supplied to the accused, it could not be said that opportunity given to the accused for cross-examination of witness was not full: 1984 M.P.L.J. 492 (D.B.).

S. 33 does not apply to a case where a witness dies after his examination-in-chief but before his cross-examination. Such evidence is, however, admissible evidence, though the weight to be attached thereto would depend upon the circumstances of each case. The fact that the trying Magistrate does not take evidence as to the death of the witness when his death is reported to him is not a sufficient ground for excluding such evidence. It is not incumbent on the Magistrate to take such evidence when no suggestion or allegation is made that the witness is not really dead but is only keeping out of the way for some reason (or other): 47 Cr.L.J. 614: A.I.R. 1946 Pat. 384.

As the person against whom proceedings have been instituted under S. 476 of the Cr.P.Code has no right to cross-examine witnesses during that enquiry, the evidence of a witness in that enquiry, who is not forthcoming at the trial started on the result of such inquiry, is not admissible: 17 Cr.L.J. 249: (1916) 18 Bom.L.R. 284; also evidence given in proceedings under S. 145, Cr.P.Code, by one defendant for another: (1925-26) 30 Cal.W.N. 254: 93 I.C. 115: A.I.R. 1926 Cal. 705.

At a Sessions enquiry an approver was examined-in-chief but the accused were not asked then and there to cross-examine him and he did not in fact dare to cross-examine and he died before trial in the Court of Sessions. *Held*, that it was doubtful whether his evidence was admissible and that in any case its value was small: 18 I.C. 406: (1912-13) 17 Cal.W.N. 230.

Where the party was not allowed to cross-examine in a prior proceeding the previous statement is not admissible in the later suit: 58 M.L.J. 446 (P.C.).

Where the earlier proceedings were between the same parties and the adverse party had the right and opportunity to cross-examine the two crucial witnesses who had thereafter died, *held*, merely because under the Portuguese Civil Procedure Code a party to the proceedings is not a witness on its own behalf but could be examined if the other party so desired, it does not mean that S. 33 was not attracted when as a matter of fact the party had been examined and cross-examined at length in the earlier suit; the evidence of the deceased witnesses recorded therein was admissible in the second suit: A.I.R. 1976 Goa 11.

11. Proviso (3).—Under S. 33 before certain evidence given by a witness in a judicial proceeding can be admitted in a subsequent judicial proceeding, it must be established that the questions in issue were substantially the same in the first as in the second proceeding. It is not necessary, however, that any specific issue need have been raised regarding any particular matter in issue between the parties, but the matter must have been in issue between them: 49 Mad.L.W. 273: A.I.R. 1939 Mad. 446: (1939) 1 M.L.J. 227. *See* also A.I.R. 1939 Rang. 225.

Where the scope of the earlier suit between the parties was limited to the issue of possession only but the pleadings contained elaborate pleadings as to the fact of possession always lying with the defendant and never in the plaintiffs, and in the second suit the bone of contention was the *benami* character of the earlier transaction in which the issue of possession is substantially in issue in the second suit, *held*, S. 30 was attracted; it is not necessary that all questions in issue in the two cases should be substantially the same. [A.I.R. 1933 P.C. 202, Rel. on]: A.I.R. 1976 Goa 11.

12. *Explanation*.—Evidence taken in the Court of a Magistrate in Simla, can be received as evidence under S. 33 in a subsequent proceeding in Koti State although the former proceeding was between the Crown and the accused and the subsequent proceeding is between Koti Darbar and the accused. *Explanation* to S. 33 makes it clear that a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused: A.I.R. 1949 Him. Pra. 15. The inquiry before the Coronor, although it may be a judicial proceeding is not a proceeding between the prosecutor and the accused and therefore, the deposition of a witness taken in an enquiry before the Coroner cannot in the event of the death of the witness, be taken into account at the trial before the High Court: (1933) 35 Bom.L.R. 1020: A.I.R. 1933 Bom. 479 (1).

13. Illustrative cases.—The deposition would not become admissible merely because of the death of the witness at any stage of the suit. If the party tendering had made no attempt before that event and happened to examine the witness in the ordinary course and if before closing his case, he had not established any of the grounds other than death mentioned in S. 33 which would make it receivable in evidence, the deposition could not be taken in merely because the witness happened to die during the trial of the suit: A.I.R. 1958 Andh. Pra. 22.

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES

34. Entries in books of account when relevant.—Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

Illustration

A sues *B* for Rs. 1,000, and shows entries in his account-books showing *B* to be indebted to him to this amount. The entries are relevant, but are not sufficient, without other evidence, to prove the debt.

Where a case under provisions of the Prevention of Food Adulteration Act, 1954 was instituted on complaint of a Food Inspector but the accused could not cross-examine Food Inspector as he was dead, *held*, accused could not be convicted on the evidence of Food Inspector who had not been cross-examined and when Panch-witnesses had not supported his case; evidence of said witness could not be used by invoking S. 33 of the Evidence Act: 1995 Cr.L.J. 1270 (Madh. Pra.).

Where a person making statement that he could recognise the accused as one of the dacoits, died before trial of the case, *held*, his statement was not admissible under S. 32: 1982 Cr.L.J. 572 (Gau.).

Where the deceased wife had written a series of letters to her relatives beseeching their help stating that she intends to commit suicide because of ill-treatment and cruelty to which she was being subjected to by the accused-husband, *held*, as the witnesses, to whom such letters were written, had deposed to what they saw and observed and had referred to the statements made to them personally and as the deceased was no more, she was relegated to the category of witnesses who are no longer available and if the correspondence was otherwise proved to have been addressed by her, it was then clearly admissible in evidence and was not hit by the rule of hearsay: 1993 Cr.L.J. 1134 (Bom.) (D.B.).

Where the victim stated in the *ejahar* that he could recognise the accused as one of the dacoits but without any statement as to the cause of death and the victim did not say anything before the Police or the public about his recognising the culprits and he died before the trial could commence, *held*, the *ejahar*, uncorroborated, was no substantive evidence: 1982 Cr.L.J. 572 (Gau.).

Where the informant died before the commencement of the trial and the Investigating Officer who recorded the first information report was also not examined, *held*, such first information report cannot be admitted in evidence under Ss. 32 or 33: 1971 B.L.J.R. 353: 1970 Pat.L.J.R. 412.

The deposition of a material witness which was relied upon by the Judge in his summing up to the jury, who resided within the jurisdiction and could be procured without unreasonable expense and delay is not to be admitted as justice requires that such a witness should be examined in the presence of the accused: 31 I.C. 354: (1915) 17 Bom.L.R. 590.

Where in a suit for specific performance, the objection allowed to be raised for the first time in the appellate Court was that the plaintiff had not proved of his being ready and willing at all material times to perform his part of the contract and it was shown that the plaintiff had so pleaded and deposed to in *ex parte* evidence and again after the *ex parte* decree had been set aside and the plaintiff was called for examination in the Court and was cross-examined by the defendant but not on this point, *held*, the evidence so recorded was admissible under S. 33: A.I.R. 1981 All. 96.

Section 34—Synopsis.

1. Scope and applicability.
2. "Books of account"—What is.
3. "Regularly kept".
4. Entries in account books—Evidentiary value.
5. Relevancy of entries.
6. Non-production of documents to support entries.
7. Entries—By whom to be proved.
8. Firm's books of account.
9. Probative value of entries in ledger.
10. "Account stated"—Meaning of.
11. Objection as to admissibility.

---

1. Scope and applicability.—It is only the account books that are properly kept that are admissible in evidence as relevant: I.L.R. 51 All. 519: 27 All.L.J. 115: A.I.R. 1929 All. 170.

Entries in account books which are not regularly kept are not relevant under S. 34 of the Evidence Act. [10 Nag.L.R. 44, Ref.]: I.L.R. (1949) Nag. 307: A.I.R. 1949 Nag. 414: 1949 Nag.L.J. 398. An entry in an account book is an admission by the maker thereof in his own favour and it is accepted as evidence only if it strictly complied with the requirements of being kept regularly and in the ordinary course of business: A.I.R. 1932 Lah. 417: (1931) 33 Punj.L.R. 168. *See* also 1940 O.W.N. 555: A.I.R. 1940 Oudh 385.

Under S. 34 of the Evidence Act, entries in account books regularly kept in the course of business are relevant, but such statements cannot alone be sufficient to charge any person with liability. The rule embodied in this section is apparently an exception to the general rule as to admission in S. 21 and the principle seems to be to admit only such statements recorded by a party in his own behalf as are ordinarily considered by their nature and circumstances beyond his power to tamper with undiscovered, to the purposes of a particular case. Since the entries themselves cannot fix liability on a person, the attending circumstances are accordingly always taken into consideration by the Court. The entry should purport to record the whole of the transaction alleged and the appearance of the book containing entries must be honest and no suspicious dealing should be apparent. The entries should not be a recital of past transactions but must be an account of transactions as they occur, of course, not necessarily to be made exactly at the time of occurrence. It is sufficient if they are made within a reasonable time when the memory could be considered recent. Such entries, though relevant, are only corroborative evidence and it has to be shown further by some independent evidence that the entries represent honest and real transactions and that the transactions took place in accordance with those entries: I.L.R. (1967) 1 Punj. 435.

What has to be seen under S. 34 of the Evidence Act in each case is whether besides the entries in the account books there is any evidence to prove that the transaction referred to in the entries actually took place. In the case of transactions, which are numerous and which extend over some length of time, it is not reasonable to expect independent evidence to prove each particular transaction. In such cases, the genuineness of the account books, if they are kept in regular course of business, will be the determining factor. It must, however, be understood that mere proof of the correctness of the entries in the account books would not be enough. There must be some further evidence to corroborate the entries in the account books. The testimony of person should be considered enough corroborative evidence of the entries made in his account books: (1964) 1 An.L.T. 82: (1964) 1 An.W.R. 69: A.I.R. 1965 Andh. Pra. 33.

Account books of a business kept in regular course of business are supposed to be accurate; strongest improbability of untruth is attached to their entries; and that precisely is the reason that they are made admissible under S. 34 even though they are admission in favour of their maker. But it has to be first established by proper evidence that they were kept in the regular course of business though if the Court is satisfied that it is impossible to produce the writer of the books, the books may be proved otherwise. But the proof of such entries by the accountant without any other evidence in support of the claim is not sufficient to decree it: A.I.R. 1991 N.O.C. 108 (Gau.).

To rely upon a document as evidence, the Court has to see: (*i*) the proof of its execution; (*ii*) the proof of its contents; and (*iii*) the evidentiary value of the document as a whole. Consent to exhibit a document merely proves its execution; but the document thereby does not gather any probative or evidentiary value if otherwise it has none; if the document (a ledger book in this case), is intrinsically inadmissible in evidence, no amount of consent can make it admissible: A.I.R. 1981 Bom. 446.

For the purposes of S. 34 no particular form of books of account is prescribed. All that is necessary is that the book should be such a regular and usual account book as explains itself and as appears on its face to create a liability in an account with the party against whom it is offered. The person making the entries should have personal knowledge of the facts stated therein: I.L.R. (1954) Madh. Bh. 237: A.I.R. 1955 Madh. Bh. 49.

All that S. 34 of the Evidence Act requires is that the entries in the accounts should be regularly kept in the course of business and the person making them should have personal knowledge of the facts stated therein. It is not necessary that the entries in the books should have been made from day to day or

from hour to hour as the transactions take place. Accounts prepared from rough books or memoranda should be treated as original accounts and cannot be rejected on the ground that they were not entered regularly from day to day: A.I.R. 1952 Madh. Bh. 55.

Where an almanac consists only of loose sheets of paper with blanks left at different places, and the writer thereof is not available, it cannot be said that the entries in it have been made in the regular course of business and have the necessary probative value. The weight which could be attached to documents which on the face of them all regularly kept cannot attach to these papers: A.I.R. 1953 S.C. 431; 17 Cut.L.T. 73.

'Account' implies reckoning and totalling and balancing. When these are not done there is no account: A.I.R. 1933 Lah. 212. *See* also 10 Nag.L.R. 44: 23 I.C. 193.

Books of account, if no balances have been struck in them may be inadmissible under S. 34, but they are, however, admissible under S. 32(2) as entries or memoranda, made by persons who are dead, in books kept in the ordinary course of business: 30 Nag.L.R. 192: A.I.R. 1934 Nag. 106. Book of account, in order to be relevant under S. 34, of the Evidence Act, must be kept regularly in the course of business and they must be in conformity with some known system of accounting. Where the books produced in a case are merely ledgers of the defendant and they are not supported by any day book or roznama and do not contain entries of transactions as they take place and there is no daily opening or closing balance, and what has been shown from these books is that there was plaintiff's account and in that account entries were made which could all have been made on any one day, the books could not be regarded as relevant under S. 34, Evidence Act: I.L.R. (1951) Assam 329: A.I.R. 1952 Assam 92.

In account books regularly kept in due course of business usually the pages are interconnected, and particularly in daily accounts, the balance of one day or one page is carried over to the other day or the other page so that interpolation or replacement of a particular page becomes very difficult and sanctity is to be attached to such books. Where that is not the position and the account book is not a bound book but is a stitched one and each customer is allotted a particular page or pages, the sheets and the entries can be substituted or interpolated at different places, and, therefore, it cannot be taken to be an account book regularly kept in the course of business to be relevant under S. 34: A.I.R. 1958 Ori. 4: I.L.R. (1957) Cut. 437.

Kachchi rokar, the genuineness of which is not seriously contested and in which the balances were struck daily, is a book regularly kept in the course of business within the intendment of S. 34. But where certain entries have been made at the other end of a copy book and not as a part of the entries purported to have been made in continuation of an earlier cash book and they are admitted by the person who made them as his private noting which has been mentioned in the pakki and kachchi rokar bahis maintained by him, the entries in the copy book cannot be said to have been made in a book of account regularly kept in the course of business within the intendment of S. 34: 1959 Cr.L.J. 268: A.I.R. 1959 All. 149.

Provisions contained under S. 34 do not apply to credit entries of accounts which reduces liability of customer by giving credit: A.I.R. 1978 N.O.C. 171 (Cal.).

Error apparent on face of record—Quasi-judicial proceedings—Proceedings under S. 32 of Rajasthan Act VI of 1952, for determination of compensation payable to expropriated Jagirdar—Jagir Commissioner, in deciding compensation claims has to act in quasi-judicial manner—Neither Evidence Act, nor C.P.Code applies—Board of Revenue disallowing claim by erroneously holding that it was not proved according to S. 34 of Evidence Act which was attracted—*Certiorari* can be issued: 1964 Raj.L.W. 83: I.L.R. (1964) 14 Raj. 90.

Entries in property register of society showing properties gifted to the society—That the entries were made not immediately but after some time will not by itself make the document inadmissible in evidence to show what properties were gifted: A.I.R. 1969 All. 248.

Where a tenant sought to prove payment of rent by him to the landlord by the receipts given by the landlord on the tenant's *bahis*, *held*, S. 34 is not attracted; this section applies only to such entries in the accounts made in the regular course and which create liabilities, and receipts on the *bahis* create no liability on any of the parties: A.I.R. 1991 P.&H. 254: (1991) 2 Rev.L.R. 152: (1991-2) 100 Punj.L.R. 112.

Finding of lower appellate Court as to maintenance of accounts in usual course of business—Finding cannot be interfered in second appeal: A.I.R. 1967 Andh. Pra. 64.

2. "Books of account"—What is.—A document, to be relied upon as a book of account, must have the characteristic of being foolproof; a detachable bundle of sheets replaceable at a moment's pleasure is no account book; besides, S. 34 requires the book of account should be regularly maintained in the course of business: A.I.R. 1981 Bom. 446.

An entry in a book of account to be relevant must be shown to have been in a book of account regularly kept in the course of business; ordinarily, a collection of paper sheets bound together permanently in one volume and used collectively alone is a book envisaged under S. 34; unbound sheets containing continuous account are not a book of account: A.I.R. 1993 Gau. 35: (1992) 1 Gau.L.R. 440: (1992) 2 Ren.C.J. 20: 1992 Ren.C.R. 357.

'Books' means sheets of paper permanently bound. Unbound sheets are not books of account: 15 Cr.L.J. 241: 23 I.C. 893: 10 Nag.L.R. 44.

3. "Regularly kept".—Account books maintained according to a particular system from day to day and balances struck at the end of each day, should be held to have been regularly kept in the usual course of business. The phrase 'regularly' means that the accounts must be kept according to a system, though that system need not be elaborate. Again, it is a mistake to think that the expression 'regularly kept' is synonymous with 'correctly kept', though if they are not correctly kept, that would affect the weight to be attached to the entries made therein but not their admissibility: 1963 Raj.L.W. 195: I.L.R. (1963) 13 Raj. 579: A.I.R. 1963 Raj. 212.

An entry in *bahi khata* is an admission by its maker in his own favour; it is accepted as evidence only if the *khata* was indeed kept regularly and in the ordinary course of business. The words 'regularly kept' mean the account kept in accordance with a certain fixed method or form; although S. 34 dispenses with formal proof of the accounts having been kept in the regular course of business, it is a matter of intrinsic evidence whether the books were the books of account regularly kept in the course of business. Thus, where the books on examination were not found to have been regularly maintained, *held*, they could not be relied upon. Moreover, the rule in S. 34 is subject to the salient proviso that such entries shall not alone be sufficient evidence to charge any person with liability: A.I.R. 1992 Raj. 149: (1992) 3 W.L.C. 636.

The words 'regularly kept' do not necessarily mean kept in a technically correct manner. Even the roughest memoranda of accounts kept by petty shop-keepers are admissible if they are authentic. Where not a single entry in the account book running for a period of five years is false or bogus, and the only mistake is about an entry which was entered as debit entry instead of credit entry, but the accounts, though not scientifically maintained, were regularly kept in the course of business carried on by the plaintiff and the entries were made by the plaintiff himself who had personal knowledge of the dealings, the account book can be relied upon: 1960 Ker.L.T. 184: 1959 Ker. L.J. 1386: I.L.R. (1960) Ker. 51.

An account book, not regularly maintained, is not relevant evidence under S. 34: A.I.R. 1969 Tripura 26.

A book of account may be said to be regularly kept although the book is not entered up from day to day or from hour to hour as the transaction takes place: (1933-34) 38 Cal.W.N. 861.

No doubt an account book kept in the form of daily entries of debits and credits is far more satisfactory. But it is not essential that the accounts should be made up daily. An account book containing entries made in time of all transactions would be regular one even if it is made up every month: A.I.R. 1957 Madh. Bh. 118.

Accounts kept in regular course of business—Practice of noting transactions of eight days, at one time in rokar system followed regularly.

Held, that though the system was defective, it could not be said that the account books, on that ground, were not maintained in regular course of business—The fact that these books were not filed before Income-tax Department would not show that they were not maintained in the regular course of business. Words and Phrases—'Accounts kept in regular course of business': 1959 B.L.J.R. 769: A.I.R. 1960 Pat. 271.

Books regularly kept in the course of business—Meaning of, *see* 19 I.C. 534: 14 Cr.L.J.

262. As to what constitutes 'regularly kept' accounts and as to the effect of irregularity in keeping accounts, *see* 95 I.C. 128: A.I.R. 1926 Nag. 407; 136 I.C. 716: 9 O.W.N. 932. *See* also I.L.R. 4 Bom. 576; 13 Cal.L.J. 139: 8 I.C. 81; 13 I.C. 678; 7 I.C. 1011.

Though statements, oral or otherwise, made in ones own favour are normally not admissible but entries made in account books regularly kept in due course of business, if so proved, are admissible. However, where the books of accounts were not maintained till after the alleged payment had been made, *held*, not regularly kept in course of business, the books were not admissible under S. 34: A.I.R. 1976 Gau. 103.

4. Entries in account books—Evidentiary value.—Normally the entries in books of account, if regularly kept, carry some weight, unless there be counteracting elements to throw sufficient doubt as to their genuineness: 1956 Cr.L.J. 1283: A.I.R. 1956 Assam 170.

It is a matter of intrinsic evidence as to whether the books in question were books of account and kept regularly in the regular course of business. The only limitation imposed by the statute is that the statement, contained in the account books 'shall not alone be sufficient to charge any one with liability'. The value of the entries is corroborative and they cannot be used as independent evidence to charge any person with liability: I.L.R. 51 All. 864: A.I.R. 1930 All. 38. *See* also 1930 All.L.J. 987: A.I.R. 1930 All. 710: 1930 O.W.N. 582; I.L.R. 16 Luck. 36: A.I.R. 1940 Oudh 385.

S. 34 cannot be read as meaning that there should be independent evidence, besides the entries in books of account, that such and such articles valued at such and such amount were supplied on such and such date. What is necessary to be seen in each case is whether besides the entries in the account books, there is any evidence to prove that the transactions referred to in the entries actually took place. In the case of transactions which are numerous and which extend over some length of time it is not reasonable to expect independent evidence to be given to prove each and every particular transaction. In such case the genuineness of the account books, if they are regularly kept in the course of business, will be the determining factor. But mere proof of the correctness of the entries in the account books would not be enough. There must be some evidence to corroborate those entries. The evidence of the person who wrote the account books and in whose presence the transactions took place would be the best corroboration. Since he cannot possibly have independent recollection of the various transactions, he may, as provided in S. 159, refresh his memory by referring to the account books. But, it is not necessary for him to prove that such and such articles valued at specified amounts were supplied on specific dates. If he proves the entries written by him and states that the transactions referred to in those entries actually took place in his presence or to his knowledge, the effect would be the same. Where, however, the dispute between the parties is confined to some particular items only, specific evidence may be available and should be insisted upon to prove those particular transactions. Mere general evidence to prove that the account books were regularly kept is not enough: I.L.R. 20 Pat. 273: 22 Pat.L.T. 383: A.I.R. 1941 Pat. 430. *See* also (1944-45) 49 Cal.W.N. 308.

Entries in account books unless corroborated not sufficient to fasten liability: 1930 All.L.J. 987: A.I.R. 1930 All. 710. Proof of accounts, *see* 100 I.C. 863: A.I.R. 1937 Nag. 177; (1944-45) 49 Cal.W.N. 308; I.L.R. 16 All. 161; I.L.R. 18 All. 92; 1 M.I.A. 47: 5 W.R. (P.C.) 29. They would be good corroborative evidence: 23 W.R. (P.C.) 27. *See* also (1987) 2 An.L.T. 574.

Even if the books of accounts were regularly kept mere entries in the books of account would not be sufficient to charge the defendant with liability and there should have been evidence to corroborate the entries: A.I.R. 1958 Raj. 255: 1958 Raj.L.W. 483.

Though account books by themselves are not sufficient to charge the defendant with liability to pay, the defendant can be made liable if there is sufficient evidence on record in support of account books: A.I.R. 1965 Assam 10.

Books of account must have been regularly kept in the course of business for dispensing with the formal proof of the entries therein. Even then the entries alone would not be sufficient evidence of the liability sought to be fixed on any person. It is necessary to prove the shortage of cash by independent evidence, and the entries could then be used as a piece of corroborative evidence: A.I.R. 1952 Him. Pra. and Bom. 46: 1952 Cr.L.J. 1128.

It is no doubt true that entries in books of account regularly kept in the course of

business are relevant under S. 34 of the Evidence Act. But as provided in the illustration to the section itself the entries by themselves are not sufficient to charge any person with liability for the debt unless there is evidence to prove the debt: (1961) 2 M.L.J. 333.

No person can be charged with liability merely on the basis of entries in the account books, even though those books are kept in the regular course of business, except when the person charged with liability thereunder accepts the correctness of the books of account and does not challenge them.

There should be independent corroborative evidence: (1973) 2 Cut.W.R. 1054. *See* also (1972) 38 Cut.L.T. 309.

Mere entries in one's own account books is neither conclusive nor binding on the other party; under S. 34, they are relevant and constitute corroborative evidence if made in the account books kept in the regular course of business; but by themselves such entries are not sufficient to found a decree thereupon, if the other party does not admit the entries; otherwise, there must be other cogent evidence like correspondence, vouchers and bills to support the entries. [A.I.R. 1967 S.C. 1058: (1967) 1 S.C.R. 898; A.I.R. 1952 Assam 92; (1968) 9 Guj.L.R. 1078; A.I.R. 1972 Guj. 208: (1972) 13 Guj.L.R. 179, Rel. on]: A.I.R. 1973 Guj. 57; (1980) 1 M.P.W.N. 276; (1980) 1 M.P.W.N. 299. *See* also I.L.R. (1987) Karn. 2673 [Mere proof of correctness of account books is not sufficient; each and every entry has to be proved].

S. 34 has constantly been interpreted as laying down a rule of evidence that entries in account books are not sufficient to fix liability against a person; there should be additional evidence, independent of the entries to prove the payment; thus, entries in account books are corroborative evidence: A.I.R. 1972 Guj. 208: (1972) 13 Guj.L.R. 179.

An entry in an account book is an admission by its maker in his own favour; thus, it is acceptable evidence only if it strictly complies with the requirement of having been kept regularly and in the ordinary course of business. If the entries or the books are suspicious or do not inspire the Court's confidence, they should not be relied upon: A.I.R. 1978 Karn. 10: I.L.R. (1977) 1 Karn. 385: (1977) 1 Kam.L.J. 756.

To attract S. 34, it is necessary to establish that the account books were regularly kept in the ordinary course of business; such entries are merely corroborative; primary evidence, namely, the original books, is always needed to prove the transaction: A.I.R. 1972 All. 494.

A book of account, being only a corroborative evidence, must be supported by some other evidence: A.I.R. 1993 Gau. 35: (1992) 1 Gau.L.R. 440: (1992) 2 Ren.C.J. 20: 1992 Ren.C.R. 357; (1990) 1 An.W.R. 6: (1991) 1 Hindu L.R. 65 (D.B.).

Account books by themselves do not charge a party with liability unless it is further shown by independent evidence that the entries or transactions indicated therein reflect true facts: A.I.R. 1978 Mad. 56: (1977) 90 Mad.L.W. 636: (1978) 1 M.L.J. 331: I.L.R. (1978) 2 Mad. 95 (D.B.).

Under S. 34, the production of account books alone is not enough to make a person liable. But it is a question of fact as to how much evidence is required to create the liability when taken together with books of account. Every case will have to be decided on its own merits. In a case where the witness, who produces the account books, is reliable and has personal knowledge, the Court may accept his statement as enough proof combined with the books of account. In cases, however, in which the witness is not reliable at all, the Court would require more proof: A.I.R. 1937 Pesh. 103.

If in addition to the production by the plaintiff of account books regularly kept in the course of business, there is evidence of witnesses who prove a number of items claimed by the plaintiff, the requirements of S. 34 are fulfilled: (1933) 35 Punj.L.R. 539.

Mere production without more of account books, does not prove anything. There must be proof, not only of the books, but of each entry and item of account: 23 Mad.L.W. 272: A.I.R. 1926 Mad. 955. *See* also A.I.R. 1927 Lah. 903; 1930 All.L.J. 987; A.I.R. 1933 Lah. 384: (1932) 34 Punj.L.R. 46; 1938 All.L.J. 449: A.I.R. 1938 All. 353.

Scope—Entries in account books regularly kept in the course of business—Entry in *A*'s account books of certain payment made to *B*—Relevancy and value of—Absence of corresponding entry in *B*'s account book regarding receipt of such payment—Non-existence of such entry though not relevant under S. 34 is relevant under Ss. 5 and 11 and can be

proved by *B*'s account books: (1964) 3 S.C.R. 297: (1963) 2 Cr.L.J. 671: A.I.R. 1963 S.C. 1850.

S. 34 of the Evidence Act does not require any particular form of corroborative evidence, and where in a suit the plaintiff produces books of accounts and a witness on his behalf gives evidence in support of the entries and there is no cross-examination of the witness with respect to his personal knowledge of the facts stated, that is sufficient corroboration. The plaintiff's own statement on oath in support of the entries made in the account books would also be sufficient to fix the defendant with liability: 1963 Raj.L.W. 195: I.L.R. (1963) 13 Raj. 579: A.I.R. 1963 Raj. 212.

Entries in books of accounts must receive corroboration to charge any person with liability—Law does not prescribe any particular form of corroboration and quantum of evidence required for corroboration would vary in each case—*Held*, on facts, that excess payment by defendant in particular year could be treated as satisfactory evidence corroborating balance brought forward from previous year maintained in Khata kept in regular course of business: I.L.R. (1967) Cut. 413: 33 Cut.L.T. 825: (1968) 1 L.L.J. 59: A.I.R. 1968 Ori. 19.

Where the transactions in dispute are numerous and extend over a large number of years, it is not necessary to prove each and every item in the account books but only the specific disputed entries are required to be proved. In such a case, the question to be determined is whether the account books are regularly kept and are genuine. Where the plaintiff has made a definite statement that the account books are regular and he was not cross-examined with regard to the genuineness of the account books, the plaintiff's own statement on oath in support of the entries is sufficient to fix the defendants with liability. Even the plaintiff's own testimony on oath in support of the entries in his books could be sufficient to fix defendant with liability: A.I.R. 1962 Punj. 27.

Per *Dua, J.*—S. 34, Evidence Act, merely makes relevant the entries in books of account regularly kept in the course of business, and it further clearly lays down in the negative that such entries shall not alone be sufficient evidence to charge any person with liability: A.I.R. 1962 Punj. 27.

Where in the accounts kept in the ordinary course of business, quite a number of entries in the ledger stand corroborated by some other admitted transactions evidenced by documents of unquestioned genuineness and some other transactions which have been fully proved before the Court, the mere fact that the party has not produced the day-book of his business which is admittedly preserved in the firm, does not detract from the evidentiary value to be attached to the ledger. The evidence of the party himself is a substantial compliance with the provisions of S. 34 corroborating the entries to fasten the liability: A.I.R. 1955 Ori. 6: 1955 Cr.L.J. 162.

The effect of S. 34 is that a mere entry in an account book by itself is not evidence of any liability. But merely because the writer of the account is not examined, the plaintiff cannot be non-suited, when most of the items claimed by the plaintiff are shown to be real by other independent evidence; it is not necessary that each entry should be further corroborated apart from the evidence of the plaintiff himself: A.I.R. 1957 Trav.-Co. 184.

Where the plaintiff's only evidence comprised of entries in their account books, *held*, it was not sufficient to charge the defendants with liability. [A.I.R. 1967 S.C. 1058, Foll.]: (1990) 2 Bom.C.R. 692.

Entries in books of account, regularly kept in the course of business, are relevant but alone not sufficient to charge any person with liability. Thus, where the sole managing partner of the firm in fiduciary relationship with its other partners had produced books of account which were vitiated by false and not genuine entries, the books' *prima facie* evidentiary value stood destroyed. He was bound to render accounts to other partners, *de hors* those books: A.I.R. 1994 Mad. 140: (1994-1) 113 Mad.L.W. 112 (D.B.).

Where in a suit for the price of the articles alleged to have been supplied by the plaintiff to the defendants on a certain day, the plaintiff relies upon the entries in his credit register on that particular date, the witness in corroboration must assert that in fact the plaintiff had supplied the article for the value of which he has brought the suit and that also on credit. Then only there will be corroboration of the position that this transaction has been rightly entered in the credit book. If the statement made by the witness, read as a whole, does not particularly refer to the transaction in suit which was on credit basis on the date, it

cannot in law serve as evidence for the purpose of satisfying the requirements under S. 34: I.L.R. (1957) Cut. 437: A.I.R. 1958 Ori. 4.

Suit for recovery of price of goods supplied on credit—Neither any receipt nor any writing given by defendant acknowledging the transaction—Plaintiff relying on certain entries in Jama Bahi and ledger but failing to establish that the books of account relied by him were kept in regular course of business—Mere entries in books of account cannot by themselves fasten the defendant with liability: A.I.R. 1965 Ori. 211.

In a suit for recovery of price of wheat sold on different dates, the defendants pleaded payments shown in their accounts, neither page marked, nor relating to accounts of other parties; defendants claimed to have paid a sum of Rs. 10,000 to the plaintiff at one time but his signatures were not obtained, *held*, when entries in the defendants' account books did not relate to other parties, they could not be said to be regularly maintained in the course of business; the entries in the *bahis*, which remained with the defendants and were not produced before any authority could be conveniently made up. No authenticity could be attached to those entries. It was for the defendants to prove the entries by cogent evidence. Mere entries in the account books showing payments were neither sufficient nor believable: (1985) 87 Punj.L.R. 252. *See* also (1988) 1 Raj.L.W. 288.

Where the plaintiff's son and attorney had orally deposed on the basis of entries from account books of the relevant period to prove sale and delivery of goods but without having any personal knowledge about the transactions, *held*, his evidence was not sufficient to decree the suit for price of the goods: (1987-2) 7 Guj.L.H. (U.J.) 1 (D.B.).

No person can be charged with liability merely on the basis of entries in books of account, even where such books of account are kept in the regular course of business. There has to be further evidence to prove payment of the money which may appear in the books of account in order that a person may be charged with liability thereunder, except where the person to be charged accepts the correctness of the books of account and does not challenge them. The original entries alone under S. 34 of the Evidence Act would not be sufficient to charge any person with liability and as such copies produced under S. 4 of the Bankers' Books Evidence Act obviously cannot charge any person with liability: (1967) 1 S.C.R. 898: A.I.R. 1967 S.C. 1058; 1979 Mah.L.J. 494.

Since books of account admissible under S. 34 constitute only corroborative evidence and not by themselves sufficient to prove the transaction, the copies produced under S. 4 of the Bankers' Books Evidence Act obviously are in no better position. However, where the entries were supported by other oral and documentary evidence and the other party had not challenged most of the entries, *held*, the transaction, corroborated by the entries, stood proved: A.I.R. 1979 N.O.C. 15 (Cal.).

The rule that plaintiff's own statement on oath in support of entries can be sufficient to support the entries in his *Bahies* so as to fix the defendant with liability is applicable only if it is found that the plaintiff's books are regularly kept in the course of business and free from any doubt. It is essential that entries of all the available *Bahies* (*e.g.*), *Rokar*, *Pakki* and *Kachi*, *Nakal* and *Khata* relating to the money claimed should be filed alongwith the plaint. The tendency on the part of creditors to base their claim solely on entries in *Khata Bahi* is to be strongly deprecated: 1939 M.L.R. 216 (Civ.).

There is no doubt that entries in the account books maintained by a creditor are not by themselves evidence to attach a liability on the debtor, but they can be used to corroborate the evidence given by the creditor that the payment had been advanced to the debtor, and a decree can be passed on the basis of such corroborated evidence: (1978) 80 Punj.L.R. 503: 1978 Cur.L.J. (Civ.) 386: 1978 Rev.L.R. 373; A.I.R. 1978 Karn. 10: (1977) 1 Karn.L.J. 385.

Books of account regularly kept—An entry in a book of account is relevant to prove a matter if the entry was made at the time of the transaction—Entry made in 1917 in the account book of creditor is not relevant on the question whether a person had taken a loan from the creditor in 1916: 1960 Nag. L.J. 113: (1960) 62 Bom.L.R. 322: A.I.R. 1961 Bom. 169.

Where the plaintiff relies on the entry in his credit register which he has himself scribed, but does not even assert that the transaction on credit took place actually and that, therefore, it was so entered, it is a very material omission on account of which his evidence cannot be treated to be corroborative of the entry: I.L.R. (1957) Cut. 437: A.I.R. 1958 Ori. 4. *See* also (1979) 2 M.P.W.N. 17.

Entries in books of account—Corroborative evidence—Plaintiff, a bank, claiming an amount on the basis of entries in its ledger book—Books maintained in regular course of business and entries and the transactions proved by its ex-Secretary—Entries, *held*, sufficiently proved—Adverse inference, *held*, could not be drawn against the Bank for the non-production of its cash book: I.L.R. (1967) Cut. 157: A.I.R. 1967 Ori. 169.

Suit for money as per accounts from plaintiff's account books—Whether such entries are basis of suit: A.I.R. 1968 Pat. 474.

Account prepared at considerable intervals from memory or possible inadequate materials cannot be treated as proof of the actual income and expenditure of the estate to which they relate although they may be useful in cases where they corroborate other evidence: I.L.R. 51 Mad. 291: 54 M.L.J. 703.

Admissibility in evidence—Khata Bahi is a book of account and if maintained in regular course of business can be admitted in evidence—Entries are not, however, admissible if not supported by corresponding entries in Rokar and Naqual Bahi: 1965 Raj.L.W. 346: I.L.R. (1965) 15 Raj. 1035: A.I.R. 1966 Raj. 229.

Such entries must be corroborated by other evidence in order to fix a liability upon: 22 W.R. 549; 23 W.R. (Cr.) 27.

Where the plaintiff produces account books and deposes that they are regularly kept and are correct, and he is not cross-examined on the point, his testimony supported by the account book is legally sufficient to establish his claim: A.I.R. 1933 Lah. 212: 145 I.C. 157.

Where a number of blank spaces are left in the Rokar Bahi in different places, the conclusion by the Court that it is unreliable is fully justified: (1939) 41 Punj.L.R. 295: A.I.R. 1939 Lah. 412.

Suit for rent—Account books produced by plaintiff showing absence of entry of receipt of rent for relevant period—Account books proved—Defence that rent was paid to servant of plaintiff not believed—Finding that rent was not paid held legal: (1953-54) 58 Cal.W.N. 84: A.I.R. 1954 Cal. 145.

Question whether house was built by deceased with joint family funds—Party tendering account books—Parties should not rely on entries here and there—All the entries have to be taken together and an inference which is consistent with the surrounding circumstances and the probabilities has to be drawn in deciding whether the cost was met by deceased exclusively from his funds, or whether it was met by the joint family funds be it partly: I.L.R. (1953) Cut. 343: A.I.R. 1953 Ori. 315. Account books are sufficiently discredited if a certain number of entries therein are proved to be bogus by independent evidence which precludes the possibility of error or accident: A.I.R. 1928 P.C. 39: 54 M.L.J. 208 (P.C.).

Where entries in a Hindu Undivided Family's books of account were not challenged as to their genuineness or truthfulness and there was no evidence otherwise, *held*, the Income-tax Authorities could not contend that the money shown as received therein was not received by the *karta* for the Family but as guardian of a minor; the basic principle, in the civil law or the law of income-tax, is the same. Without impeaching them as not genuine or not truthful, the entries have to be accepted as truthful: (1980) 19 Cur.Tax Rep. 105: 129 I.T.R. 573: 1981 Tax L.R. 918 (Guj.) (D.B.). *See* also 1978 Tax L.R. 972: 113 I.T.R. 389: 1978 Rajdhani L.R. 240 (D.B.).

Proof of accounts—Entries in certified copies of statement of accounts corroborated by certificate of its truth—They are sufficient to charge debtor with liability: (1962) 32 Comp. Cas. 511: A.I.R. 1961 Cal. 191.

Where the defendant had categorically denied the transaction in his written statement and the plaintiff had not proved the original entries in his books of account and there was no material whatsoever, apart from the books of account or the balance sheet of the plaintiff, to prove the transaction of loan advanced, *held*, the plaintiff was not entitled to any decree: A.I.R. 1991 Gau. 92: (1991) 2 Gau.L.R. 180.

Where entries in the Bank's account books were produced in the Court and corroborated by its Manager and other officials, and the defendant had himself admitted having taken the loan from the Bank in his written statement, *held*, the loan stood established: A.I.R. 1994 S.C. 1644.

Where the plaintiff deposed that he had paid money by cheque to one person and later on that he had paid to another and eventually that he did not know who the payee was and the entry of payment in the ledger was not supported by producing counterfoil of the

cheque, *held*, the payment was not proved: A.I.R. 1977 Andh. Pra. 164: (1976) 2 A.P.L.J. (H.C.) 337: (1977) 1 An.W.R. 114 (D.B.).

Where *Bahis* were neither relied nor produced till after the plaintiff's evidence had been recorded and the explanation offered was that they had then been misplaced and entries on 13 sheets thereof were sought to be proved by the mason for payment of wages under his signatures to him and his son for doing construction work, and the *Bahis* did not contain the name of the owner, was not proved to have been kept regularly in the normal course of business, did not contain the date of payment nor was it shown as to who was the author of the entries, *held*, the entry was not admissible under S. 34: A.I.R. 1977 Him. Pra. 1: 1977 Sim.L.C. 294: I.L.R. (1976) Him. Pra. 499 (D.B.).

Where the loan sought to be recovered was substantiated by the plaintiff mainly from entries in his account books which appeared not to have been kept regularly, and in the ordinary course of business and which were, being interpolations in between the lines, even otherwise suspicious, *held*, the entries were not sufficient to prove the loan; even if they were not suspicious, other evidence of the loan also had to be adduced: A.I.R. 1978 Karn. 10: I.L.R. (1977) 1 Karn. 385: (1977) 1 Karn.L.J. 756.

Where the defendant managing the family affairs had engaged clerks to maintain accounts and no moneys could be spent without his instructions and the plaintiff had admitted not only that the defendant had no need to come up with false accounts but had also kept the books with him for checking them, *held*, the books proved by the defendant without any suggestion about falsity of any entry contained therein, could not be discarded as untrue: (1991) 1 Hindu L.R. 65: (1990) 1 An.W.R. 6 (D.B.).

An entry in the Sales Tax Register is sufficient corroboration especially when the impugned entry in the books of account was not the last transaction and did not appear to have been subsequently made or interpolated: (1979) 48 Cut.L.T. 38.

Where the words 'deposit karaya' in the *roznamcha* (a book of accounts) were confronted to the witness even though he was not the writer thereof as having not been written on the same day and the Court had itself found the same to be a genuine entry, *held*, the other party could not contend that the account book was not proved when it had been deposed to on behalf of the party which had produced the book that the books of account were properly maintained and it was not possible to arrange the presence of the writer of the book: A.I.R. 1971 S.C. 2551.

Where account books and diary found admissible established payment of consideration by the plaintiffs, who were in possession of the sale deed as well as the property purchased by them *held*, the title in the property vested in the plaintiffs; its ostensible owner was a mere *benamidar*: A.I.R. 1982 N.O.C. 109 (Cal.).

Where entrustment of money in prosecution under S. 408 of the Indian Penal Code was sought to be proved by a debit entry in the employer's books of account, *held*, though under S. 34 entries in the books of account, regularly kept in the course of business are relevant, they alone are not sufficient to charge the accused with liability; the prosecution ought to have adduced evidence to establish that the books were maintained in regular course of business and that the money was indeed paid to the accused; the prosecution must also have proved how its offices worked and the method of making debit and credit entries in the books: A.I.R. 1974 S.C. 388: 1974 Cr.L.J. 447: (1974) 3 S.C.C. 630.

Where a witness merely deposed about the suit claim but the other witness specifically spoke about and referred to entries made in the security registers of equitable mortgages maintained by the Bank, *held*, the second witness, thus, corroborated the entries in the registers which stood legally proved: (1994-2) 114 Mad.L.W. 315 (D.B.).

The illustration to S. 34, Evidence Act refers only to the entries in the account books of a plaintiff. The entries are not sufficient to charge the defendant with liability unless there is other corroborative evidence.

Where the books of account on which the plaintiff has relied are not those maintained by the plaintiff itself but they are the account books of an entirely different institution, namely, the High Commission of India in London, neither the illustration to S. 34 nor the argument that self-serving admissions without more cannot be the sufficient basis to charge a defendant with liability can strictly

speaking be applicable. The circumstances surrounding the existence of the books of account and the circumstances surrounding the transaction which is recorded in the book of account may well constitute sufficient corroborative material. No hard and fast rule can be or has been laid down as to the nature of quantum of evidence necessary to support the entries in the books of account under S. 34 of the Evidence Act. The quantum of other evidence required in each case will depend upon the circumstances of that case: A.I.R. 1960 J.&K. 136.

A debit entry at the end of a page in an account book showed certain goods as sold at a certain rate. The description was written down closely in a cramped style on the same page, though it could have been written on the next page. Further the total amount debited was written in different ink. The entry was relied upon to prove the price agreed by the parties.

Held, that the circumstances detracted from the value of the entry and the Court would be justified in accepting the opinion of the trial Court on the point which had the original document before it, rather than of the High Court: (1963) 2 M.L.J. (S.C.) 110: (1963) 2 S.C.R. (Supp.) 995: A.I.R. 1964 S.C. 818.

5. Relevancy of entries.—*See* 5 M.I.A. 432; 4 Beng.L.R. (P.C.) 31; 13 M.I.A. 365; I.L.R. 16 Luck. 36; 3 N.W.P. 308; 5 W.R. 242. Such books can be used to refresh memory of witness: I.L.R. 29 Cal. 334.

Such entries need not be made by or at the dictation of a person who had a personal knowledge of the truth of the facts stated: I.L.R. 1 Bom. 610.

Entries in account books are relevant as admissions against the party even when the entries are written by his agent: (1933-34) 38 Cal.W.N. 861. The noting of the items in an account book kept regularly by a munim in whose presence the money was not paid is no evidence: A.I.R. 1923 Lah. 431(1). As to what constitutes being kept in the regular course of business, *see* I.L.R. 4 Bom. 576.

Although the actual entries in books of account are relevant, the book itself is not relevant to disprove an alleged transaction by the absence of any entry concerning it: I.L.R. 10 Cal. 1024, followed in 3 I.C. 291. *See* also 7 C.L.R. 256; I.L.R. 30 Cal. 231 (247). But *see contra* A.I.R. 1924 Nag. 22 in which it was held that the absence of an entry in an account book is a relevant fact admissible in evidence. [(1900) 4 Cal.W.N. 207, Foll.].

As to the effect of failure to produce account books, *see* 176 I.C. 675: A.I.R. 1938 Nag. 254. Jama wasil-baki papers—Admissibility of. *See* 5 W.R. 242; 7 W.R. 533: I.L.R. 27 Cal. 118; I.L.R. 32 Cal. 582; 46 Cal.L.J. 253: A.I.R. 1927 Cal. 855. Jamabandi papers—Admissibility of. *See* 6 Beng.L.R. App. 62: 14 W.R. 474; 9 W.R. 451; 1 N.W.P. App. 65; 22 W.R. 256; 20 W.R. 142; A.I.R. 1928 Pat. 429 (are in the nature of account books and admissible). As to zamindari papers, *see* I.L.R 19 Pat. 398: A.I.R. 1940 Pat. 622. As to Bahi entries, *see* (1939) 41 Punj.L.R. 373: A.I.R. 1939 Lah. 438.

It is settled law that *jamabandis* do not create title; they are only corroborative evidence under S. 34 and cannot by themselves establish title of the person purportedly recorded as the owner: A.I.R. 1990 Pat. 201: 1990 B.B.C.J. 367: 1990 Pat.L.J.R. 645: (1990-2) 38 B.L.J.R. 1048: (1990-2) 38 B.L.J.R. 780.

6. Non-production of documents to support entries.—Non-production of account books — Court can presume adversely: (1966-67) 71 Cal.W.N. 51.

Non-production of account books—Case proved by other evidence—Adverse inference against plaintiff for non-production need not be drawn: A.I.R. 1968 Mad. 203.

Where none of the witnesses deposed as to the account book entries being correct nor did the party offered any explanation for non-production of documents that could support the book entries, *held*, the account books are unreliable as their contents, the entries made therein, have not been proved: A.I.R. 1989 S.C. 1269: (1989-2) 30 Guj.L.R. 1051: (1989) 2 S.C.C. 630.

Where the tenant had pleaded payment of rent to the landlord by adjustment against the price of cloth sold by him to the landlord's wife and sought to prove it by his *bahikhatas* which were found to be unreliable and suspicious and had stated in his cross-examination that the details of cloth sold were in the bills not produced in the Court, *held*, the payment of rent by the tenant was not proved: (1992) 3 W.L.C. 636: A.I.R. 1992 Raj. 149; 1982 M.P.W.N. 243 [When ledger and vouchers were not produced in support of claim based on mere entries in books of account, *held*, claim could not be decreed].

Where at the instance of the defendant a ledger account was opened to enable the defendant to purchase petrol on credit, the ledger account kept in the regular course of business, unless proved to be wrong, is *prima facie* the relevant account book for ascertaining the liability of the defendant. No adverse inference can be drawn against the plaintiff from the non-production of the credit memo. book if the non-production has been explained and there is nothing to cast any doubt on that explanation: A.I.R. 1965 Assam 10.

7. Entries—By whom to be proved.—Transactions evidenced by entries in account books—Proof of—Accountant who made entries not examined—Transaction noted in account books can be proved by person whose account books they are and who had knowledge of the transactions: I.L.R. (1962) 11 Raj. 1022: 1962 Raj.L.W. 103: A.I.R. 1962 Raj. 118.

Where the writer of the account books is alive but has not been examined, the account books cannot be said to be duly proved and are, therefore, inadmissible in evidence: A.I.R. 1962 Punj. 27.

Account books kept in regular course of business—Proof of—Entries of transactions—Transactions can be proved by person having knowledge of transactions—Books of accounts are admissible as corroborative evidence—Entries need not be proved by persons who made them: I.L.R. (1960) 10 Raj. 1304: A.I.R. 1961 Raj. 52.

Where neither the writer of the entry nor the person who made payment indicated in the entry, were examined as witnesses with no explanation therefor but only the Manager, having nothing to do with either, was examined as a witness, *held*, mere production of account books does not satisfy the requirements of S. 34: (1992-1) 109 Mad.L.W. 262: (1992) 2 M.L.J. 481.

8. Firm's books of account.—Where other partners entrust the management of the firm to the managing partner whereby he alone acts for and on behalf of the other partners, *held*, a bond of fiduciary character is created between him and other partners; he is bound to render account of what he receives or spends on his own as well as on behalf of other partners; they have the right to challenge the books of account maintained by the managing partner; they are not joint tenants of debts due to the firm under the English common law or equity; the presumption of the genuineness of the books of account maintained by him is certainly not available to him; the Court may reject the account books and direct reopening of the whole account instead of disallowing individual entries in the books: A.I.R. 1994 Mad. 140: (1994-1) 113 Mad.L.W. 112 (D.B.).

The correct approach is that the Court shall not reopen a settled account unless the account books have been shown to be erroneous to a considerable extent both in amount as well as in number of entries or where fiduciary relationship exists and one or more fraudulent errors or omissions are shown. The *ratio* is that where the accounting partner did not properly maintain accounts and mixed up his private affairs with those of the firm and the accounts do not truly reflect the firm's income and expenditure, the Court must reopen and/or reject the accounts. (Case law discussed): A.I.R. 1994 Mad. 140: (1994-1) 113 Mad.L.W. 112 (D.B.).

It is hardly proper to stigmatise the books of a respectable firm as books which it is not difficult to fabricate, without coming to a specific finding that the books produced were as a matter of fact fabricated and without giving reasons therefor: 14 Pat.L.T. 61: A.I.R. 1933 Pat. 145.

Credit entry of deposit made by wife of assessee in account books of firm—Value of: A.I.R. 1968 Assam 1.

9. Probative value of entries in ledger.—The law relating to the probative value of entries in ledgers is: (1) the ledger by itself is no proof of the transaction and fastens no liability unless the entry therein is corroborated by other evidence; (2) the ledger would become relevant only when there is corroboration either of the entries therein or of the suit transaction; and (3) the nature of corroboration would depend on facts of each case like if the entries in the ledger are not denied by the other party, no corroboration would be necessary: A.I.R. 1985 J.&K. 85: 1985 Kash.L.J. 341.

A ledger by itself is not a book of account; other books including primary books of account if are not made available to check and cross-check it, a ledger by itself has no evidentiary value: A.I.R. 1981 Bom. 446.

Certified copy of ledger account maintained by a banker in regular course of business is admissible under S. 34: A.I.R. 1995 Ori. 244.

Where the Tribunal declined to rely on the ledger accounts prepared by the tenant for the sole reason that many pages thereof had been left blank, *held*, the decision was erroneous in law. It is common knowledge, and judicial notice can be taken, that whereas a cash book or journal or other primary books of account may not have blank pages, there will be few

35. Relevancy of entry in public record, made in performance of duty.—An entry in any public or other official book, register, or record stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact.

---

ledgers without blank pages; ledgers are meant to contain accounts of different parties, each account being allotted a certain number of pages, usually for a whole year; they are bound to have blank pages: A.I.R. 1990 Del. 51: (1989) 38 Del.L.T. 445: (1989) 2 Ren.L.R. 486.

10. "Account stated"—Meaning of.—An 'account stated' means an account no longer open or current but closed by a statement, agreed to by both the parties, of a balance due to one or the other party whereupon action at law may be brought; it also means an 'account settled'. [The term elaborately discussed with reference to Osborn's Concise Law Dictionary, Black's Law Dictionary and Halsbury's Laws of England]: A.I.R. 1988 Gau. 33: (1988) 1 Gau.L.R. 90 (D.B.).

Where total of different items was stated and the balance struck and acknowledged by signatures of the party underneath which is neither denied nor explained away, *held*, its binding nature as 'account stated' cannot be denied merely by branding it as based on slips and not being a formal account—The word 'account' has no definite legal meaning; the primary idea of *'account computatio'* is some matter of debit and credit implying that the parties are liable to each other in respect thereof either on contract or some fiduciary relation, public or private, created by law: A.I.R. 1988 Gau. 33: (1988) 1 Gau.L.R. 90 (D.B.).

11. Objection to admissibility.—Where entries in certain books of account are proved to be in the handwriting of a person since deceased, any objection to their admissibility on the ground that they were not proved to have been kept in the regular course of business ought to be taken at the time of trial: 32 I.C. 665: 17 Cr.L.J. 73 (M.).

In the absence of evidence that the books produced were account books regularly kept in the ordinary course of business, the account books should not be admitted. In such cases, however, it is essential that objection should be taken at the earliest stage, *i.e.*, as soon as the books of account are sought to be admitted in evidence. If no objection is taken at that time it cannot subsequently be taken in appeal. However, even if no objection could be taken in appeal to the admissibility of the evidence, their reliability and the weight to be given to the account books have still to be considered: 1960 Nag.L.J. 113: (1960) 62 Bom.L.R. 322: A.I.R. 1961 Bom. 169.

Where what was introduced in evidence by the plaintiff, albeit with no objection from the opposite side, was an exercise book, without page numbers, containing some slips of papers and none of the entries therein was proved by any witness, *held*, they do not constitute evidence under S. 34; non-objection by the opposite party does not take away the Court's right to question or scrutinise its evidentiary value; not having been proved as required under S. 61 by primary or secondary evidence, the documents must be brushed aside as mere scraps of paper not kept in the regular course of business. [A.I.R. 1967 S.C. 1058, Rel. on]: A.I.R. 1995 Gau. 23.

Where a ledger was produced, proved and exhibited with consent or without objection from the other party that corresponding day books had not been produced in the Court, *held*, the objection to its proof in appeal is not competent. Besides, the ledger is an old account book kept in the regular course of business; it was written at a time when the dispute in suit could not be in contemplation of the deceased; it contained seal of the Income-tax Department, sufficient to show that it could not be fabricated thereafter; the entries' genuineness is beyond suspicion: (1988-1) 101 Mad.L.W. 48 (S.N.) (D.B.).

Section 35—Synopsis.

[*See* also S. 34.]

1. Scope of section.

2. Non-examination of maker of entries—Effect.

3. Letters passing between officials before final decision is reached—Admissibility.

4. Date of birth—Proof of—General.

5. Birth and Death register.

6. School record.

7. Record-of-rights.

8. Survey record.

9. Settlement record.

10. Revenue record.

11. Family pedigree.

12. *Jamabandi*.

13. *Khasra girdawari*.

14. Entry in *Khatian*.

15. *Riwaj-i-am*.

16. *Wajib-ul-arz*.
17. Inam register.
18. *Batwara khasra*.
19. Municipal record.
20. Certificate of guardianship.
21. Voters' list.
22. Hospital record.
23. First Information Report.
24. Police report.
25. Commissioner's report.
26. Entry in order sheet regarding service of notice.
27. Witness's deposition.
28. Admissibility of previous judgment/ inquiry.
29. Miscellaneous.

---

1. Scope of section.—*See* 68 I.A. 1: I.L.R. (1941) Lah. 154: A.I.R. 1941 P.C. 21 (P.C.). An entry in an official record is admissible if it states a relevant fact. It is not necessary for the admissibility of the entry that it should relate to a fact known to the public officer recording it: 27 Sind L.R. 101: A.I.R. 1933 Sind 317. As to admissibility of statements contained in public documents, *see* I.L.R. 6 Lah. 269: A.I.R. 1925 P.C. 170: 50 M.L.J. 120 (P.C.).

An entry in a Register made by a public officer in the discharge of his duties, *held*, squarely falls within the four corners of S. 35 which requires the following conditions to be fulfilled before a document can be admitted under this section: (*1*) the document must be in the nature of an entry in any public or other official book, register or record; (2) it must state a fact in issue or a relevant fact; (3) the entry must be made by a public servant in the discharge of his official duties or in performance of his duties especially enjoined by the law of the country in which the relevant entry is kept: A.I.R. 1983 S.C. 684: (1983) 3 S.C.C. 118; A.I.R. 1988 S.C. 1796; (1988) 36 B.L.J.R. 539; (1992) 2 Rev.L.R. 147 (P.&H.) (D.B.); (*4*) merely because such a document has been exhibited does not dispense with its proof: A.I.R. 1995 Madh. Pra. 134.

To fall within the orbit of S. 35, the register need not be one enjoined by law to be maintained; the section contemplates two types of official or public registers (*i*) those maintained by public servants in the discharge of their official duty; and (*ii*) those maintained by persons other than public servants in performance of duty specially enjoined by law. The qualification 'being specially enjoined by law' does not apply to the first type of registers. They are public documents: A.I.R. 1982 Ker. 232.

A document's admissibility is one thing; its probative value quite another; and the two cannot be combined. A document may be admissible and yet, carrying no conviction, its probative value may be nil: A.I.R. 1983 S.C. 684: (1983) 3 S.C.C. 118.

Admissibility of evidence and the weight and value to be attached thereto are two distinct things; the former is a matter of law, the latter a question of fact; public documents cannot be taken into consideration unless they have been adjudged as admissible; besides, relevancy, admissibility and proof being different aspects, all of them must exist before the document can be admitted; similarly, evidence and proof of a fact are not synonymous; proof, strictly speaking, is merely the effect of weighing the evidence: A.I.R. 1977 Del. 73: (1976) 12 Del.L.T. 321.

A document, admissible or ancient, cannot carry the same weight or probative value as a document prepared under a statute which requires certain conditions to be fulfilled therefor; thus, a report by a responsible Officer, based on evidence of witnesses and documents and having statutory flavour, having been given not merely by an Administrative Officer but under the authority of a statute, has a very high probative value and it would be entitled to great weight: A.I.R. 1983 S.C. 684: (1983) 3 S.C.C. 118.

In the absence of anything on the record to show that the document is not genuine it is incorrect to hold that the record is a collusive one: 1972 All.W.R. 341: 1972 Cr.L.J. 1377.

The combined effect of Ss. 35, 65(*e*), 76, 77 and 79 is to enable the proof of public documents by the certified copies of the extracts therefrom: A.I.R. 1982 Ker. 232.

A mere production of a certified copy of a public document is no proof of its contents; its admissibility depends on its contents being facts in issue in the case or otherwise relevant under the law of evidence; thus, a mere production of a copy of a self-serving statement made before another Tribunal would not become relevant and admissible: A.I.R. 1977 Del. 73: (1976) 12 Del.L.T. 321.

File of papers containing official communications maintained according to practice—Such Official Register is official document within S. 35 and public document within S. 74—Copy of sanction for prosecution lost—Case comes under S. 65(*c*)—Original from file can be produced as secondary evidence: (1953) 1 M.L.J. 636: A.I.R. 1953 Mad. 785.

Under S. 74 documents forming the acts and records of official bodies and public offices are public documents; their certified copies are admissible in evidence without calling for or proving their originals; but opportunity has to be given to the other party to adduce evidence to controvert presumption arising out of such documents admitted in evidence; otherwise the proceedings would be vitiated: (1982-83) 87 Cal.W.N. 294 (D.B.).

Ordinarily, it is not necessary to prove that a particular entry really represents an act of the public servant concerned because this may reasonably be presumed from the fact that he was in charge of the preparation of the record in which the entry finds place, but the presumption is destroyed by admission or clear proof of the fact that the entry in question is not in the handwriting of that public servant. In such a case it is not possible to receive the entry in evidence unless there is proof either direct or circumstantial that it does, in reality, constitute an act of the public servant whose duty was to prepare the record containing the entry. To presume from the mere existence of an entry in a public record that it was made by a public servant despite admission or clear proof that it was not in his handwriting would amount to curtailing the express requirements of S. 35 of the Indian Evidence Act. Such entries are to be excluded from consideration: 1964 All.L.J. 1139: 1964 All.W.R. (H.C.) 311.

S. 35 only provides that any entry in an official or public book, which is duly made by a public servant in the execution of his duty, is of itself a relevant fact but does not make the public book evidence to show that a particular entry has not been entered in it: 1960 Cr.L.J. 1181: A.I.R. 1960 Andh. Pra. 441.

Records maintained in the Post-office are public records; thus, an entry therein of sending the money order, its refusal and its return are admissible: A.I.R. 1982 All. 44: 1981 All.W.C. 612: (1982) 8 All.L.R. 70.

So long as the opinions expressed in official publications are not treated as conclusive in respect of matters requiring judicial determination, there would appear to be no objection in referring to the report for the purpose of gathering historical facts which are not in issue: A.I.R. 1953 Madh. Bh. 97.

The words 'an entry' in S. 35 are not intended to apply to the opinions of public officers based on or inferences drawn from the allegations made before them in the course of enquiries conducted under S. 202, Cr.P.Code, or under O. 26, C.P.Code: I.L.R. 16 Lah. 377: A.I.R. 1934 Lah. 890. *See* also 165 I.C. 626: A.I.R. 1936 Lah. 37.

The words 'an entry' in S. 35 are not intended to apply to the opinions of public officers, based on, or references drawn from, the allegations made before them in the course of inquiries. Moreover, the very wording of S. 35 conveys the idea that the entry will be of a permanent nature and excludes all such writings as are merely of an ephemeral character. Further, the person making the entry should be such as is invested with authority to record a decision which so far as the matter before him is concerned will be final.

Where a copy of a report of a Settlement Naib Tahsildar submitted, in connection with the application for correction of the entries in revenue records was relied on by the party, but neither the Settlement Naib Tahsildar who was not invested with authority to record final decision in the matter of correction of entries in the revenue papers, nor the original report submitted by him was produced.

Held, that the copy of the report of the Settlement Naib Tahsildar was not admissible in evidence as the report constituted merely his opinion based on allegations, made before him and it could not be regarded as an entry in any public or other official record within the meaning of S. 35: A.I.R. 1966 Him. Pra. 54.

Where the Tehsildar had, after examining the spot, prepared a report as well as a site plan of the area where one of the parties had held *melas*, which he had submitted to the Sub-Divisional Officer, *held*, it amounted to the Tehsildar's expression of his impression of what he observed at the spot; it was merely evidence of his having been deputed to inspect the spot and having prepared his report; the report is certainly not admissible under S. 35 without the Tehsildar having proved it by his evidence: A.I.R. 1976 All. 121: 1975 All.W.C. 632 (D.B.).

A Naib Tehsildar's report of spot inspection made to the Tehsildar, *held*, is only an expression of his own opinion; it is neither a public document under S. 74 nor admissible under S. 35 unless it is proved by proper evidence adduced in the Court: A.I.R. 1990 All. 175.

Document neither shown to be prepared by public servant nor shown as forming the act or record of public officer is not admissible: A.I.R. 1930 All. 26.

The mere fact that a public servant when making an entry in an official record acts under a misconception about his official duty, is not sufficient to take such entry by such an official out of the class referred to in S. 35: I.L.R. 21 Luck. 1: A.I.R. 1946 Oudh 163.

'Official duty'—Meaning of—Act done contrary to law—If done in discharge of official duty. *See* (1958) 1 An.W.R. 527.

Documents proved to have been received in official correspondence by the witnesses and found to be genuine are admissible under S. 35, Evidence Act: 1958 M.P.C. 156: 1958 M.P.L.J. 192: 1958 Jab.L.J. 235: (1958) 28 Comp. Cas. (Ins.) 19: A.I.R. 1958 Madh. Pra. 297.

Upon the question whether a talukdar was a convert to Islam or was chief of a Rajput clan, it is permissible to prove that the fact of such conversion was unknown to the district and local officers and was not ascertainable from anything to be found in official publications: (1939-40) 44 Cal.W.N. 66: A.I.R. 1939 P.C. 249.

A book of copies of communications sent by the Collector to various subordinate officers, maintained in the Collector's office, that being the prevalent official practice is itself an official register within the meaning of S. 35, and a public document under S. 74. A certified copy of such a document is clearly admissible in evidence, and should not be rejected as being a copy of a copy: 1939 Mad.W.N. 841.

Official reports have no judicial value when they express any opinion on private rights of parties. But being reports of public officers made in the course of their duty and under statutory authority, they are entitled to great consideration. Though such official reports are valuable and in many cases the best evidence of the facts stated therein, the opinions therein expressed need not be treated as conclusive in respect of matters requiring judicial determination: I.L.R. (1960) Cut. 230.

An entry in the register of powers-of-attorney maintained by the registering officer under the Registration Act, is undoubtedly relevant under S. 35 to prove the contents of the power-of-attorney. The abstract of the power which appears in the entry is made by the Sub-Registrar in the discharge of his official duty, and the Court is entitled to presume its correctness: (1938-39) 43 Cal.W.N. 907: A.I.R. 1939 Cal. 569.

A mere production of the power of attorney authenticated by the Notary Public is not sufficient to raise presumption of its validity and effect unless it is further shown that the grantor was possessed of power to confer the power granted under the power of attorney: (1982) 2 Bom.C.R. 612.

Although S. 35 primarily meant to apply to old records and entries in old registers, there is no reason why it should not be applied to a report if it is proved to have been prepared by a public servant in the discharge of his official duty or by another person in performance of a legal duty: 1958 B.L.J.R. 6: A.I.R. 1958 Pat. 166.

The underlying principle of S. 35 is the 'fact that record made by authorised and accredited agents appointed for the purpose and publicised is presumed to be true and is admissible'; thus, the Collector's decision under S. 5(1) of the Orissa Estate Abolition Act, 1951, is not only admissible but, being between the same parties and the same properties, is entitled to great weight: (1974) 40 Cut.L.T. 88 (D.B.).

Report of the Court of Enquiry appointed under R. 75 of the Aircraft Rules, 1937 cannot be regarded as an entry in a public or official book, register or record within the meaning of S. 35 of the Evidence Act. However, this enquiry is a formal and statutory enquiry under S. 7 of the Aircraft Act, 1934 read with R. 75 of the Aircraft Rules. It is not a private enquiry. The enquiry relates to the causes of accident. This report is relevant fact under S. 5 of the Evidence Act because it bears on the question of the existence or non-existence of every fact in issue and of such other facts which are regarded as relevant under the Evidence Act. This report is also a fact which speaks of the occasion, cause or effect or facts in issue under S. 7 of the Evidence Act. The report is also admissible as a fact under S. 9 of the Evidence Act, because it is a fact necessary to explain or introduce a fact in issue or relevant fact or which supports or rebuts an inference suggested by a fact in issue or relevant fact or fixes the time and place at which any fact in issue or relevant fact happened. The report was produced by the defendant's witness, from his file under cross-examination. It was a printed report and was published by the Governme

of India under S. 75, of the Indian Aircraft Rules. The witness was the Assistant Aerodrome Officer under the Civil Aviation Department, Director-General of Civil Aviation, Union of India. The report bore all the authentic marks of official recognition such as the title 'Government of India, Ministry of Communication', the insignia of three lions and the Ashoka Chakra with the official caption and a title 'report of the Court of Enquiry on the accident to Indian Airlines Dakota VT-CHF on the 12th December, 1953, near Nagpur'. Its very first page contained the communication by the Court to the Secretary to the Government of India, Ministry of Communications, New Delhi.

Held that, on those facts the report must be held properly and duly proved under S. 81 of the Evidence Act. But although the report was admissible and had been duly proved as a fact of this case, yet the evidence tendered before the Court of Enquiry was not necessarily evidence in the suit unless the questions and answers put to the witnesses were put to those witnesses who deposed at the trial and only those portions of that evidence before the Court of Enquiry which was tendered before the witness concerned would be evidence in the suit and not otherwise. This report, however, did not become evidence under Ss. 2 and 3 of the Commercial Evidence Act, 1939: A.I.R. 1965 Cal. 252.

The report embodying the findings as to the causes of the accident of an aircrash being of a formal investigation by a Court under R. 75 of the Aircraft Rules is admissible in evidence. The investigation under R. 75 is to be conducted by an authority who is designated in the rule as a 'Court'. Though designated as a 'Court' it is not a civil Court which can deliver judgment and pass a decree. Nevertheless, it has all the powers of a civil Court to enable it to conduct an enquiry and make a report. The report so made is not admissible as a judgment under Ss. 40, 41 and 42 of the Evidence Act, but is admissible under S. 35 of the Act. Its findings and conclusions both as to facts and its opinion as to cause of disaster is not binding on the Court that is deciding a suit brought under the Fatal Accidents Act. However, the Report must be given adequate weight and its findings as to matters of fact cannot be rejected or set aside unless sufficient acceptable evidence is tendered before the Court hearing the suit, to indicate a contrary finding: A.I.R. 1962 Cal. 544.

Trunk-call tickets are official records and the entries therein are made by public servants in the discharge of their official duties. As those entries relate to a relevant fact, namely, whether trunk-calls were booked from the residence of an accused to his co-accused at Bombay, the entries themselves become relevant piece of evidence under S. 35, Evidence Act. Under S. 35, it is necessary that the entry should be made either in a public book, register or record. In the latter category, it would not also be essential to show that official book, register or record is public document which should be open to inspection by the general public. The trunk-call tickets are not inadmissible in evidence because their writers were not called as witnesses. There is a presumption about their genuineness because those tickets purport to be documents kept under R. 49, of the Posts and Telegraphs Financial Rules Handbook and were produced from proper custody, *vide* S. 81 of the Evidence Act: (1965) 1 Cr.L.J. 393 (Punj.).

Notification No. 2252/49, dated 27th February, 1950 issued under S. 135-B, Bombay Land Revenue Code—It does not fall within scope of S. 135-B—Presumption under S. 135-B is not attracted—But notification is not *ultra vires*—Entries made in record of rights in pursuance of said notification—Such entries to be considered under S. 35, Evidence Act: (1964) 5 Guj.L.R. 701.

Impression gathered or circumstances ascertained by Police Officer at spot are not required to be entered in general diary—They are not relevant facts under S. 35, Evidence Act and hence not admissible in evidence: I.L.R. (1965) 1 All. 298: 1966 Cr.L.J. 498: A.I.R. 1966 All. 222.

Proceeding regarding industrial dispute before Labour Court—Nature of—It is not strictly judicial but is quasi-judicial—Evidence Act does not apply: (1963) 6 Fac.L.R. 161 (Cal.).

Constitution of India, Art. 134—Accused contending that War Diaries of 6. Bombay Pioneers and Chief Engineer, Burcorps were not admissible in evidence as they were not public documents—Accused further contending, for the first time in appeal under Art. 134, that persons maintaining diaries were not servants of Indian Government—*Held*, diaries were records of official acts and were,

therefore, admissible in evidence—In interpreting S. 35, decision on common law in England could not be of much help—Second contention involved mixed question of law and fact, but the case being proceeded on basis that persons maintaining diaries were servants of Indian Government—Court could not go into question of fact whether prosecution led evidence to show that officers maintaining diaries were in service of Government of India: 1967 Cr.L.J. 656: (1967) 1 S.C.R. 211: A.I.R. 1967 S.C. 752.

Orders of detention passed under R. 26(1)(*b*) of the Defence of India Rules are not public records and, therefore, S. 35 has no application: A.I.R. 1944 Lah. 33 (F.B.).

Official reports—Facts stated in—Reports valuable and in many cases the best evidence: But the opinion as to nature of estate—partible or impartible is not conclusive: A.I.R. 1928 P.C. 10 : 55 I.A. 45: I.L.R. 55 Cal. 403: 54 M.L.J. 397 (P.C.).

In a criminal prosecution the prosecution cannot take advantage of the entries on the bin-cards in the absence of proof as to who their author was, that such author was a public servant and that he had made the entries in the discharge of his official duties: 1974 Cur.L.J. 371 (P.&H.).

Where extracts from the property registers maintained by the Town Area Committee were relied upon to establish title, *held*, the registers were public documents; their extracts were admissible under S. 35. [A.I.R. 1948 All. 309, Rel. on]: A.I.R. 1978 All. 292.

Entries in an official book made by a forest guard and checked and initialled by the officer responsible for the correctness of the marketing are entries in an official record which is admissible: I.L.R. (1943) Nag. 358: A.I.R. 1943 Nag. 139.

An assessment order of the Sales Tax Officer is a public document and where the question is whether a person was a partner of the firm of assessee during the relevant period, the order is a relevant piece of evidence and is admissible.

The return of sales tax filed by an assessee under the U.P. Sales Tax Act is also a public document. Apart from S. 35 of the Evidence Act, this return of the sales tax is also admissible under S. 11 of the Evidence Act, as it makes the existence of the fact in issue highly probable: A.I.R. 1958 All. 829: (1958) 9 S.T.C. 699: I.L.R. (1958) 1 All. 673.

Entry made by bill collector in discharge of his official duty and not under any statutory duty—Entry is not admissible: (1965) 78 Mad.L.W. 157: I.L.R. (1965) 2 Mad. 107.

A register of rent suits would be admissible as written by a public servant in the discharge of his official duty: 71 Cal.L.J. 504: A.I.R. 1940 Cal. 539.

Printed copy of index register of lands granted on lease in city is admissible in evidence. *See* (1942) 44 Bom.L.R. 295: I.L.R. (1942) Bom. 307: A.I.R. 1942 Bom. 161.

Canal papers are documents which are prepared in ordinary course of business, and there is no reason why they should not be admitted into evidence. They are certainly evidence of possession; but what weight should be attached to such evidence must depend upon the facts of each particular case. [A.I.R. 1952 Pat. 429 and A.I.R. 1945 Pat. 453 and I.L.R. 32 Pat. 903, Ref. to]: 1958 B.L.J.R. 64: A.I.R. 1958 Pat. 353.

A canal parcha is very good evidence of possession and is admissible to prove khas possession. The canal authorities grant parcha for irrigation of the land to those persons whom they find in possession of land and the parcha has, therefore, great evidentiary value: 1941 Pat.W.N. 428. *See* also 23 Pat.L.T. 42: A.I.R. 1942 Pat. 346.

The Jail Registers are official records kept by public servants in the discharge of their official duties and as such admissible under S. 35: 1942 O.W.N. 530: A.I.R. 1943 Oudh 1.

2. Non-examination of maker of entries—Effect.—Though entries may be admissible under S. 35 without examining their makers, it does not mean that they have the same probative value in all cases and under all circumstances; that depends on a host of circumstances as also other evidence on record. Of course, if the maker of the entries is examined, the Court will be in a better position to assess their probative value; however, the Court has still to assess such probative value even if the maker is not examined as a witness: A.I.R. 1982 Ker. 232.

The Motor Accidents Claims Tribunal is legally competent to use entries in the scene *mahazar* without examining its maker or any person connected therewith; however, any

party disputing its correctness is at liberty, subject to principles of natural justice to examine a relevant witness to establish its unreliability: (1990) 2 Civ.L.J. 296: A.I.R. 1991 N.O.C. 17 (Ker.) (D.B.).

Applicability—Proceeding started on basis of report by Patwari—Patwari need not be examined—Report is admissible: 1959 Nag.L.J. (Notes) 55 (Rev.).

An endorsement of refusal on registered notices by the Postman, *held*, is *per se* admissible without examining the Postman as it is made by a public servant in the discharge of his duties: 1987 Punj.L.J. 376.

Where an inquest report, proved by the Investigating Officer, contains the record of what he had seen with his own eyes, *held*, the record of his observations is admissible under S. 35 even if the officer did not repeat the observation in his oral testimony before the Court: (1993) 1 Ker.L.J. 839 (D.B.).

Cultivation Registers and Paddy Producers and Rent Receivers' Registers are prepared by the village assistant, a public servant; though not maintained under any law, they are necessary records for official and public purposes; they are official registers; they can be proved by their certified copies without examining their makers: A.I.R. 1982 Ker. 232.

Where bigamy was sought to be proved by a wedding card and an extract from the marriage register of the Gram Panchayat but without examining the owner of the printing press where the card was printed or the informant of the second marriage to the Panchayat, *held*, this evidence itself is of no help to the prosecution; the extract from the marriage register was no doubt a public document and could be proved by certified copy but it had little probative value when no explanation was furnished by the prosecution as to who the informant was and why could not he be produced as a witness: A.I.R. 1981 Bom. 283: 1981 Mah.L.J. 614: (1981) 83 Bom.L.R. 312.

Where inter-departmental communications between the Reserve Bank of India and the Controller of Capital Issues in the custody of the C.B.I. were tendered as evidence in the Court, *held*, they are admissible evidence even without being proved by their writers but having very weak probative value, they can be used only for corroboration; but if they are proved by their respective writers they can be taken as independent evidence: A.I.R. 1980 Cal. 83.

A recital in the order of a President of a Union Board is not admissible under S. 35 or S. 13 unless such President has been examined with regard to the fact mentioned in his order: 131 I.C. 654: A.I.R. 1931 Mad. 487.

3. Letters passing between officials before final decision is reached—Admissibility.—The very wording of S. 35 conveys the idea of a duty imposed upon the maker of the entry by law or his official position to record the information he possesses or has gathered in an official document of the nature described therein. It further imports that the entry will be of permanent nature and thus excludes all such writings as are merely of an ephemeral character; and in so far as they do not incorporate the result of personal inquiries they are not intended to be used for reference in future. Another idea which runs underneath this section is that the person making the entry should be such as is invested with authority to record a decision which, so far as the matter before him is concerned, will be final. It thus excludes all views expressed before the final stage is reached and makes only those decisions relevant which constitute the final word in the matter. Hence, letters which have passed between the various officials cannot be admitted under S. 35 so as to make the remarks made therein legal evidence in the case; and if the final conclusions arrived at are recorded in the settlement papers, those are the only documents which can be admitted in evidence: (1936) 38 Punj.L.R. 748: A.I.R. 1936 Lah. 37. *See* also 1939 Mad.W.N. 841: A.I.R. 1940 Mad. 273.

4. Date of birth—Proof of—General.—It is well settled that a birth entry in a public or official record or register, though relevant under S. 35, is not conclusive presumptive proof of what is recorded there; in case a dispute arises, none can insist that the entry be accepted and acted upon as conclusive proof; the dispute perforce has to be resolved in an ordinary civil Court: (1986) 99 Mad.L.W. 738: (1987) 1 M.L.J. 82.

(1904) 31 Ind. App. 38 (Privy Council) and A.I.R. 1924 Cal. 558 cited as authorities for the proposition that the age mentioned at the head of a witness's testimony in Court is no evidence, *held*, are no sealing authorities for the blanket proposition that such age can never be treated as evidence. Thus, where the

witness mentions his age after he had been sworn, that age is certainly 'evidence proper': A.I.R. 1989 Cal. 14: (1988) 1 Cal.L.J. 250: (1988) 1 Cal.H.N. 219: (1988) 1 Ren.L.R. 555: (1987-88) 92 Cal.W.N. 929: (1988) 2 Ren.C.R. 179: (1989) 1 Ren.C.J. 702 (D.B.).

Value of accused's statement under S. 35, as regards proof of age. *See* 1984 Cr.L.J. 1081: 1983 T.L.N.J. 90: 1984 M.L.J. (Cr.) 195: 1984 Mad.L.W. (Cr.) 12.

The ossification test is not a sure test regarding the age. It gives only an approximation which may vary by two years on either side: 1992 Cr.L.J. 4073 (Del.). *See* also (1978) 2 M.P.W.N. 118.

Where in a case of rape on minor, the mother of the prosecutrix stated that victim was above 16 years of age while ossification test showed that she was below 16 years and there was no evidence to establish the age of the prosecutrix and further the Doctor had opined that she was used to sexual intercourse, *held*, the trial Court was not right in concluding that the prosecutrix was below the age of 16 yeas on the date of occurrence: 1992 Cr.L.J. 4073 (Del.). *See* also (1986) 3 Crimes 189 (Madh. Pra.); (1984) 3 Crimes 295 (All.).

When the question of birth date of a person is in issue birth entries in books kept for the purpose by Police Patel and in the books kept by Police Station, are relevant facts under S. 35 and their certified copies are admissible in proof of original entry under S. 77. Similarly, the entries of vaccination in Vaccination Report are also relevant and their certified copies are admissible: A.I.R. 1955 Nag. 290: I.L.R. (1955) Nag. 709.

Birth entry in Police records—That the entry relates to the person whose birth date is in question must be established: A.I.R. 1955 Nag. 290: I.L.R. (1955) Nag. 709.

It will not be proper for the Court to base any conclusion about the age of a candidate for election on the entries in the School Admission Register, Matriculation Certificate or application for a Government post: (1964) 2 M.L.J. (S.C.) 140: (1965) 1 S.C.A. 378: A.I.R. 1965 S.C. 282.

Entry of age in service book. *See* (1978) 2 M.P.W.N. 118.

5. Birth and Death register.—The Municipal register in which births and deaths are registered is admissible as it is kept by a public servant in the discharge of his duties: 11 O.W.N. 416: A.I.R. 1934 Oudh 167; 177 I.C. 517: A.I.R. 1938 Cal. 120; 1939 All.W.R. (B.R.) 4: 1939 R.D. 80; 1936 All.L.J. 404: A.I.R. 1936 All. 218; A.I.R. 1940 Mad. 285. *See* also I.L.R. (1937) Nag. 382: A.I.R. 1937 Nag. 264; (1941) 54 Mad.L.W. 411: A.I.R. 1942 Mad. 129; 175 I.C. 263: A.I.R. 1938 All. 242.

Entries in Birth and Death Registers are public documents and are admissible under S. 35, Evidence Act. The ground of reception of such evidence is that it is the public duty of a person who keeps the register to make such entries after satisfying himself of the truth. When it is the duty of a public servant to make such entries in any public or official register, it becomes admissible to prove the truth of facts entered as well as the fact that the entries were made by the officer. Entries in a register of birth, death or marriage are at least *prima facie*, though they may not be always conclusive evidence. It is not necessary to prove who made the entries and what was the source of his information. [A.I.R. 1947 All. 429, Rel. on]. No doubt, identity of the person whose birth and death is entered has to be established by other evidence if that is in dispute. In that case, the informant, if available, will be competent witness. Other kind of evidence may also be led to identify the person. But when the identity of a particular person is established, the description of the deceased person in the entry as the widow of that person can be accepted. The whole entry, which is admissible under S. 35 of the Evidence Act, need not conform to the special provisions of S. 32 or S. 50 of that Act. Relevancy of an evidence can be established under any of those three sections: A.I.R. 1964 Pat. 301.

Where the Municipal By-laws prescribe the mode of maintaining birth and death registers, they have to be regarded as the record of official acts performed by public servants in the discharge of their official duties; they are, thus, admissible under S. 35: A.I.R. 1972 P.&H. 199: (1972) 74 Punj.L.R. 67.

The Birth and Death Register is no doubt a document within the meaning of S. 35, Evidence Act, and is, therefore, relevant and has evidentiary value. But this does not mean that each and every entry made in that register is admissible in evidence. Only such entries as are made therein by persons in the discharge of their official duty are admissible: A.I.R. 1956 Nag. 74: I.L.R. (1956) Nag. 282. *See* also (1973) 2 Mys.L.J. (S.N.) 63.

An entry in a birth and/or death register as to age would be excellent evidence and may have to be preferred to entries in the records of educational institutions. The same rule cannot, however, apply where the evidence furnished by the birth registers is not available at all. Each case must depend upon its own facts and circumstances and must be decided on the net balance or the various counts of proof offered therein.

The entries in the School records as to the age of a candidate for election were proved to have been made on the basis of information supplied to the School authorities by the candidate's own father, while the entries in previous electoral rolls betrayed a motive behind them to enable the candidate to stand for certain election and did not inspire confidence.

Held, that no finality could attach to the entries in the electoral rolls and they were at best a piece of *prima facie* evidence liable to be rebutted. In the instant case the entries in electoral rolls were successfully rebutted by the entries in School records: I.L.R. (1964) 14 Raj. 26: A.I.R. 1964 Raj. 126.

The entries in Birth and Death Registers are public documents and are admissible under S. 35 of the Evidence Act and it is not necessary to prove who made the entries and what was the source of his information. The register being a public document, presumption of correctness attaches to it and heavy onus lies on the party who wants to dispute the presumption: I.L.R. 47 Pat. 636: A.I.R. 1968 Pat. 481.

The entry in a birth register is no doubt admissible in evidence under the provisions of S. 35 of the Act; but the fact that it relates to a particular person and none other is further required to be proved. The possibility of there being more persons than one of the same village bearing the same name, to whom a son might have been born and his birth recorded must be ruled out. Mere filing of a birth certificate by the opposite party may be sufficient to prove that a son was born in the village to the person named therein, but that will not *per se* prove that the birth entry relates to a particular person. The mere possibility of the entry that is produced relating to the petitioner is not enough. The connection between the birth entry to be relied upon with the particular person to whom it is sought to apply must be established by evidence *aliunde*. The assumption without any proof that it relates to a particular person is unwarranted: 1962 All.W.R. (H.C.) 495: 1962 All.L.J 1094.

Age—Proof—Admissibility and value of entry in birth and death register: A.I.R. 1964 Punj. 231.

It is an accepted principle that an entry in the Register of Births as originally recorded or recorded under orders from a Magistrate is not conclusive of the disputed date of birth: A.I.R. 1976 Karn. 231: (1976) 1 Karn.L.J. 283: I.L.R. (1976) Karn. 800.

S. 15(*c*) of the Bihar Gram Panchayat Act, 1948 having cast upon Panchayats the duty to maintain Registers of Births and Death empowering the Gram Sewak, a public servant, to make entries in the Register, *held*, such an entry is admissible as well as relevant under S. 35: A.I.R. 1985 Pat. 35: 1985 Pat.L.J.R. 36.

Certificate of the entry of a date of birth, duly made as per the Registration of Births and Deaths Act, 1969 and issued by the Registrar is admissible under S. 35; and though an ossification test may be a surer basis for age than a medical expert's opinion under S. 45, but that opinion cannot be preferred to the positive evidence of the entry in the Register of Births and Deaths: 1993 Cr.L.J. 549 (Madh. Pra.).

Birth Register—Entries therein furnish best evidence of the date of birth and can safely be accepted unless they are shown to be wrong—Birth entries in registers of public Schools though relevant under S. 35 they are of far less evidentiary value and of little avail to show correct age: 1966 Ker.L.J. 545: 1966 Ker.L.T. 1129: A.I.R. 1966 Ker. 305.

A birth register is the conclusive proof of age, but entry does not prove itself and is no proof of age of any particular person unless the persons connected with the entry either by making the entry or giving information come forward and speak regarding the entry and connect it with the individual concerned: (1964) 6 Ori.J.D. 1: I.L.R. (1963) Cut. 917: (1964) 2 Cr.L.J. 102.

It is wrong to assume that mere filing of a copy of an entry in the birth register or the kotwari book proves *ipso facto* that the entry relates to or proves the birth of the person concerned; evidence has to be introduced to connect that entry with the person whose date of birth has to be established. Connection of the identity of the person under the entry

must be established by other evidence: 1962 Nag.L.J. 54: (1962) 64 Bom.L.R. 86: I.L.R. (1961) Bom. 963: A.I.R. 1963 Bom. 25.

It is not safe to accept a mere entry in the birth register as proof of the age of the child concerned without some evidence or admission of the parties about the identity of the parents and the child mentioned in the register: A.I.R. 1957 Ker. 106: 1957 Ker.L.T. 804: 1957 Ker.L.J. 912.

Though entries in a birth register, being a public document, are admissible *per se* but mere production of their copy does not, as a matter of law, connect them with the person concerned; thus, where it was not shown that the entry pertained to the person concerned, the burden for which lies on the party propounding it, the age of the person cannot be determined as per the birth entry: A.I.R. 1983 P.&H. 366; (1978) 5 Cr.L.T. 215: 1978 C.L.R. 146 (P.&H.).

A mere entry in a birth and death register to the effect that child was born to a person without any statement as to the identity of the child is not sufficient to prove the birth of a particular person. The identity of that person has to be fully established by the other evidence: A.I.R. 1956 Nag. 74: I.L.R. (1956) Nag. 282; A.I.R. 1957 Him. Pra. 42: 1957 Cr.L.J. 847.

Where a birth entry merely stated that a girl child was born to a certain villager without any indication or other evidence to show that there was no other person of that name to whom that girl could at that time be born or that the entry pertained to the party who claims to be that daughter, *held*, the entry had no evidentiary value: A.I.R. 1976 P.&H. 24: 1975 Rev.L.R. 567.

Ss. 35, 76—Madras Registration of Births and Deaths Act (III of 1899), S. 17(2)—Dispute as to date of death of person—Extract from register of deaths under Madras Act III of 1899 is bound to be accepted as conclusive of the matter when there is no controversy that the extract did not relate to the person, the date of whose death is in question—Death register is covered by language of S. 35: (1964) 77 Mad.L.W. 679: I.L.R. (1965) 2 Mad. 556: A.I.R. 1965 Mad. 205.

Birth Register extract obtained from Municipality is a valuable piece of evidence as regards the age of a person in a kidnapping case and can be relied upon: 1995 Cr.L.J. 632 (Mad.).

When information is given by a village servant to the Registering Officer that a child was born to a male and a female, it is his duty to make entries. The birth register is maintained under Act III of 1889. Under S. 17(2) of the Act, an extract of the entries from the book is proof of the entries. The second proviso to S. 8 provides for the manner in which the entries in the register should be made in the case of an illegitimate child. The registering officer, however, cannot be supposed to have knowledge of the fact that the male was the paramour of the woman or that the servant informed him that the child born was the illegitimate child of the male, and, it cannot be said that when he made the entries, he did not discharge his official duty within the meaning of S. 35, and therefore, the entry is inadmissible: (1957) 2 An.W.R. 308.

Where to show the age of prosecutrix, a copy of entry in the birth Register was produced, *held*, the facts that (*i*) the author of the entry in said register was not known and (*ii*) disputed entry was procured after a lapse of more than six months of the occurrence, did not rule out the possibility of the entry having been manoeuvred or at least made afterwards in the register and in any case it did raise a doubt of which benefit should be given to the accused: 1992 Cr.L.J. 1758 (Him. Pra.) (D.B.).

Where none was produced to prove an affidavit, unattested and bearing no date but signed by a person who was proved to be illiterate and incapable of signing, and the admission form and the School's admission register had interpolations, unpaged and in loose sheets, *held*, the date of birth shown therein could not be relied upon; besides, it being a private School, no presumption of authenticity could be raised about the School record: 1991 Cr.L.J. 687 (Del.).

Where age of the prosecutrix was established by evidence of the radiologist, the Headmaster of her School and certified copy of the entry in the birth register, *held*, the birth register, kept by the concerned official in discharge of his official duties, could not be excluded from consideration because that official had not been examined; the extract was admissible under S. 35: A.I.R. 1981 S.C. 361: 1981 Cr.L.J. 1: 1981 U.J. (S.C.) 63: (1981) 1 S.C.C. 560. *See* also (1986) 3 Crimes 193 (Madh. Pra.).

The age certificate of the prosecutrix in a rape case issued by the Municipal Corporation on the basis of the Register of Births and Deaths, *held*, is admissible under S. 35; it is not necessary to prove the certificate by the official who had made the entry: (1991-2) 11 Guj.L.H. 263: (1991-2) 32 Guj.L.R. 1243 (D.B.).

The reason why an entry made by a public servant in a public or other official book, register, or record stating a fact in issue or a relevant fact has been made relevant is that when a public servant makes it himself in the discharge of his official duty, the probability of its being truly and correctly recorded is high. That probability is reduced to a minimum when the public servant himself is illiterate and has to depend on somebody else to make the entry. Accordingly, an entry made in an official record of births maintained by an illiterate chowkidar, by somebody else at his request does not come within S. 35 of the Evidence Act: (1964) 2 M.L.J. (S.C.) 140: (1965) 1 S.C.A. 378: A.I.R. 1965 S.C. 282.

An entry in a Death Register maintained by a Municipality is admissible evidence under S. 35 but by no means conclusive; merely because a party produced a certified copy of the entry which showed a different date of death than pleaded by it in an earlier proceeding does not tantamount to fraud by the party producing it: A.I.R. 1974 Cal. 393: (1973-74) 78 Cal.W.N. 1039 (D.B.).

A Choukidari Hat Chitha Book recording the birth of a child cannot be discarded as of no importance merely because the name of the child is not given there; that certainly is very improper reason; children are normally not named by the time their birth is recorded in the Register: A.I.R. 1971 Ori. 230.

An entry in the Choukidari Hata Chitha becomes admissible under S. 35. But, where an entry of birth or death is made on official record maintained by an illiterate Choukidar by some body else at his request, such entry does not come within S. 35: (1973) 1 Cut.W.R. 797; 1971 Cr.L.J. 1656 (Raj.) (D.B.); A.I.R. 1971 Ori. 230; A.I.R. 1974 P.&H. 31. *See* also A.I.R. 1972 Ori. 78: (1971) 1 Cut.W.R. 339.

But see: The Hath chitha of the Chaukidar containing the date of birth of a person is admissible to prove the age of a person though the entry was made by the defadar, the Chaukidar being illiterate: 14 Pat.L.T. 441: A.I.R. 1933 Pat. 473. *See* also 26 Pat.L.T. 225: A.I.R. 1945 Pat. 489.

Hath chitha—No proof as to who made the entry or whether it was made in the discharge of any official duty—Hath chitha, if admissible in evidence.

The learned Additional Sessions Judge had rejected the version of the prosecution regarding the shooting of Kaleshwar Yadav mainly on the basis of entries in an attested copy of the chaukidar's hath chitha according to which the death of Kaleshwar took place in Gopalpur mauza on 12th August, 1960, that is, three days prior to the occurrence.

Is the hath chitha admissible in evidence?

Held that, the reason why an entry made by a public servant in a public or other official book, register, or record stating a fact in issue or a relevant fact has been made relevant is that when a public servant makes it himself in discharge of his official duty, the probability of its being truly and correctly recorded is high. No proof has been led in this case as to who made the entry and whether the entry was made in the discharge of any official duty. As the High Court rightly pointed out, the Additional Sessions Judge should have dealt with the question of the admissibility of the document. Therefore, the document was inadmissible in evidence: A.I.R. 1970 S.C. 326: 1970 B.L.J.R. 144: (1970) 1 S.C.R. 694.

Birth register—Entry of birth in Hatha Chitha—Hatha Chitha is public document—Entry is admissible on proof: I.L.R. (1962) Cut. 409.

An entry made in a Chaukidar's register of births and deaths is not admissible if it neither purports nor is proved to be signed by the station writer, the register not being one directed to be kept by any law: 22 O.C. 250: 54 I.C. 166; 23 Mad.L.W. 688: A.I.R. 1926 Mad. 985 (Birth register). In proof of the age of a person, a certified copy of an extract of an entry in the birth register maintained in the Thana was produced. On a question to its admissibility and evidentiary value, *held*, that it was admissible under S. 35 being a certified copy of a public document and that though it could not be trusted for the exact date of birth, it was accurate within a few days and was valuable evidence of age: A.I.R. 1948 Oudh 1: 1947 O.W.N. 180. Entries in the register of births maintained at the Thana are admissible in evidence under S. 35 as such a register is a public document and the entries are made by an employee of the Police Department. It cannot be said that they are not admissible unless it is proved as to who wrote those entries and what his source of information was: 1947 All.L.J. 76: 48 Cr.L.J. 449; 46 Cr.L.J. 864: A.I.R. 1947 All. 429. Where the copy produced is that of an entry in the register of births and deaths

kept by the Circle Registration Officer under para. 306 of the Police Regulations, it is a copy obtained from a public office and is a copy of a public document within the terms of the Evidence Act and is, hence, admissible in evidence: 1940 R.D. 6: 1940 All.L.J. (Supp.) 1.

Where the age and date of birth for admission to a medical course was required to be furnished 'as found in S.S.L.C. or H.S.C. or other records', *held*, an extract from the Register of Births maintained by a Municipal Committee could also be taken into consideration; its evidentiary value under S. 35 is well settled: (1989-2) 104 Mad.L.W. 257.

Where the date of birth of a student seeking admission to a Medical College was different as recorded in her birth certificate from her School register, *held*, the University could not insist that it would accept only the age recorded in the School register, as required by its Rules, for the purposes of admission, and not the age recorded in the birth register; the function of every public body is to do elementary justice and observe fair play: 1988 Mah.L.J. 1085.

Entry in death register—Certificate of death—More than thirty years old—Admissibility in evidence—Certificate mentioning caste of deceased—Produced by returned candidate in election petition against him—Person whose death was recorded alleged to be father of returned candidate—Candidate not deposing to it in his statement—Mere production of copy would not, as a matter of law, connect the entry with the returned candidate's father—Document has to be excluded from consideration as evidence of caste of the returned candidate: A.I.R. 1966 Punj. 282.

Death Registers are maintained in all Police Stations under R. 126(*a*) of the Bihar and Orissa Police Manual; they are public documents and donot require proof as to how the entry in the Register was made; presumption of correctness attaches to it; heavy onus lies on the party disputing the presumption. [A.I.R. 1918 Mad. 451; A.I.R. 1919 Cal. 721; A.I.R. 1925 All. 78; A.I.R. 1964 Pat. 353; A.I.R. 1968 Pat. 481, Rel. on]: A.I.R. 1974 Pat. 68.

Entry in Births and Deaths Register, regarding birth of certain person made on information given after expiry of the period prescribed by S. 7, Bengal Births and Deaths Registration Act, 1873—Still it is admissible in evidence under S. 35 as the Registrar was maintained by public servant, namely, the Registrar in the discharge of his official duty: A.I.R. 1964 Pat. 353.

Birth certificate.—The birth certificate does not prove itself and is no proof of age of any particular person unless the person connected with that entry either by making the entry or giving information comes forward and speaks to the entry and connects the entry with the individual concerned: A.I.R. 1949 Ori. 22: 50 Cr.L.J. 650.

Birth certificate—Proof. *See* (1983) 1 Karn.L.J. 344.

Birth certificate—Certified copy—Certified copy signed by Chief Executive Officer of Municipal Corporation—It is automatic evidence as public document under conjoint effect of Ss. 35 and 77—It is conclusive evidence unless disproved: (1968-69) 73 Cal.W.N. 877: A.I.R. 1970 Cal. 292.

Where a respectable person, not shown to have any statutory duty to keep record of births and deaths, issued a certificate of death of the deceased whose family once resided in the respectable person's place, *held*, does not satisfy the requirements of S. 35: A.I.R. 1984 S.C. 1234: (1984) 3 S.C.C. 619: 1984 U.J. (S.C.) 687: (1984) 26 Del.L.T. 118: (1984) 97 Mad.L.W. (S.N.) 181.

Entry of parentage.—Where the fact to be determined is the paternity of a person, *held*, entries of parentage made in the birth registers or School admission registers are of no evidentiary value unless they are proved by evidence of a person who had special means of knowledge as to the relationship or the source of that knowledge; in the absence of such evidence, the entries or recitals therein cannot by themselves be treated as substantive evidence; entries relating to relationship or paternity are extraneous to what is strictly enjoined to be recorded in those registers: A.I.R. 1977 Karn. 115: (1977) 1 Karn.L.J. 206 (D.B.).

Though a certified copy of an entry in a birth register, a public document required to be maintained by public officials, may be a relevant fact but not sufficient to establish the reliability of its contents; all that would depend as to the time when the entry was made and the character of the informant; if the entry is recent and information was given by the mother or her well wishers or close relations, it would have little evidentiary value if it is

impeached by the purported father; but if it is made by the father or his well wishers, it would amount to either admission of paternity by the father or his well-wishers, having a higher evidentiary value: 1984 Hindu L.R. 655 (Ker.).

Entry in birth register—Column requiring Officer to record name of father of new born child—Father's name entered as *A* son of *B*—*Held*, entry was not admissible with reference to parentage of *A*: I.L.R. (1969) 1 Mad. 459: (1970) 1 M.L.J. 105: A.I.R. 1969 Mad. 329 (D.B.).

An entry in a birth register mentioning the names of the father and mother of a new-born child made by a villageMunsif in the course of his official duty is a public document and admissible under S. 35. The authenticity of this entry assumes importance when it was produced not from the custody of the village Munsif but from the office of the Registrar of Assurances; the entry cannot be challenged: 1978 Cr.L.J. 752: 1978 M.L.J. (Cr.) 327: 1977 Mad.L.W. (Cr.) 217.

Where the entry in the birth register contained name of the child though not required under law and the name of the informant was left blank, *held*, no presumption can be raised that the child was the progeny of the purported father; there must be other independent evidence to connect the child with the birth entry and prove his parentage: (1986) 99 Mad.L.W. 175 (D.B.).

The factum of marriage between the parents of a child cannot be proved by the entry of the child's birth in the birth register; particulars other than that of the birth of the child are not strictly covered by the entries; marriage of the child's parents is not proved by birth entries. [A.I.R. 1969 Mad. 329 (D.B.); (1986) 99 Mad.L.W. 175 (D.B.), Foll.]: (1993) 2 M.L.J. 17.

When *X* was shown as daughter of *Y* in the School record, more than 30 years old, prepared and maintained when *X* was minor and there was no circumstance to create any doubt about it, *held*, *X* was to be treated as daughter of *Y*: (1988) 1 Bom.C.R. 421.

A statement made by the father of the child to the Vaccination Register which is given three years after the birth of the child is not admissible for the purpose of proving the paternity of the child: 1929 Mad.W.N. 696: A.I.R. 1930 Mad. 194.

Where the dispute in a matrimonial cause for restitution of conjugal rights at the wife's instance involved her earlier marriage having been automatically dissolved under custom, the factum of the second marriage was sought *inter alia* to be proved by a certified copy of the birth entry which was only tendered in evidence by the wife at the fag end of the trial as additional evidence, *held*, in the absence of any material on record as to who was the informant, no reliance could be placed on the entry to prove the identity of her husband as father of her son; the register of births is no doubt a *prima facie* evidence but it is not conclusive; more so when such entry attributes parentage of the child to a man outside the lawful wedlock as her earlier marriage to her husband's brother was validly subsisting: A.I.R. 1987 P.&H. 37: (1986) 90 Punj.L.R. 581: (1987) 1 Hindu L.R. 594.

Entries to prove religion.—Entry in death register proved to be prepared in a somewhat casual way is of little value: A.I.R. 1930 Cal. 636. Entries in a death register are at best reliable only with regard to the date of death and the fact of death. It is not safe to rely on them for the purpose of proving the religion of a particular person in a case in which there is much conflicting evidence as to his religion: A.I.R. 1934 Mad. 630: 67 M.L.J. 389; (1987) 100 Mad.L.W. 895.

6. School record.—The Education Code enjoins upon the Head-master of each School to prepare and maintain an admission register of the pupils admitted to that particular School. Of the several particulars to be entered in such a register the date of birth of the pupil as stated by the parent or guardian is an important item. Thus, there can be no doubt that the admission register is a public record maintained by the head of the institution who is duty bound to maintain such a register containing certain particulars relating to each pupil as required by the Education Code. In making such entries in the admission register the head of the institution, who is a public servant, is merely discharging his official duty. The date of birth as entered in such an official record is a relevant fact as contemplated by S. 35 of the Evidence Act and the same can be proved by production of that record. The entry thus made in such an official record by a public servant in the discharge of his official duty, has to be presumed to be correct in the absence of other reliable evidence to the

contrary. Where the father who presented the application for getting the pupil admitted to the School, is no more, the particulars as stated by him in his application, can be proved and admitted in evidence under S. 32 by the production of the document containing those statements: I.L.R. (1957) Ker. 367: A.I.R. 1957 Ker. 103.

Since every School is under statutory compulsion to maintain registers of admissions together with the prescribed particulars, *held*, they constitute official records admissible under S. 35: A.I.R. 1983 Andh. Pra. 181: (1983) 1 A.P.L.J. (H.C.) 78 (D.B.).

An entry in a School register which is maintained by a recognised School is evidence of the date of birth of a pupil: 1959 M.P.L.J. (Notes) 143.

Admission register in a School is maintained as per Government Rules in the usual course of business and the true copy of the entry therein signed and issued by the Headmaster of the School after verification with the original is relevant and admissible under S. 35: 1966 Cr.L.J. 210 (2) (Ker.).

An entry in the scholar's register made by the father since deceased as regards his son's age is admissible as one made in a public register made by a public servant in the discharge of his official duty: 114 I.C. 801: A.I.R. 1929 Oudh 113; 28 Nag.L.R. 127: A.I.R. 1932 Nag. 117; 12 Mys.L.J. 133: 39 Mys.H.C.R. 406.

Where the date of birth in the scholar's register is entered on information given by the parents, a certified copy thereof has a evidentiary value for determining the age of the scholar; however, if that information came from a stranger who had no special means of knowledge of the date of birth, the entry has no evidentiary value whatsoever; mere proof of documents is no proof of their contents: A.I.R. 1988 S.C. 1796.

A School register containing an entry as to the age of a student is admissible to prove his age but much value cannot be attached to it if it is not clear on whose statements the age was recorded: A.I.R. 1941 Cal. 41: 72 Cal.L.J. 208; A.I.R. 1941 Pesh. 38.

The entries as to the age of pupils in the High School registers though they might have been merely copied from the Secondary School registers are admissible as entries made by a public servant in public or official register in the discharge of his official duty. Whether he had any special means of knowledge so as to make the entry relevant under S. 32(5) does not affect the admissibility of the entry under S. 35 though it may affect its value. S. 35 stands by itself independently of S. 32(5): 1940 Nag.L.J. 150: A.I.R. 1940 Nag. 217. *See* also A.I.R. 1941 Pesh. 38.

An entry in a School register stating a fact in issue or a relevant fact, made by a public servant on official duty or by any other person performing a duty specially enjoined by the law upon him, is relevant under S. 35; but how much weight should be attached to it is a pure question of fact: A.I.R. 1972 Raj. 272: 1972 W.L.N. 245: 1972 Raj.L.W. 573 (D.B.); 1976 Rev.L.R. 119 .

Question regarding age of girl—Certified copies from School register and affidavit by father stating date of her birth and statement of girl to Police with regard to her age amount to evidence under Evidence Act: I.L.R. (1964) 2 All. 423: (1964) 5 S.C.R. 86: A.I.R. 1964 S.C. 1625.

Where S. 35 properly comes into play, an entry made by a public servant in any public or official book in the discharge of his official duty (Entry as to age of student in School register of Government School) becomes relevant by itself, and no other proof of such entry is required as a matter of law by Evidence Act; but this does not exclude the possibility that such an entry may become admissible otherwise if it is properly proved to have been made by a person ordinarily competent to make it: I.L.R. (1964) 14 Raj. 26: A.I.R. 1964 Raj. 126.

Entry in School register is public record and is admissible in evidence under S. 35: 1969 Kash.L.J. 27 (J.&K.).

In actual life it often happens that persons give false age of the boy at the time of his admission to a School so that later in life he would have an advantage when seeking public service for which a minimum age for eligibility is often prescribed. The Court cannot ignore this fact while assessing the value of the entry and it would be improper for the Court to base any conclusion on the basis of the entry, when it is alleged that the entry was made upon false information supplied with the above motive: (1964) 2 M.L.J. (S.C.) 140: (1965) 1 S.C.A. 378: A.I.R. 1965 S.C. 282.

It is well known that School certificates do not afford reliable proof of age and it often

happens that the correct age is not disclosed to the School authorities and a lower age is mentioned in these certificates: 1957 All.L.J. 383: 1957 All.W.R. (H.C.) 339.

A presumption may certainly be drawn that the School admission registers are based upon information furnished in the application seeking admission to the School; in the absence of any material on record to indicate that the date of birth so furnished was not correct or there was a possible motive to give a wrong date of birth, its truth cannot be doubted in every case merely because it is not uncommon to give lower age—for which there is absolutely no evidence, either oral or documentary—or that law provides alteration of the date of birth by Railway servants: (1975) 88 Mad.L.W. 34 (S.N.).

Under R. 52 of the Madras Educational Rules (21st Edition, 1958), every School is required to keep a register of admissions and withdrawals in the form prescribed in Appendix VI. The register of a Municipal High School is, therefore, an official register. Under S. 358 of the District Municipalities Act (V of 1920), every Municipal officer or servant shall be deemed to be a public servant within the meaning of S. 21 of the I.P.Code. It follows that the clerk of the Municipal High School was a public servant and that he maintained the register in the discharge of his official duty. The register being an official register, the entries therein are relevant under S. 35 of the Evidence Act. The section embodies an exception to the rule of hearsay and, if its requirements are satisfied, it is unnecessary for the purpose of proving the entries that the clerk who has made the entries himself should be called as a witness. It is, however, only as a matter of probability and the ground that the public servant, who maintained the register, would not have omitted any transaction which has to be entered in it that the absence of entries becomes relevant under S. 9 or S. 11 of the Evidence Act. But the absence of entries by itself may be capable of some other explanation such as that the public servant was not enjoined to enter every transaction or was negligent or had some motive to omit some of the transactions. It is from this point of view that the non-examination of the clerk that maintained the register becomes material: (1959) 2 An.W.R. 249: 1959 M.L.J. (Cr.) 651: A.I.R. 1960 Andh. Pra. 253.

Where the Headmaster proving the date of birth from the School records, free from any discrepancy was not shown to have any motive or interest, *held*, his evidence could be safely acted upon: A.I.R. 1983 Andh. Pra. 181: (1983) 1 A.P.L.J. (H.C.) 78 (D.B.). But where the Headmaster did not produce material on basis of which entry was made in School register, *held*, no reliance could be placed on it: 1980 W.L.N. (U.C.) 292 (Raj.).

Where an accused child's age is to be determined and *anti-litem motam* entries in two Schools (St. Teressa Primary School, Ajmer and St. Paul's School, Jaipur) where he was admitted one after the other and which were supported by other documents kept by the Schools, showed same date of his birth, *held*, their genuineness could not be doubted; they were relevant and admissible and could not be brushed aside merely because the records were not maintained by a public officer; under S. 35, all that is necessary is that the documents should have been maintained regularly by a person whose duty is to maintain the record; there is no legal requirement that they should be maintained by a public officer only; that is a requirement only for public documents. [A.I.R. 1964 S.C. 1625 and A.I.R. 1963 Ker. 18, Rel. on]: A.I.R. 1982 S.C. 1057: 1982 Cr.L.J. 994: (1982) 2 S.C.C. 202: 1982 U.J. (S.C.) 426.

Public documents—Official records—Register for admission and withdrawal in a Municipal School and application for admission made to such School duly endorsed by the Headmaster are public documents—Proof by secondary evidence permissible: (1963) 2 An.W.R. 307: (1963) 2 An.L.T. 442: A.I.R. 1964 Andh. Pra. 53.

In an election petition, challenging the election of the respondent to the State Assembly, on the ground *inter alia*, that some of the votes polled were minor votes that is, votes of those who, though registered as electors on the electoral roll, had not completed twenty-one years of age on the qualifying date, the admission registers of Government Schools being admissible under S. 35 of the Evidence Act, could not be discarded on the ground that the petitioner failed to examine the parents or guardian in support of the School records.

The oral evidence of the voters alone, who according to the electoral roll were adults and most of whom have voted, that the relevant entries in the School registers showing them as minors are erroneous or incorrect is as

unsafe to be acted upon, as the evidence of those who after voting as adults come forward and say that they were minors and rely on the registers.

Entries in the School registers are of far less evidentiary value than the entries in the electoral roll. On a close study of the relevant provisions of the Travancore Education Code pursuant to which entries were made in the admission registers and of the Representation of the People Act, 1950 and of the Representation of the People (Preparation of Electoral Rolls) Rules framed thereunder according to which the electoral rolls are compiled, the same conclusion is reached.

Considerations are different in the case of the entries in birth registers. Those entries furnish the best evidence of the date of the birth and can safely be accepted unless they are shown to be wrong. If according to the entry in the birth register an elector whose vote has been cast is below the age of 21 on the qualifying date, then a case of minor vote is established.

Often the admission register, where available, is the sole evidence or reliable evidence as to a man's age on which a Court of law might choose to act, depending on the facts and circumstances of the case. The birth register extracts, however, are the most dependable evidence as to age. But in determining whether a person had completed 21 years of age on the qualifying date or not, as between the competing entries in the electoral roll and the admission register, uncorroborated by anything else, the former is entitled to greater probative value than the latter: I.L.R. (1962) 2 Ker. 65: 1962 Ker.L.J. 810: A.I.R. 1963 Ker. 18.

Where a Doctor, stating in his examination-in-chief that the accused was aged between 18 and 20 years, was not cross-examined, it was in his examination by the Court that the accused had contended that he was only 15 years of age and the accused produced a School certificate at the stage of seeking special leave to appeal, *held*, since the certificate mentioned the accused's date of birth on the basis of transfer certificate from another School whose name was not mentioned, the certificate could not be relied upon to prove the accused's age: A.I.R. 1993 S.C. 2448: 1993 Cr.L.J. 2886.

The plaintiff was compelled to retire from service with the defendant on grounds of his attaining the age of 60 years. The year of his birth was entered in the staff card on the statements made by the plaintiff himself. The plaintiff alleged that he was born much later and produced a document relating to the entry in the School Admission Register. Both the documents were found to be genuine. However, no one had been examined to prove that the plaintiff was actually born on that date nor had any one been examined to prove that he made the statement before the School authorities at the time of plaintiff's admission and that the statement made by him was correct.

Held, that the mere entry in the School Admission Register could not be taken to be conclusive to prove the allegation that he was born on that date and, hence, the lower Court committed an error of law in preferring the entry in the School Admission Register to that of staff card: A.I.R. 1966 Pat. 458.

Where a Railway employee on joining in 1955 declared his date of birth as 6-9-1930 which he also reaffirmed in his provident fund withdrawal form, dated 20-2-1980, and had not even availed the opportunity provided by the Railway Board in 1972 to literate employees to apply, latest by 31-7-1973, for correction of their date of birth, and it was only on 25-12-1985 and 12-3-1987 that he made representations for correction of his date of birth but it was only in 1988 that he relied on three school leaving certificates belatedly procured by and containing contradictory assertions, one of the certificates having been prepared on 19-9-1988, a mere 11 days before his retirement had become due, *held*, the case was clearly covered by A.I.R. 1993 S.C. 1367, but the Tribunal, ignoring it, deemed the Railway servant not to have been superannuated and allowed him reliefs on that basis while in view of the three decades unexplained delay and unsatisfactory nature of the evidence adduced by him the case was liable to be dismissed: A.I.R. 1995 S.C. 1349.

Entries in admission registers kept in private Schools cannot be considered as entries made by a public servant in the discharge of his official duties. Nor can it be said that these registers are kept in the performance of a duty specifically enjoined by the law of the country within the meaning of S. 35, Evidence Act. The rules in pursuance of which these registers are kept do not show that they have been framed, in the exercise of any statutory power by the Government of Madras. In these circumstances the rules cannot be said to be statutory rules and thus, law within the meaning of S. 35: 1958 Ker.L.T. 388: I.L.R. (1958) Ker. 916: A.I.R. 1959 Ker. 12.

An employee in a School other than a Government or a State School is not a public servant and any entry in its register made by

him is not one made in a public or official register by 'a public servant' in the discharge of his official duty. Hence, entries in registers of Schools other than Government or State Schools are not admissible: 1940 Rang.L.R. 481: A.I.R. 1940 Rang. 191. *See* also I.L.R. (1941) 1 Cal. 234: A.I.R. 1941 Cal. 41.

Private School teachers are not public servants and the registers of the students' dates of birth are neither public nor official registers—Entries made therein by the teachers are not admissible under S. 35: A.I.R. 1975 P.&H. 198: (1975) 77 Punj.L.R. 75.

An entry in the record of a private School as to the age of a student, *held*, may be admissible under S. 35 if the School is run under the Education Code framed by or under the authority of the State Government. [A.I.R. 1934 Nag. 1; A.I.R. 1961 Pat. 21, Rel. on]: A.I.R. 1971 J.&K. 62 (D.B.).

Entry of birth date in non-Government School's General Register under Statutory Rules—Entry admissible under S. 35—However, its evidentiary value depends on other factors—Kidnapping case—Parents of girl not examined as to her age—Entry held could not be held to have proved the age: A.I.R. 1970 Guj. 178: 1970 Cr.L.J. 1348 (D.B.).

School leaving certificates and transfer certificates issued by (Government) School authorities giving the date of birth are admissible proof of age under S. 35; documents maintained by public servants in discharge of official duties are relevant and admissible without being proved by the public servants as witnesses: (1982) 1 Karn.L.J. 210: 1982 Hindu L.R. 248 (D.B.).

Date of birth recorded in the transfer certificate issued by the School authorities is to be accepted as true: (1995-1) 43 B.L.J.R. 701.

Where the School Leaving Certificate was exhibited and duly proved in accordance with law, *held*, it was not necessary to examine the Headmaster who had issued it; the certificate would speak for itself; if the other party impeaches its contents, burden would be on it to disprove them: A.I.R. 1978 All. 472.

School certificates duly prepared according to authority are admissible: 149 I.C. 660: A.I.R. 1934 Nag. 44. Evidentiary value of entry as to age in School Register, *see* I.L.R. 14 Lah. 473: A.I.R. 1933 Lah. 601. *See* also (1936) 38 Punj.L.R. 69: A.I.R. 1936 Lah. 598; A.I.R. 1941 Cal. 41: I.L.R. (1941) 1 Cal. 234; 148 I.C. 418; A.I.R 1934 Oudh 167; I.L.R. (1938) 2 Cal. 457: A.I.R. 1938 Cal. 641; 1957 All.L.J. 383 (Not reliable proof of age).

The School certificate or the admission form is not a conclusive evidence of the age when it is based on no evidence at all: 1992 Cr.L.J. 4073 (Del.).

Applicability—Age, proof of—Unproved and unexhibited School certificate cannot be relied upon. [Criminal Appeal No. 913 of 1966 (Punjab and Haryana), Reversed]: (1970) 1 S.C.W.R. 767: 1970 Cr.L.J. 991: A.I.R. 1970 S.C. 1029.

Matriculation certificate and entries in admission register of Schools—They are admissible in evidence: 1966 B.L.J.R. 571: A.I.R. 1966 Pat. 383; A.I.R. 1962 Cal. 265: (1960-61) 65 Cal.W.N. 1165.

Once the matriculation certificate is produced, in absence of any cogent reason, *held*, it should ordinarily be accepted as correct in respect of date of birth shown therein: (1990-91) 95 Cal.W.N. 142: (1990) 2 Cal.H.N. 412.

Matriculation certificate held admissible as proof of age of the person concerned: (1955-56) 60 Cal.W.N. 1053: A.I.R. 1957 Cal. 211; A.I.R. 1958 Cal. 533: (1957-58) 62 Cal.W.N. 336.

The matriculation certificate is only a piece of evidence and the Government, although it normally accepts it, may for good reason decline to consider it as setting out the true date of birth but not on the ground that it was not a party to the proceeding taken by the University for correcting the matriculation certificate: 1976 Lab.I.C. 1233: I.L.R. (1975) Him. Pra. 641 (D.B.).

Though for proof of age the High School certificate is a piece of evidence which may be considered but it is not a conclusive proof, especially when there is contrary evidence: 1979 W.L.N. 667 (Raj.) (D.B.); 1974 Lab.I.C. 1190 (D.B.). *See* also A.I.R. 1980 S.C. 1251 reversing (1980) 1 Serv.L.R. 251 (Del.).

7. Record-of-rights.—It is true that a presumption of correctness attaches to entries appearing in the record-of-rights but such entries are not the foundations of title but are mere items of evidence. The presumption raised by them is not conclusive, but *'prima facie'* merely, and while it must prevail where there is no rebutting evidence, it may be repelled by other evidence and circumstances showing that the entries are not correct: (1954) 56 Punj.L.R. 468: A.I.R. 1955 Punj. 37.

There is no abstract principle that whatever will appear in the record-of-rights will be presumed to be correct when it is shown by evidence that the entries are not correct: A.I.R. 1977 S.C. 1712; A.I.R. 1994 Sikkim 6 (D.B.).

An entry in record-of-rights neither creates nor extinguishes a right; it merely records that right to be used as evidence in future. A *fard abpashi* does the same in regard to irrigation. The presumption of its correctness is

rebuttable. But it cannot be contended that such presumption refers to the point of time when it was prepared for that would completely negative the presumption and render wholly waste the energy spent in preparing the records of rights. However, as laid down by the Supreme Court in 1966 B.L.J.R. 147, if a state of thing is shown to exist at a certain time, an inference of its continuity within a reasonably proximate time, forwards or backwards, may be drawn, though that presumption would weaken with the passage of time: A.I.R. 1980 Pat. 89: 1979 B.B.C.J. (H.C.) 584: 1979 B.L.J. 619.

Record-of-rights—Entries in—Whether conclusive proof as to the rights and customs recorded therein: 1957 Pat.L.R. 288.

Though the record-of-rights is not a document of title, the Court is perfectly entitled to take into consideration the entry in the record-of-rights for coming to the conclusion that certain person was the 'raiyat' of the land in question: 1954 B.L.J.R. 225: A.I.R. 1954 Pat. 481.

It is entry in the record-of-rights and not an entry in the Tenancy Register that has presumptive value: (1961) 1 Cr.L.J. 649 (Guj.).

Entry in record-of-rights—Evidentiary value—Rebuttal of presumption—Admissibility of prior facts. *See* A.I.R. 1958 Pat. 279.

Record-of-rights—Conclusiveness—Conclusiveness attaches to character of land and not to nature of title. *See* A.I.R. 1957 Pat. 482.

The parchas, or the draft record-of-rights, issued by public officers in due discharge of duties prescribed under the Survey and Settlement Manual, are admissible under S. 35; but they have no presumptive value of correctness as is attached to the finally published record of rights under S. 117(3) of the Orissa Tenancy Act; the only, inference to be drawn is that the person to whom the Parchas were issued was then found to be in possession: (1973) 1 Cut.W.R. 794.

Entries made in draft record-of-rights, which are made by public servants in discharge of their public duties, are relevant evidence under S. 35: A.I.R. 1979 Cal. 50.

Where the entry in the record-of-rights shows the suit lands in the name of plaintiff, the onus is on the defendant to prove that the said entry in favour of the plaintiff is not correct: A.I.R. 1963 Ori. 29.

Record-of-rights—Presumption of correctness of entry—Party relying on presumption of correctness need not prove foundation or basis of correctness: (1964-65) 69 Cal.W.N. 210: A.I.R. 1965 Cal. 328.

Entries in record-of-rights—Evidentiary value under S. 30(3), C.P. Land Revenue Act—Entries can be presumed to be correct until the contrary is shown: (1962) 64 Bom.L.R. 322: I.L.R. (1962) Bom. 417: A.I.R. 1963 Bom. 100.

Presumption and onus of proof—Record-of-rights showing land in plaintiff's name—Presumption is in favour of plaintiff that he holds the land in the right mentioned therein—Onus lies on defendant to prove his own independent title to half land and his alleged korfa right to the other half under an agreement alleged by him: A.I.R. 1968 Tripura 5.

Record-of-rights—Particular land of certain khata recorded as jointly belonging to branches of *L* and *B*—Such entry must be deemed to be correct unless contrary is shown—Mere fact of possession is not sufficient to rebut presumption attached to entry in record of rights—(Tenancy Laws—Bihar Tenancy Act (VIII of 1885), S. 103-B): A.I.R. 1968 Pat. 450.

When the factum of partition was evidenced by entries in the record-of-rights, which was maintained in official course of business, *held*, said entries is a relevant piece of documentary evidence in support of the oral evidence given by the respondent and his brother to prove the factum of partition: A.I.R. 1995 S.C. 1728.

Record-of-rights—Entries in—Conflict between entries—Evidentiary value: A.I.R. 1963 S.C. 361. *See* also (1979) 2 Cal.L.J. 44.

Record-of-rights—Order under Record-of-Rights Act directing name of respondent to be entered in the record—Order is by no means conclusive—It is always open to petitioner to institute a suit to establish his title—In that suit such order can have no effect since title will be decided therein on evidence provided by parties: (1969) 2 Mys.L.J. 198.

Where registers of Government properties maintained by the Cantonment area were not shown to have been prepared after notice to individual owners of properties and there was no Act or Rule which permitted issuance of a public notice, *held*, no presumption of truth is attached to entries in such registers; the registers are not record-of-rights under the Land Acquisition Act: A.I.R. 1980 Bom. 9 (D.B.).

Dag chithas prepared under R. 66 of the Manipur Land Revenue and Land Reforms Rules, 1961, constitute an important basic step in the preparation of the 'record-of-rights' which expression, according to R. 56, consists of *jamabandi* and tenants *khatian*. The *dag chithas* without dispute do not form part of record-of-rights. But equally indisputably the *dag chithas* are documents in the nature of revenue records and they are prepared by public servants in discharge of their statutory

M. VAIDYANATH & CO.
CHARTERED ACCOUNTANTS
No. 1, FIRST MAIN ROAD,
KOTTUR GARDENS
CHENNAI - 600 085

functions and as such they are relevant under S. 35 of the Evidence Act. They cannot be declared inadmissible because of their non-publication for purpose of attestation: A.I.R. 1970 Manipur 7.

Entry in *dag chitha* maintained under Manipur Land Revenue and Land Reforms Rules—Public document—Evidentiary value: A.I.R. 1969 Manipur 79.

Record-of-rights like *dag chitha* and *jamabandi* have presumptive value as to the possession of persons named there as being in possession of particular lands: A.I.R. 1975 Gau. 47(D.B.).

The entry made in the record-of-rights in respect of the property *A*, a khorposh grant, that they are kabilzapti properties on failure of legitimate descendants of the original grantee is not only admissible in evidence but has a much higher value, namely, that it carries with it the presumption of correctness and will prevail until rebutted by proper evidence. In view of S. 81(*j*), Chota Nagpur Tenancy Act it would be difficult to hold that the entry with regard to primogeniture or kabilzapti properties does not constitute an incident of the properties and that as such there can be no presumption attaching to such an entry: 1953 B.L.J.R. 531: A.I.R. 1954 Pat. 173.

As the law does not require valuation to be given in the register of record-of-rights, *held*, entries as to valuation are irrelevant and, therefore, inadmissible: 146 I.C. 152: A.I.R. 1933 Nag. 310.

Tenancy Laws—Kerala Land Reforms Act, 1964, S. 29—Proceedings for preparation of record-of-rights—Though record-of-rights is only a piece of evidence, its evidential value will be great with passage of time and might be practically conclusive in respect of rights of parties—Proceedings for preparation of record-of-rights are, therefore, quasi-judicial in character and amenable to be quashed in *certiorari*: 1966 Ker.L.T. 1051.

Where the record-of-rights contained no entry that the defendant was in possession of land nor was there any receipts in token of having paid rent therefor and the evidence adduced by him was not sufficient to rebut the plaintiff's possession as shown in the record-of-rights, *held*, the finding of fact by the Courts below that the defendant was tenant in possession could not be sustained in second appeal: 1981 Sim.L.C. 426.

'Record-of-rights'—Tabdilat papers—Maintained under Revenue Rules, these are public documents—Entry therein showing separate mutations in favour of different persons—Agreement under which they claim also referred to in the papers—Entry proves that there existed such a document and that mutation was made in favour of such persons—Entry does not lose its evidentiary value if the document referred to cannot be produced: I.L.R. (1966) Cut. 816: 33 Cut.L.T. 960.

Record-of-rights—Entries in—Admissible even though the record is not finally published: A.I.R. 1969 Manipur 84.

Record-of-rights and *jamabandi* papers: 31 Nag.L.R. (Supp.) 202: 163 I.C. 179: A.I.R. 1936 Nag. 71.

Entry in record-of-rights prepared for diary purposes, value of. *See* (1945-46) 50 Cal.W.N. 382: A.I.R. 1946 Cal. 326. Survey register: 98 I.C. 166: A.I.R. 1926 Rang. 204; (1926-27) 31 Cal.W.N. 419: A.I.R. 1927 Cal. 345; (1935-36) 40 Cal.W.N. 821.

Record-of-rights—Entries in—Bombay Land Revenue Code, 1879, S. 135-J—Section raises presumption of correctness of entries: (1969) 2 Mys.L.J. 202.

8. Survey record.—The value to be attached to entries in Survey Records depends on the evidence and probabilities in each case; there is no hard and fast rule governing it. The entries are no doubt entitled to weight as having been made in the ordinary course of official duty several years ago, there being no motive or reason at that time for anything being recorded contrary to existing facts. The entries while they are admissible as a piece of evidence and a valuable piece of evidence, cannot be conclusive. It is not part of the duty of Survey Officers to determine questions of title or the nature of the rights of persons in occupation of the lands. Whether the occupants are khadim or permanent tenants is a question which has to be decided on a consideration of materials which may be of a varied kind with respect to the several lands in a village. The presumption in the case of lands in a jodi village is against permanent tenancy and in the absence of satisfactory proof that any one has acquired a particular right to the land, the land would be at the absolute disposal of the jodidar: I.L.R. (1952) Mys. 172: A.I.R. 1953 Mys. 44: 30 Mys.L.J. 115.

A survey entry carries only a presumption of correctness and cannot be regarded as conclusive: I.L.R. 33 Pat. 690: A.I.R. 1955 Pat. 1 (S.B.).

The entry in a survey record or khewat raises a presumption that the particulars recorded therein were right but such presumption may be rebutted: I.L.R. 13 Pat. 589: A.I.R. 1934 P.C. 182: 64 M.L.J. 450 (P.C.). *See* also A.I.R. 1933 Pat. 671: I.L.R. 13 Pat. 51.

As to two inconsistent survey entries, *see* 199 I.C. 144: A.I.R. 1942 Pat. 372.

Discrepancy between Gangetic Survey Map and later Cadastral Survey Map—Preference: A.I.R. 1933 Pat. 671: I.L.R. 13 Pat. 51.

Remarks made by survey officer at the time of inspection of a village: I.L.R. 2 Luck. 4: 99 I.C. 786. *See* also 68 I.A. 1: I.L.R. (1941) Lah. 154: (1941) 43 Bom.L.R. 432: A.I.R. 1941 P.C. 21 (P.C.) (Answers to questions given in Wilson's Manual).

Where the Thak and revenue survey maps differ and the Thak map agrees with the local landmarks, the Thak map and the boundary shown in it can be accepted in preference to the revenue survey map and the boundary ascertained by the pleader commissioner upon its basis: 73 Cr.L.J. 47.

As between Thakash map and Revenue Survey map, the latter is more accurate and should be relied on to determine boundaries: 96 I.C. 1027: A.I.R. 1926 Pat. 385. *See* also A.I.R. 1937 Pat. 463; I.L.R. 17 Pat. 120: A.I.R. 1938 Pat. 81 (S.B.). (Appraisement record).

Map prepared under Calcutta Survey Act, 1887, depicting certain property—Map, though admissible has no presumption of correctness attached to it: (1964-65) 69 Cal.W.N. 759.

9. Settlement record.—Entries in the settlement records are not by themselves conclusive evidence of the facts stated therein; they may only supply gap: (1988) 36 B.L.J.R. 539.

The Settlement record is not a document of title. It does not create or extinguish title to land. At the most, it may be relevant as some evidence of title to the recorded Dags and may raise a presumption of title by virtue of the statutory presumption of correctness attaching to its entries under S. 103-B (5), Bengal Tenancy Act. Such evidence, however, is rebuttable and so also the presumption and they may be effectively rebutted by production of contrary evidence. An admission by the party (in whose favour the settlement entry stands) declaring that he had or has no title or possession in the disputed property and that the settlement entry to the contrary effect, in his favour is incorrect, save where such admission can be explained or shown to be wrong, usually binds him and it is normally the best evidence against him on the point, and it is certainly relevant and ordinarily quite sufficient to rebut the presumption of correctness of the record of rights. The admission is certainly relevant and in the normal course of things, it ought to prevail over the record: (1955-56) 60 Cal.W.N. 793: A.I.R. 1956 Cal. 669.

The Survey and Settlement Report is a public document and is admissible in evidence. The official reports regarding the nature of the estate are valuable and in many cases the best evidence of facts stated therein, but opinion therein expressed should not be treated as conclusive in respect of matters requiring judicial determination. [A.I.R. 1941 Pat. 260 and A.I.R. 1928 P.C. 10 and (S.) A.I.R. 1955 Ori. 97, Foll.]. For the Settlement authorities to determine the net annual yield different modes are available. One mode of determining may be more accurate than another mode. But it cannot be said that the mode adopted by them which is incorporated in the report for determination of the out-turn is inadmissible or has no probative value at all: I.L.R. (1964) Cut. 785: A.I.R. 1965 Ori. 49.

The fact that entries in the settlement records show that the Math was the recorded owner in respect of certain properties by itself leads to a strong presumption in favour of the Math: 25 Cut.L.T. 345.

Where the western strip of land in question was bereft of graves and the oral evidence was also to the effect that in the recent past as well burials had been made in the eastern portion, *held*, mere absence of any demarcation line between the two portions or mere entry in the settlement khasra of qabristan and masjid could not lead to the conclusion that the entire land was in use since time immemorial as graveyard: A.I.R. 1981 All. 52.

Where no right existed, settlement entries by themselves will not create rights and their value on the question of jointness or separation of the members of the family is slight. But there is a slight difference between the presumption attaching the settlement entries made in areas where the Orissa Tenancy Act is in force and in areas like South Orissa where the Madras Estates Land Act is in force and in Sambalpur district where the Central Provinces Land Revenue Act, 1881 is in force. The difference in language between the three Acts is very marked. In North Orissa, the presumption of correctness of settlement entry can be rebutted only by evidence and not by mere general presumptions under the ordinary law.

The question as to whether a settlement entry in rebuttal is essentially a question of fact and the conduct of the parties both before and after the making of the settlement entries is undoubtedly very relevant. Where the party does not rely on settlement entries but also the conduct prior and subsequent to the settlement entries of persons at whose instance the entries were made, presumption of correctness is confirmed: I.L.R. (1961) Cut. 635.

Settlement record—Conflict between previous and current record—Which prevails: 1957 Pat.L.R. 288.

Admission of parties recorded in settlement proceedings: 20 Pat.L.T. 929: A.I.R. 1939 Pat. 591.

Patta of property in settlement records by itself cannot confer title to property. It is of no consequence in adjudicating the proprietary right in respect of property in a suit for possession: 1969 Ker.L.R. 894.

Where the entry in the current settlement definitely shows that a uniform rent was being realised as the annual rent of a holding, such entry raised a presumption that the holding has been held on an invariable rent. The mere fact that some counterfoils of rent receipts, which are produced by the landlord contain entries showing that a higher rent was realised cannot outweigh the value to be attached to the settlement entry particularly when the rent receipt counterfoils are not above suspicion or challenge and are not duly proved: A.I.R. 1951 Ori. 262: 18 Cut.L.T. 117.

Bihar and Orissa Survey Settlement Manual 1927, R. 356—Orissa Survey and Settlement Act (III of 1959)—Evidence Act, 1872, S. 35—Parcha slips—Extent of admissibility in evidence: I.L.R. (1967) Cut. 163.

10. Revenue record.—Though revenue record entries should generally be accepted at their face value but the presumption of truth attaches to genuine and not forged or fraudulent entries; the distinction, fine but real, is that though one cannot challenge the entry as incorrect but one can always impugn it as having been made fraudulently or surreptitiously; fraud and forgery would rob the entry of all its legal effect: A.I.R. 1976 S.C. 1485: (1976) 3 S.C.C. 642: 1976 (U.J.) S.C. 573.

The entries in annual Revenue Records are no evidence of title for they are kept for fiscal purposes. At any rate, on question of title, the evidentiary value of revenue papers varies with circumstances. Where entries in them are made after a most careful public enquiry, they are cogent evidence of the facts recorded though not conclusive. However, where from an entry in a revenue register the fountain source of right cannot be traced, it is not safe to rely upon the entry itself but recourse must be had to the origin of the entry itself: 1961 M.P.L.J. (Notes) 105.

Entries in revenue documents are not conclusive but their importance in a case for possession cannot be denied: I.L.R. 8 Rang. 556: A.I.R. 1931 Rang. 40. Entries in parapetrak papers and revenue receipts have always been looked upon with considerable reliance in the Hyderabad High Court, as such entries are made in the discharge of official duties to keep up the Revenue record of the cultivators. They are of high evidentiary value unless rebutted effectively by evidence: A.I.R. 1952 Hyd. 75.

The entries in the survey and settlement records and other documents maintained by revenue department are not evidence of title: 15 Law Rep. 118: (1968) 2 Mys.L.J. 439.

The record of the Revenue Authorities is not conclusive of title. It is only a record of possession and is made for fiscal purposes: A.I.R. 1958 Madh. Pra. 246.

Revenue authorities do not hold judicial proceedings; they are fiscal enquiries to ascertain as to which claimant should be put in possession of immovable property with better certainty of realising the revenue from him. Thus, certified copies of such proceedings or of extracts from the revenue records are not conclusive of title; they are only *prima facie* evidence of possession and title and conclusive only in the revenue proceedings, not in civil Courts where the same is to be determined in the light of all relevant evidence: A.I.R. 1985 N.O.C. 6 (Andh. Pra.).

The entries in the revenue records, though they may be relevant evidence under S. 35 of the Evidence Act, are not evidence of title. Though the entries in the Diglot Register may be evidence, they are by themselves not conclusive evidence of the facts which they purport to record: A.I.R. 1961 Andh. Pra. 361.

Revenue Officer inspecting land to be acquired—His report is not admissible as evidence under S. 35: (1966) 2 An. W.R. 186: A.I.R. 1967 Andh. Pra. 230.

Reports made by Revenue officers though not regarded as having judicial authority where they express opinions on the private rights of the parties are entitled to great consideration being reports of public officers made in the course of their duties in so far as they supply information of official proceedings and historical facts and also in so far as they are relevant to explain the conduct and acts of the parties in relation to them and the proceedings of the Government founded on them: I.L.R. (1952) Nag. 318: A.I.R. 1952 Nag. 271.

Reports submitted by a Revenue Inspector and a Tahsildar as to the state or features of a place after local inspection are clearly admissible in evidence under S. 35 of the Evidence Act, although on the particular facts noticed by them, they may be a weak piece of evidence unless the officers themselves come forward as witness and face a cross-examination regarding the facts said to have been noticed by them at the time of their local inspection: 17 Cut.L.T. 120. Revenue records are admissible in evidence under S. 35 of the Evidence Act, if it is shown that under the rules or the law in force it was a part of the duty of the officer preparing them to mention the facts which appear therein: A.I.R. 1952 Raj. 91: I.L.R. (1951) Raj. 166.

The statement of the Patwari, the report of the Tahsildar and the order of the S.D.O. in regard to the entries relating to the disappearance of pattis whose names are entered in the Revenue records, are all acts prescribed by the rules as part of the official duties of the officers concerned and would, thus, be admissible in evidence, where the disappearance of the party is in question: 1947 O.W.N. 242.

Report of the Revenue Supervisor who was directed by the Tahsildar in a proceeding under the Orissa Land Reforms Act, to report about possession is admissible but it is not of any evidentiary value so far as factum of possession is concerned, in view of the fact that the report is based upon evidence gathered at the spot and not on his personal knowledge: (1974) 1 Cut.W.R. 115: 41 Cut.L.T. 52.

The mutation of names is not conclusive and the civil Court can go behind the pattas issued by the Revenue Authorities: A.I.R. 1956 Madh. Bh. 56.

The order of the Ruler of Mandi sanctioning mutation in favour of *A* and directing that the name of *B* be recorded as tenant of *A* would not relieve *A* of the burden to establish his case affirmatively, by cogent and convincing evidence: A.I.R. 1956 Him. Pra. 50.

The object of mutation is to keep entries in the record of rights uptodate; presumption of correctness attaches to record of rights under the Land Revenue Act. But entries in the record of rights or in mutation do not by themselves determine the right and title; they are rebuttable. Thus, where a mutation based on oral gift of land indicated that both the donor and the donee had acknowledged the factum of gift but the donor denied the same on oath in the civil Court and neither the Revenue officer nor the person who had identified the donor and the donee were examined as witnesses, *held*, much reliance could not be placed on the mutation proceedings: A.I.R. 1982 Him. Pra. 38: 1982 Punj.L.J. 26.

Admission or consent in relation to possession in mutation proceedings, under S. 34 of the U.P. Land Revenue Act (1901), *held*, is admissible in title suits: 1979 All.L.J. 640.

For determining under S. 2(*f*) of the Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act, 1953 as to who is an occupancy tenant, the entry in the revenue record, is final and conclusive: I.L.R. (1985) Him. Pra. 6 (D.B.).

Entries made in the mutation register by a Patwari in the discharge of his public duties or the orders passed thereon by the Revenue Officer is indisputably relevant evidence under S. 35 to prove any fact in issue or a relevant fact; but a copy of the mutation is admissible only to prove the factum of sale and not the terms and conditions thereof in view of the bar under S. 91. [1979 Rev.L.R. 107: (1979) 81 Punj.L.R. 27, Overruled]: A.I.R. 1986 P.&H. 143: 1986 Rev.L.R. 42: 1985 Punj.L.J. 583: (1986-1) 89 Punj.L.R. 109: I.L.R. (1986) 1 P.&H. 90 (F.B.); 1989 Punj.L.J. 15.

A presumption of correctness is attached to official acts; it arises because Government officials are supposed to act independently, without bias and without personal interest in the matter. However, where a Mondal ('Surveyor of lands') was related to one of the parties and was, thus, not supposed to give a report in the matter and had made misleading reports for that reason, *held*, no presumption of correctness could be attached to his official reports and acts: A.I.R. 1986 Sikkim 22.

Reports of Patwari and Wasil Baqui Nawis—Reports showing that petitioner was

in cultivating possession as tenant since 1946-47—Presumption should be in favour of correctness of reports: 1967 Cur.L.J. 283: (1967) 69 Punj.L.R. 495.

Any entry made a considerable time ago by the Patwari in village papers, would be treated as an entry in a public document maintained in the course of business: 1939 R.D. 325: 1939 All.W.R. (B.R.) 277.

Mutation does not confer any title on a person in whose favour it is so attested. Thus, even though S. 34 of the Punjab Land Revenue Act, 1887 requires that the acquisition of rights of mortgage should be reported to the Patwari, so that he could make an entry in his register of mutations in respect of acquisition of mortgage, *held*, non-reporting of same would not mean that such a transaction did not take place at all: A.I.R. 1976 Him. Pra. 41 (D.B.).

Patwari cannot be permitted to give evidence against the records prepared by him unless he has made a report against the entries: 1951 R.D. 43: 1951 All.W.R. (Rev.) 23.

Where an entry was made in revenue record in performance of duty but the Revenue Officer had done so under S. 151 of the Code of Civil Procedure when there was no such provision in the W.B. Estates Acquisition Act, *held*, the entry, not having been made in performance of duty, was not relevant under S. 35; it did not fall under S. 74 either. [A.I.R. 1975 Cal. 257, Rel. on]: A.I.R. 1982 Cal. 294: (1982) 1 Cal.L.J. 256: (1982) 1 Cal.H.N. 206 (D.B.).

The Financial Commissioner (Revenue) while hearing a revision arising out of mutation proceedings acts as a Revenue Officer; his revision order is, thus, an entry made in official record stating a fact in issue or a relevant fact, having been made by a public servant in discharge of his official duty is itself a relevant fact, admissible under S. 35: 1980 Rev.L.R. 581 (P.&H.).

Where the Land Register prepared under S. 6(2) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972, describes the property as *bagayat* unfit for consolidation, *held*, having been prepared by the Assistant Consolidation Officer, it is relevant evidence under S. 35 and can be considered along with the other evidence: A.I.R. 1980 Ori. 183: (1980) 50 Cut.L.T. 178.

Even if there is no statutory presumption regarding the entries of Fard Hissa Kossi or Parat Mal Guzari, documents prepared by Revenue authorities, it can be presumed, where they are old, that in the absence of anything proved to the contrary, the entries contained therein were correct: A.I.R. 1950 Pepsu 55. Entries in revenue records—Presumption—Finality—Entry of persons being adopted son—Finality—Recital is not binding on rightful holder. *See* I.L.R. (1954) Nag. 692: A.I.R. 1954 Nag. 319.

The mere recording of sir land as the plaintiff's occupancy in the revenue records is only presumptive evidence which can be adequately rebutted by the evidence showing that it was the plaintiff's sir: 1963 Jab.L.J. 590: 1963 M.P.L.J. 542: A.I.R. 1963 Madh. Pra. 344.

The Collector's book is intended for purposes of revenue and not of title and definition of shares in revenue and village papers affords, by itself, but very little indication of an actual separation of a Hindu family; in no case can it be regarded that such definition of shares is sufficient evidence to find that the members of the family had separated: A.I.R. 1952 Madh. Bh. 146.

The words *Naqdic Hasab Partah Deh* recorded in the tenant's column in revenue records, even as per their literal translation, do not *per se* indicate that the person in whose favour the entry is in adverse possession, nor are they any proof of adverse possession at all; they merely denote that the rent payable is equal to the land revenue; the reference is only to the quantum of rent payable. The existence of other facts or circumstances providing evidence of adverse possession, however, is a different matter which the Court may consider: A.I.R. 1973 J.&K. 53: 1972 Kash.L.J. 398 (F.B.).

11. Family pedigree.—Pedigree-tables prepared at the time of settlement form part of the records of rights as prescribed under S. 31(2)(*d*) of the Punjab Land Revenue Act. Presumption of truth must, therefore, extend to such pedigree-tables until the contrary is proved. The burden of proving that an entry in the pedigree-table so prepared is wrong must in the circumstances rest heavily on those who make such assertion. Apart from the statutory presumption permissible under S. 44, Punjab Land Revenue Act, Ss. 35, 114 and 90 of the Evidence Act read together would also give rise to a presumption that the settlement pedigree-tables represent the correct position: (1961) 63 Punj.L.R. 177: A.I.R. 1961 Punj. 251.

The principle underlying S. 35 of the Evidence Act is that the person making the entry should be a person vested with authority to record a decision which so far as the matter before him is concerned, will be final. In other words, that section excludes all views expressed before the final stage is reached and makes relevant only those decisions, which constitute the final word in the matter. Therefore, a judgment is not relevant under that section to prove the pedigree mentioned therein, when no decision is given on any of the issues that arose in that case upon the pedigree: (1952) 54 Punj.L.R. 226: A.I.R. 1952 Punj. 301.

The family pedigree which accompanied a statement by certain members of the family in an inam enquiry of 1865 and two of which were enclosures to reports by the Collector to the Board of Revenue under the Court of Wards Act are relevant and admissible in a later proceeding: I.L.R. 55 Mad. 40: A.I.R. 1932 Mad. 198: 62 M.L.J. 116. *See* also 1939 R.D. 20: 1939 All.W.R. (B.R.) 127.

Where a handwritten pedigree is prepared under a form prescribed by the Rules framed under the Court of Wards Act, it is admissible in evidence under S. 35: 189 I.C. 757: A.I.R. 1940 All. 353.

A pedigree contained in an estate note book, maintained under the Court of Wards Manual prepared under the U.P. Court of Wards Act, is an official document prepared by a public authority in pursuance of a statutory duty, and is admissible in evidence though it is not conclusive evidence of the facts stated therein. A criticism against this document that it does not show the sources on which the Court of Wards based its findings, is not a criticism of weight against a public document. The Court must assume that the Court of Wards did its duty to the best of its ability, and based the pedigree on material of the accuracy of which it was satisfied: (1945-46) 50 Cal.W.N. 729: A.I.R. 1946 P.C. 103: (1946) 2 M.L.J. 235 (P.C.).

A pedigree table prepared for purposes of settlement, which is the basis of the entries in khewat, is relevant under S. 35, if prepared in discharge of public duty: A.I.R. 1949 Him. Pra. 11. *See* I.L.R. 4 Luck. 39: A.I.R. 1929 Oudh 129, as to admissibility of settlement pedigree.

The decision of a Naib Tehsildar, confirmed in appeal by the Deputy Commissioner, but based on an untrue genealogy, has, little evidentiary value: A.I.R. 1971 S.C. 681. *See* also A.I.R. 1983 P.&H. 162 and A.I.R. 1971 P.&H. 329: 1970 Punj.L.J. 776, cited under Note 12, *infra*.

12. *Jamabandi*.—It is settled law that entries in the *jamabandi* are not proof of title; they are only statements for revenue purpose: (1994) 1 M.L.J. 50 (S.C.).

It is settled law that the *jamabandi* entries are only for fiscal purpose and they create no title when it is not the case that the opposite party had any knowledge and acquiesced to it: 1993 D.N.J. 166 (S.C.).

Entries in *jamabandi* are presumed to be correct: A.I.R. 1965 Him. Pra. 32.

The entry of a person's name in the *jamabandis* of the fields does not confer any right on him: A.I.R. 1956 Nag. 95: I.L.R. (1956) Nag. 64: 1956 Nag.L.J. 654.

The presumption of truth attaches to a *jamabandi* under S. 45 of the H.P. Land Revenue Act: A.I.R. 1977 Him. Pra. 1: 1977 Sim.L.C. 294: I.L.R. (1976) Him. Pra. 499 (D.B.).

Lands settled on annual patta—Entries in *jamabandi*—Indicate only possession of that year: A.I.R. 1967 Assam 9.

Where the *jamabandis* and the pedigree table wherein it was specifically stated that the widow had inherited the property from her husband which she had sold to another person and ceased to be its owner, *held*, the facts stood validly proved; the finding cannot be disturbed in appeal merely because the mutation of inheritance from the husband to the widow was not produced: A.I.R. 1983 P.&H. 162.

Where land sold by a widow was sought to be pre-empted by her husband's brother's son under S. 15(2)(*b*) of the Punjab Pre-emption Act, 1960 and the pedigree table and the *jamabandi* adduced by him in evidence merely proved the widow to be so related to him and in occupation of the land sold as its owner, *held*, no presumption could be drawn that she must have inherited it from her deceased husband or son; the burden lay on the plaintiff to establish the factum of inheritance by positive and independent evidence: A.I.R. 1971 P.&H. 329: 1970 Punj.L.J. 776.

Where in a suit for permanent injunction, the plaintiff based his claim on ownership with possession, supported by entries in

jamabandi and *khasra girdawari*, while the defendant pleaded possession as a tenant and both the Courts below found in favour of the tenant, *held*, being a finding of fact, it cannot normally be disturbed in second appeal; but since the Courts below did not take into consideration the *jamabandi*, a record of rights to which the presumption of truth is attached, and the *khasra girdawari*, a public record made by a public servant in discharge of his duties, the presumption arising from the *jamabandi* and *khasra girdawari* can be rebutted only by convincing and reliable evidence to the contrary; it is, thus, the plaintiff who was in possession as owner; concurrent findings of the Courts below set aside: A.I.R. 1985 Him. Pra. 10: 1984 Sim.L.C. 283: I.L.R. (1984) Him. Pra. 363.

13. *Khasra girdawari*.—When there is no other cogent evidence on the record, much less any documentary evidence, which might detract from the correctness of the *khasra girdawaris*, *held*, presumption of truth can be attached to the *khasra girdawaris*: (1985-2) 88 Punj.L.R. 503: (1986) 1 Cr.L.J. 502.

The *khasra girdawari* embodies the record of a public servant's acts performed in the discharge of his official duties and is, thus, admissible under S. 35; true, it carries no presumption of correctness but its evidentiary value is certainly not nil; the Court should not start with the presumption that it is not correct or, unless supported it can be rejected only if it is found on evidence to be false or its genuineness becomes suspicious: A.I.R. 1972 P.&H. 393: 1972 Punj.L.J. 118.

Though the record of *khasra girdawari* is admissible under S. 35, *held*, the statutory presumption of correctness under S. 44 of the Punjab Land Revenue Act does not extend to it; that presumption is available only to record of rights and *jamabandis*; and where the record of *girdawari* was itself found to be suspicious on its face, the presumption under S. 114(*e*) would also be not available to it either: A.I.R. 1974 S.C. 223: (1974) 1 S.C.C. 138.

Public document—*Khasra girdawari* is public document and, hence, certified copies of entries are admissible in evidence—Not obligatory to produce Patwari preparing *khasra girdawari*: A.I.R. 1966 Him. Pra. 48.

Entries in *khasra girdawari* in Rajasthan are to be presumed true until there is proof to the contrary: 1959 Raj.L.W. 381.

Under S. 35 an entry in any public or other official register stating a fact in issue or relevant fact and made by public servant in the discharge of his duties becomes a relevant fact and is provable in the prescribed manner. Entries in Khasra register maintained under an Act are entries in a public and official register and made by a public servant in the discharge of his official duties and the columns provided in the register are to be filled up in the discharge of an official duty of the public servant concerned. Till those entries are proved to be false, they will be good evidence of what is stated thereunder: 1964 B.L.J.R. 152: A.I.R. 1964 Pat. 187.

Khasra is, under S. 45(2) of the C.P. Land Revenue Act, 1917, a record of rights and, under S. 80(3) thereof, it is to be presumed to be correct unless contrary is shown. The burden of proving adverse possession lies heavily on the person who contends so in opposition to the entries in the *khasra girdawari*: A.I.R. 1974 S.C. 1178: (1974) 1 S.C.C. 675.

A Khasra Paimaish prepared under the orders of Government is relevant under S. 35: (1938) 40 Punj.L.R. 298: A.I.R. 1938 Lah. 751; A.I.R. 1938 Lah. 440.

Khasra Paimaish of Municipality—Value of as record of title: A.I.R. 1934 Lah. 885: I.L.R. 16 Lah. 313.

Where the defence raised was that the defendant was a tenant under the plaintiff's predecessor in interest without stating either the time the tenancy was created or the terms and conditions thereof and it was found that the *khasra girdawaris* produced to sustain the defence were contrary and changed from time to time at the Patwari's sweet-will, *held*, the defendant was rightly found to be a trespasser liable to be evicted: 1991 Punj.L.J. 408.

Khasra girdawaris—Entries in—Are relevant in considering surplus area for purposes of Pepsu Tenancy and Agricultural Lands Act: (1969) 71 Punj.L.R. 983: 1969 Punj.L.J. 310.

See also A.I.R. 1985 Him. Pra. 10: 1984 Sim.L.C. 283: I.L.R. (1984) Him. Pra. 363, cited under Note 12, *supra*.

14. Entry in *Khatian*.—An entry in a *khatian* is relevant to establish a fact recorded therein as a public record under S. 35: A.I.R. 1982 N.O.C. 188 (Sikkim).

In case of a conflict between entries in R.S. khatians, it is the latter entry which is

presumed to be correct, and not the earlier ones. [A.I.R. 1963 S.C. 361, Foll.]. But an unauthorised latter entry cannot prevail over a valid earlier entry: A.I.R. 1982 Cal. 294: (1982) 1 Cal.L.J. 256: (1982) 1 Cal.H.N. 206 (D.B.).

Where the earlier C.S. Khatian described the land as tenure and the later R.S. Khatian showed it as non-agricultural whose correctness is not even challenged, *held*, the R.S. Khatian will prevail. [A.I.R. 1963 S.C. 361, Foll.]: A.I.R. 1978 Cal. 556.

Where the entry in C.S. Khatian showed a female to be a limited owner of the property but R.S. Khatian, prepared thereafter, showed her as a full owner thereof in pursuance of the commencement of the Hindu Succession Act, 1956, *held*, the latter entry would prevail; a finding by the lower Court that C.S. Khatian could not be rebutted is perverse. [A.I.R. 1963 S.C. 361 and A.I.R. 1978 Cal. 556, Rel. on]: A.I.R. 1981 Cal. 74: (1980-81) 85 Cal.W.N. 357: (1981) 1 Cal.H.N. 195.

Entry in clause 10-A of Khatauni—Evidentiary value—Entry not decisive regarding nature of occupation: 1964 All.L.J. 1127.

Returns (Khatauni papers) made or purported to have been made under the U.P. Land Revenue Act, are admissible in evidence both under S. 35 of the Evidence Act and also under S. 44 or S. 57, as the case may be, of the said U.P. Act itself, read in the light of Ss. 32, 33 and 56 thereof and the relevant Rules, prescribing the particular form. Under S. 57 or S. 44, of the U.P. Act the entries in these returns would have a presumptive value and the presumption of correctness would prevail until rebutted: A.I.R. 1960 Cal. 724.

15. ***Riwaj-i-am.***—Entries in *Riwaj-i-am*, an official record, kept by a person in performance of his public duty after satisfying himself of their correctness, are presumed to be correct; they are themselves evidence of their truth until their falsity by proper evidence by which evidentiary value of any public book, register or document may be attacked. However, if the custom recorded in the *Riwaj-i-am* is opposed to the general custom or to the rights of females, not consulted when it was prepared, the initial presumption of truth is weakened but nevertheless it is sufficient to shift the burden of proof on the party impeaching the existence of the custom and that too only by proof of instances where the custom was not acted upon; thus, if the custom recorded in a later properly prepared *Riwaj-i-am* is different from the one recorded in the earlier *Riwaj-i-am*, the Court is duty bound to uphold the modified custom recorded therein: A.I.R. 1978 P.&H. 98: I.L.R. (1977) 2 Punj. 61: (1978) 80 Punj.L.R. 373 (F.B.).

No statutory presumption attaches to the contents of a *Riwaj-i-am* or similar compilation, but, being a public record prepared by a public officer in the discharge of his duties under Government Rules, the statements to be found therein in support of custom are admissible to prove facts recited therein and will generally be regarded as a strong piece of evidence of the custom. The entries in the *Riwaj-i-am* may, however, be proved to be incorrect and the question of evidence required for the purpose of rebutting them will vary with the circumstances of each case. The presumption of correctness attaching to a *Riwaj-i-am* may be rebutted, if it is shown that it affects adversely the rights of females or any other class of persons who had no opportunity of appearing before the revenue authorities: (1953) 55 Punj.L.R. 25: A.I.R. 1953 Punj. 196. A certified copy of *Riwaz-i-am*, prepared by the Settlement Officer in the year 1913 may be of very high evidentiary value: (1958) 60 Bom.L.R. 1022: I.L.R. (1959) Bom. 77: A.I.R. 1959 Bom. 241.

As regards the customary law, the entries in the *Riwaj-i-am* are relevant evidence under S. 35. There is an initial presumption of correctness as regards the entries in the *Riwaj-i-am* and when the custom as recorded in the *Riwaj-i-am* is in conflict with the general custom as recorded in Rattigan's Digest or ascertained otherwise, the entries in the *Riwaj-i-am* should ordinarily prevail except that where the *Riwaj-i-am* affects adversely the rights of females who had no opportunity whatever of appearing before the Revenue authorities, the presumption would be weak, and only a few instances would suffice to rebut it: I.L.R. (1960) 2 Punj. 615: (1960) 3 S.C.R. 975: A.I.R. 1960 S.C. 1118.

Riwaj-i-am—Evidentiary value—*Riwaj-i-am* of Gurdaspur district—Validity. *See* A.I.R. 1955 S.C. 266: (1955) 1 S.C.R. 1191.

Hindu Succession Act, 1916, S. 14 (2)—*Riwaj-i-am* is not an instrument but a record of custom—Hindu Succession Act, 1956, S. 14 (2)—Custom (General)—Custom (Punjab): (1967) 69 Punj.L.R. 391.

Entries in *Riwaj-i-am* are presumed to be correct—Proof of custom—Oral and documentary evidence of mutations and other transaction recognising custom, are material. *See* under S. 13, Note 1: A.I.R. 1966 S.C. 1555.

16. *Wajib-ul-arz*.—*Wajib-ul-arz* is village administration paper prepared with due care and after due enquiry by a public servant in the discharge of his official duties; it is a part of the settlement record. Statutory presumption of correctness attaches to it: A.I.R. 1979 S.C. 861.

S. 31(2) (*a*) and (*b*) of the Punjab Land Revenue Act, 1887 makes it evident that *Sharait wajib-ul-arz* is included in the record of rights of an estate; James Thompson, the first Administrator of Punjab, had directed the Settlement Officers preparing the record of rights to prepare *Ikrarnamas* or *sharait wajib-ul-arz* (Village Administration Papers) which were most important to him as they intended to show the entire constitution of the village; they are public record made in performance of duty: A.I.R. 1991 P.&H. 134 (D.B.).

Entry in *wajib-ul-arz* is admissible in proof of custom—Admissibility does not depend upon verification of *wajib-ul-arz* by proprietors: A.I.R. 1927 Oudh 608.

Entry in *wajib-ul-arz*—Presumption as to correctness. *See* (1957) 59 Punj.L.R. 263. In the case of discrepancy in the khasra entries and the *wajib-ul-arz*, the entries in the latter must prevail: I.L.R. (1954) Nag. 96: A.I.R. 1954 Nag. 103.

Entries in *wajib-ul-arz*—Admissibility. *See* A.I.R. 1957 S.C. 286. *See* also 101 I.C. 820: 1 Luck. Cases 73.

Though the Mines and Minerals (Regulation and Development) Act, 1957 provides for regulation and development of mines or minerals but it does not vest any particular mineral in the State Government; whether a particular mineral vests in the State Government or a private owner of the land is to be determined as per *wajib-ul-arz* to which is attached the presumption of truth: A.I.R. 1972 P.&H. 50: (1972) 74 Punj.L.R. 897 (D.B.).

17. Inam register.—The preparation of the inam register is an important act of State; its compilation is a result of an elaborate enquiry based upon oral evidence, on the spot enquiry and based upon available accounts and records: A.I.R. 1974 Mad. 182: (1973) 86 Mad.L.W. 613: (1973) 2 M.L.J. 317 (D.B.).

The entries in the inam register are evidence of the true intent and effect of the transactions and of the character of the right which was being recognised and continued. The entries in the inam register and the description of the inamdar therein can be accepted as indications of the nature and quantum of the right and the interest created in the land. The entries made in the inam register are the result of an elaborate enquiry based upon oral evidence, on-the-spot enquiry and scrutiny of available accounts and records. The inam statement is only one of the pieces of evidence which the Inam Commissioner might have taken into consideration in compiling the inam register. The recitals in the statement must, therefore, give place to the recitals in the inam register though an attempt shall be made to harmonize them, if possible.

Held, on a consideration of the recitals in the inam register and statements filed before the Inam Enquiry Commissioner, that the grant to the deity was of both the warams, *viz.* Melwaram and Kudiwaram: (1964) 8 S.C.R. 347: A.I.R. 1965 S.C. 516.

Though in the absence of the original grant the inam register is of great evidentiary value, it does not mean that the entry or entries in any particular column or columns of the register should be accepted at their face value without giving due consideration to other matters recorded in the entry itself. There is no doubt the entries cannot displace actual or authentic evidence in individual cases: A.I.R. 1919 P.C. 62.

Thus, the fact that the Inam Commissioner treated certain grant to be in support of Sadavarti and for the support of the temple of Sri Jagannadhaswami, would not make the grant for the purposes of the temple when the temple itself was not in existence at the time the grant was made and when a later sanad referring to it definitely stated that the original villages were granted for the purposes of charity: (1962) 2 S.C.R. (Supp.) 276: (1962) 2 An.L.T. 274: A.I.R. 1963 S.C. 510.

Although there is no statutory presumption of correctness regarding entries in the inam register as in the case of entries in a record of rights, yet as the inam register was prepared after thorough inquiry at the spot by public officials, entries contained therein should, in the absence of actual and authentic evidence to the contrary, be given the utmost importance, and cannot be brushed aside as a

real piece of evidence: A.I.R. 1953 Ori. 92: 18 Cut.L.T. 33.

Decision of Inam Commission in inam register has great evidential value as to the nature and quantum of right and interest in land in absence of authentic evidence to contrary: A.I.R. 1960 S.C. 100.

Absence of original grant—Entries in inam register are of great evidentiary value and are almost conclusive: (1953) 1 M.L.J. 164: A.I.R. 1953 Mad. 580.

See also I.L.R. (1945) Mad. 194: A.I.R. 1944 Mad. 468: (1944) 2 M.L.J. 56 (Inam register—Entries in Wallace's Register).

It is true that Inam fair register is entitled to great weight as the preparation of Inam register was a great act of State and its preparation and the contents were the subject of much consideration under elaborately detailed reports and minutes. But that is not to say that the entries therein would override or nullify the effect of registers prepared long before. It is only in the absence of authentic evidence that utmost importance will be given to the Inam fair register, but it will not displace earlier documents, the authenticity of which could not be questioned: (1958) 1 An.W.R. 343.

It is well established that the preparation of the Inam fair register was a great act of state; it was prepared by Government Officials after an on the spot enquiry and examining all relevant and available documents; though not conclusive, it has great evidentiary value; yet its entries may be rebutted by authentic and clinching record: A.I.R. 1976 Andh. Pra. 295: (1976) 1 A.P.L.J. (H.C.) 114 (D.B.).

18. *Batwara khasra*.—Batwara record is not conclusive evidence but merely evidence under S. 35, as an official record. It is a weak type of evidence when it conflicts with the record of rights: (1933-34) 38 Cal.W.N. 268: A.I.R. 1934 Cal. 488.

Batwara papers are admissible in evidence: 1980 All.W.C. 501.

A *batwara khasra* is not a public document within the meaning of S. 35; but if it had been prepared under the provisions of the Estates Partition Act by the Deputy Collector in discharge of his official duty, it is admissible as a public document: I.L.R. 7 Pat. 85: A.I.R. 1929 Pat. 32. *See* also A.I.R. 1933 Pat. 333: 170 I.C. 187; A.I.R. 1937 Pat. 463; 18 Pat.L.T. 464: 171 I.C. 732: A.I.R. 1937 Pat. 567; (1938) 40 Punj.L.R. 693: A.I.R. 1938 Lah. 440; 1939 Pat.W.N. 700: A.I.R. 1939 Pat. 591 (Decision in settlement proceedings); A.I.R. 1937 Pat. 561 (Road cess return); 1929 R.D. 325 (Patwari papers); (1925-26) 30 Cal.W.N. 689: A.I.R. 1926 Cal. 862 (Record of rights); A.I.R. 1926 Nag. 161 (Parepatraka); A.I.R. 1929 Lah. 328 (Khatardhar paper); A.I.R. 1926 Cal. 290 (Map prepared for the purposes of partition); A.I.R. 1926 Oudh 88; A.I.R. 1930 Oudh 97; A.I.R. 1929 Oudh 134. *See contra* A.I.R. 1928 Cal. 893 (Sale certificate). *See* also I.L.R. 56 All. 766: 1934 All.L.J. 318: A.I.R. 1934 All. 406 (F.B.).

Batwara khasra is admissible: A.I.R. 1922 Pat. 447; I.L.R. 15 Pat. 584: A.I.R. 1937 Pat. 189; A.I.R. 1944 Sind 176: I.L.R. (1944) Kar. 14 (Evidentiary value of entries in Revenue records); Batwara papers, *see* A.I.R. 1923 Cal. 261; 59 I.C. 963.

19. Municipal record.—The report of a Municipal overseer as to when the construction of chajja took place is inadmissible: 26 I.C. 670: 12 All.L.J. 740. Municipal register containing entries as to ownership of property: 163 I.C. 867: A.I.R. 1936 Lah. 965.

Municipal records—Presumption of correctness—Presumption relates only to the period when entries were made: 75 I.T.R. 318: (1970) 2 I.T.J. 17: A.I.R. 1970 Pat. 327.

An extract from the khewat khasra of 1921 and an extract from the Register of immovable property of 1931, kept by the Municipal Board under the orders of Government are admissible in evidence as extracts from public documents: I.L.R. (1948) All. 215: A.I.R. 1948 All. 509.

Under S. 136 of the Calcutta Municipal Act, the authority is limited to inspection, survey and measurement and does not extend to making of any entry in a book described as 'Inspection Book of Lands and Buildings'. If the making of the entry is neither authorised nor required by the statute it cannot be said that the Assessment Inspector made the entries in discharge of his official duty or in performance of a duty specially enjoined by the law of this country: (1956-57) 61 Cal.W.N. 175.

Certified copies of the entries made in the assessment register, a public record maintained by the Municipal Corporation under S. 135 of the Calcutta Municipal Corporation Act, 1923, are admissible: [(1956-57) 61

Cal.W.N. 175, Disting.]: A.I.R. 1984 N.O.C. 148 (Cal.). *See* also (1992) 2 Cal.L.T. 89.

Assessment registers of a Municipality are public documents prepared in performance of public documents; they can be proved by certified copies: A.I.R. 1982 Cal. 294: (1982) 1 Cal.L.J. 256: (1982) 1 Cal.H.N. 206 (D.B.). A certified copy of the document from 'Inspection Book of Land and Buildings' maintained by the Corporation, *held*, is not admissible under S. 35: (1988-89) 93 Cal.W.N. 1045; (1984) 2 Cal.L.J. 329: (1985) 1 Cal.H.N. 84. Relevancy of an entry in Municipal House Tax Register regarding mortgage, when no such entry is required to be made by law. *See* (1978) 2 M.P.W.N. 179.

Municipal parcha—No presumption available as to its correctness: 1966 B.L.J.R. 761.

The question in dispute was whether Municipal plot No. 106 was a part of the cadastral survey plot No. 1090 which was recorded as raiyati. To prove this, copies of Municipal survey map and cadastral survey map prepared by an Amin were produced but the Amin was not examined. Instead another witness who was a survey passed pleader was examined. He deposed that he checked these copies of maps with the cadastral survey and the Municipal survey maps and by superimposition of the two copies he found that plot No. 106 was a part of plot No. 1090. *Held*, that when the accuracy of the copies of maps prepared by the Amin had not been established, the conclusion derived from superimposing one map upon the other could not be accepted: 1955 B.L.J.R. 626: A.I.R. 1956 Pat. 57.

20. Certificate of guardianship.—Certificate of guardianship under S. 7 of Guardians and Wards Act is admissible in evidence—Entries therein as to period of minority are relevant under S. 35, Evidence Act—(Guardians and Wards Act, 1890, S. 7). [(1896) I.L.R. 18 All. 478, Not Foll.; (1890) I.L.R. 17 Cal. 849, Disting.; A.I.R. 1928 P.C. 152, Ref.; A.I.R. 1926 Oudh 88 and A.I.R. 1929 Oudh 134, Foll.]: A.I.R. 1969 All. 162.

A certificate of guardianship issued by the Court is not admissible in evidence under S. 35 to prove the minority of a person. Such certificate is neither a book nor a register nor a record kept by any officer in accordance with any law. It is a certificate, as it professes to be, and is a document issued to a person, giving that person and only to him a particular kind of authority: A.I.R. 1950 Cal. 533; A.I.R. 1942 Cal. 438: 199 I.C. 10.

21. Voters' list.—Electoral rolls are public record made in performance of duty specially enjoined by the Representation of the People Act; it directly comes under S. 35 as well as S. 74(1)(*iii*); the presumption under S. 81 being available to it, the Court has to (shall) presume its genuineness and regard the entry in the roll proved unless it is disproved: A.I.R. 1972 Ori. 158: (1972) 1 Cut.W.R. 57: 38 Cut.L.T. 82: I.L.R. (1972) Cut 161 (F.B.). *See* also A.I.R. 1980 All. 109: 1979 All.W.C. 698.

The electoral roll is a public document and is admissible in evidence; it is not necessary to prove the source of information on the basis whereof the facts stated in the roll were recorded, nor is it necessary that the person who prepared the electoral roll has to be examined in Court to prove the electoral roll: A.I.R. 1974 Ori. 107: (1973) 2 Cut.W.R. 1108.

The voters' list which are public records prepared in accordance with the provisions of the Representation of the People Act, 1950 and the Rules made thereunder are admissible under S. 35 and S. 74(1)(*iii*) of the Evidence Act: 1978 B.L.J.R. 165 (D.B.); 1978 Cr.L.J. 752: 1977 Mad.L.W. (Cr.) 217: 1978 M.L.J. (Cr.) 327 (Entries in voters' list of village showing relationship of husband and wife supported by *karnam* of village, *held*, are admissible to prove marriage).

It is one thing to say that a document is conclusive evidence and another that it is one of the pieces of evidence; thus, the voters' list by itself is not conclusive or final; but being a public document under S. 74(1)(*iii*), it is admissible in evidence and together with other evidence connecting the list with the person concerned, the two supplement each other and may prove the fact in issue: (1986) 2 M.L.J. 235: (1986) 99 Mad.L.W. 901.

A diary shown to have been maintained and written by the Returning or Election Officers while discharging their official duties as polling of votes was in progress, *held*, is relevant and admissible under S. 35: A.I.R. 1977 N.O.C. 254 (All.).

Where in a suit for partition of ancestral properties belonging to the grand father, the plaintiff's status as son of the grandfather was impeached who relied, *inter alia* ,on the voters' lists which were rejected by the trial Court on the ground that two of its pages do not bear

the seal of the Panchayat or Election Office and there were no signatures on the seal of the Police Station, *held*, the voters' lists prepared under the Representation of the People Act were public record under S. 35 and public document under S. 74(1)(*iii*); they were admissible in evidence as such without examining their author or the authority furnishing copy thereof. [A.I.R. 1972 Ori. 158 (F.B.), Rel. on]: A.I.R. 1983 Ori. 279 (D.B.).

Where the extract from the village electoral roll and family register, proved by a certified copy thereof showed that Bachan Singh was husband of Purna Devi and father of her three children, *held*, they, being public documents, were not required to be proved by evidence *aliunde*; they were presumptive evidence and the burden lay on the other party to rebut truth of the entries: A.I.R. 1980 All. 174.

Where there was no evidence to show that at whose instance the father's name of the voter was mentioned and the person preparing the voters' list was not examined, *held*, no reliance could be placed on the voters' list affecting the proof of relationship claimed in the voters' list: (1970) 36 Cut.L.T. 1211 (D.B.).

Voters' list has practically no evidentiary value on question of identity of house under occupation of a person and cannot displace what is established by entries in Municipal record: I.L.R. (1953) Nag. 126: A.I.R. 1953 Nag. 146.

Where in a suit for maintenance by a widow, it was contended that she had been dispossessed and driven out from the village and the voters' lists of 2 villages showed that her name was entered in the voters' list of both the villages, *held*, much importance cannot be attached to such entries; it merely indicated that she would have lived in both the villages at the time of enumeration: A.I.R. 1971 Mad. 282: (1970) 1 M.L.J. 222 (D.B.).

22. Hospital record.—An outdoor ticket and the discharge certificate granted by authorities of a public hospital are public documents and are, therefore, admissible in evidence on the combined effect of Ss. 35 and 74 of the Evidence Act, as these documents show the entries in the Official Register made by a public servant in the discharge of his official duties: (1965) 1 Cr.L.J. 600: A.I.R. 1965 Tripura 17.

In patient bed head ticket kept in the office of a Government hospital being a public record, it is admissible under S. 35: 1975 Raj.L.W. 161: 1975 W.L.N. 858: I.L.R. (1975) 25 Raj. 623.

Certified copy of a post mortem report can be taken into consideration: (1989) 2 Raj.L.W. 60.

Prescription register in Government hospitals is admissible though handwriting of the entry is not proved: 103 I.C. 512: A.I.R. 1927 Oudh 310.

Accusation of adultery—Establishment of—Evidence by spouse—Corroboration necessary—Statements of adulteress recorded in Government Maternity Home and Rescue Home registers can be used for corroboration: (1964) 2 Cr.L.J. 686: A.I.R. 1964 Mys. 280.

23. First Information Report.—The first information report, strictly speaking, can be used only for the purpose of corroborating or contradicting the maker thereof. Omissions of important facts in the first information report affecting the probabilities of the case are relevant under S. 11 of the Evidence Act in judging the veracity of prosecution case. [A.I.R. 1975 S.C. 1026, Foll.]: (1984) 57 Cut.L.T. 27. *See* also (1984) 58 Cut.L.T. 422 [Effect of non-mentioning of names of some of witnesses].

F.I.R.—Use of—Oral complaint reduced to writing by officer in charge of Police Station—Report signed by complainant and countersigned by Police Officer—Handwriting of Police Officer not proved—Document not admissible in evidence for corroboration—Complaint entered in prescribed book under S. 154, Cr.P.Code—Entry not complaint—Report made to Magistrate as prescribed under S. 157—Not relevant under S. 35, Evidence Act: (1962) 3 Guj. L.R. 107: (1962) 2 Cr.L.J. 55: A.I.R. 1962 Guj. 214.

First information report not signed by informant—Admissibility: 1960 Cr.L.J. 461: A.I.R. 1960 Bom. 146.

First information report taken down by Police Officer—Admissibility and use of: 11 Mys.L.J. 475: 39 Mys.H.C.R. 75; I.L.R. (1937) Nag. 315: A.I.R. 1937 Nag. 17 (F.B.) [Entries in village crime note books]. Judgment not *inter partes*: 9 Nag.L.J. 215: A.I.R. 1927 Nag. 19; I.L.R. 18 Mad. 73: A.I.R. 1948 Mad. 388: (1948) 1 M.L.J. 215.

Where in a divorce case on the ground of cruelty under S. 13 of the Hindu Marriage Act 1955, the wife in her written statement had

admitted that she had lodged a report with the Police and a constable appeared as a witness with the original report and having testified that it was made by the wife, produced its copy but was not at all cross-examined nor any objection was raised to its admissibility, *held*, the report was admissible: 1982 Hindu L.R. 30: 1982 Hindu L.R. 124 (P.&H.) (D.B.).

24. Police report.—The reports made by officers of the C.I.D. Special Branch who cover public election meetings comprising, *inter alia*, the mental notes made by them, constitute valuable evidence to establish the number of public meetings and other particulars thereof, *held*, are undoubtedly reports made by public servants in discharge of their official duty and, thus, relevant and admissible under S. 35; same is the case with the chart of such meetings, the places they were held at and the names of the speakers prepared and furnished by the Police: A.I.R. 1975 S.C. 308: (1975) 3 S.C.C. 646.

Where a candidate had obtained Police permission to hold an election meeting and use a loudspeaker therein and the Police Inspector deputed a Head Constable to attend the meeting and submit a report of the speeches and proceedings thereof, *held*, the reports were clearly made by a public servant in discharge of his official duty; the reports are extremely relevant: A.I.R. 1972 S.C. 608: (1972) 85 Mad.L.W. 39 (S.N.).

Where under the State Government's direction, a Deputy Inspector General of Police had submitted his report after investigation into the blinding by the Police of 24 undertrials while in Police custody, *held*, the report is relevant and admissible evidence under S. 35; it is an official record and related to facts in issue as to how and by whom were the undertrials were blinded: A.I.R. 1981 S.C. 1068: 1981 Cr.L.J. 597: (1981) 2 S.C.C. 493: 1981 B.L.J.R. 425: (1981) 1 Karn.L.J. (Sh.N.) 116.

An application sent to the Superintendent of Police is not a public document; its contents have to be proved; mere proof of signatures of the applicant are no proof of its contents. [A.I.R. 1925 All. 413, Disting.]: 1985 All.Cr.C. 141.

Police records of levy of punitive tax—Value of as record of title: A.I.R. 1934 Lah. 885: I.L.R. 16 Lah. 313.

25. Commissioner's report.—A local Commissioner's confirmed report is admissible as evidence and becomes part of the record of the case. The confirmed report of a local Commissioner, appointed by the Court in a suit is admissible in a subsequent suit; it cannot be brushed aside out of hand simply because the party relying upon it did not produce the Commissioner to prove it in the latter suit; the report could be used to judge the reliability of a witness's evidence. [A.I.R. 1934 Lah. 890; A.I.R. 1936 Oudh 192, Dissent. from]: (1982) 8 All.L.R. 41: 1981 All.L.J. 1349.

There is no doubt that being public documents, certified copies of the Commissioner's report and inspection note in the earlier suit are admissible in evidence without further proof under S. 77 as proof of their contents; however, if the Commissioner's report was not confirmed in the earlier suit, it would be of no evidentiary value; and even if it was confirmed in the earlier suit, it might have been open to the parties who contested that report to call for the Commissioner for cross-examination in order to test its correctness, or to show that it was incorrect by some other evidence; it could not be brushed aside out of hand simply because it was a report made in an earlier suit and the party who relied upon it did not produce the Commissioner to prove that report in the present suit. As to the inspection note of the Presiding Officer, the report could be used to judge the reliability of evidence of witnesses in the subsequent case. Even the Commissioner's report could be primarily used for the same purpose; but none of them were substantive evidence on which the plaintiff's case could be based: (1981) 7 All.L.R. 293.

Commissioner dying after filing his report—His report is admissible in evidence under the provision: A.I.R. 1969 Pat. 385.

26. Entry in order-sheet regarding service of notice.—An entry in the order-sheet recording that a notice of a proceeding had been served is admissible under S. 35 as evidence of the fact of service of the notice: A.I.R. 1943 Cal. 114: I.L.R. (1943) 1 Cal. 22. *See* also A.I.R. 1933 Pat. 658.

Report by process peon who is dead regarding service of notice: A.I.R. 1933 Pat. 658: 191 I.C. 45; (1940) 42 Punj.L.R. 288: A.I.R. 1940 Lah. 312.

A process-server is an officer of the Court so that his report that a person is not served is admissible under S. 35 read with S. 74, Evidence Act: 1964 M.P.L.J. (Notes) 13.

27. Witness's deposition.—The depositions of witnesses in an heirship inquiry under S. 71 of the Bombay Land Revenue Code are inadmissible as substantive evidence relating to title but they might be used as corroborating or contradicting the witnesses examined in the case: (1933) 35 Bom.L.R. 118: A.I.R. 1933 Bom. 126. So also family traditions recorded by settlement officer: 163 I.C. 770: A.I.R. 1936 Oudh 340.

Where a deposition of a witness had been recorded in the ordinary way, that record and not an abstract of the evidence in the judgment is the proper evidence of the statement; but where the Court has acted upon an oral admission and recorded in its judgment which constitutes the only official record of it, it is admissible: A.I.R. 1933 Mad. 184: 142 I.C. 548; 40 Mad.L.W. 810: A.I.R. 1935 Mad. 268.

28. Admissibility of previous judgments/ inquiry.—The Evidence Act does not make a finding of fact arrived at on the evidence before the Court in one case evidence of that fact in another case. A judgment, not *inter partes*, which is not admissible under Ss. 40 to 43 of the Evidence Act, does not become relevant, merely because it contains a statement as to a fact which is in issue or relevant in the suit, and to such a judgment S. 35 of the Evidence Act does not apply. Where a judgment is not *in rem*, nor relating to matters of public nature nor between the parties to a subsequent suit, the fact that the Court by that judgment decides a point in a particular way is not relevant for the purpose of the decision of the same point in the subsequent suit. Therefore, a statement of a relevant fact in previous judgment, not *inter partes*, is not admissible under S. 35 of the Evidence Act: 1962 B.L.J.R. 323: A.I.R. 1962 Pat. 420.

A previous judgment though not *inter partes* is admissible under S. 35 to prove a statement made by a predecessor-in-title of the party against whom the document is sought to be used. Thus, an admission contained in such judgment as to the date of the death of the father of the predecessor-in-title is admissible to prove the date of death of such person: A.I.R. 1948 Mad. 388: (1948) 1 M.L.J. 215. *See* also A.I.R. 1927 Nag. 19.

(Process-server's report as to giving possession in execution of decree). The Evidence Act does not make a finding of fact arrived at on the evidence before the Court in one case, evidence of the fact in another case when the parties are not same. A recital, therefore, in a judgment not *inter partes* of a relevant fact is not admissible in another litigation, though the judgment may be used in certain circumstances as a fact in issue or as a relevant fact or possibly as a transaction: 121 I.C. 509: A.I.R. 1930 Lah. 237.

Where the finding that the suit land had been mortgaged was based on a judgment in a previous pre-emption suit whereby on its being decreed, the plaintiff needed money to satisfy the decree, *held*, the judgment established the factum of its existence as well as the circumstances leading to its delivery; it was admissible under S. 40: A.I.R. 1972 Him. Pra. 135.

An admission made in a written statement which is no longer available but is mentioned in the judgment of an earlier suit, *held*, is admissible. [(1883) I.L.R. 9 Cal. 586; (1895) I.L.R. 18 Mad. 73; A.I.R. 1934 P.C. 157 and A.I.R. 1929 P.C. 77, Rel. on]: A.I.R. 1977 Pat. 23: 1976 B.B.C.J. 509: 1977 Pat.L.J.R. 25 (D.B.).

Though a criminal judgment may not be admissible in a civil proceeding in so far as it discusses evidence or speaks of confession of guilt by the defendant, yet it is certainly relevant and admissible to show that the two defendants had been charged with and convicted for theft; the lower appellate Court's finding that the defendants had not been established to be responsible for theft is perverse and clearly against evidence and law: A.I.R. 1974 Mad. 14: (1973) 86 Mad.L.W. 395.

Where relationship between persons is in dispute, a finding thereon in *inter partes* proceeding before a Settlement Officer, a public officer acting in discharge of his public duties, is relevant and admissible in subsequent civil suit between those parties: A.I.R. 1985 N.O.C. 154 (Ori.).

Copies of statements of certain persons made during an enquiry into the conduct of *Mahant* wherein the issue was whether he should be removed from his office, *held*, is not admissible in a proceedings wherein the issue was regarding the character or nature of the institution of which he was *Mahant*: (1992) 2 Rev.L.R. 147 (D.B.).

29. Miscellaneous.—An entry as to ownership in 'frad baghat' is admissible, but is not admissible when it does not appear who made the entry: 14 R.D. 444. An entry in Mouxawari Register is admissible as regards title to land: I.L.R. 58 Cal. 858: 60 M.L.J. 142: A.I.R. 1931 P.C. 1 (P.C.). *See* also A.I.R. 1937 Pat. 463 (Sifton's Settlement Report). Report of Government Officers, nature of: I.L.R. 13 Pat. 517: A.I.R. 1935 Pat. 33.

The Gazette of the Bombay Presidency, Vol. III published in 1879, is admissible under S. 35 read with S. 81 of the Evidence Act, 1872. The Gazette is admissible being official

record evidencing public affairs and the Court may presume their contents as genuine. The statement contained therein can be taken into account to discover the historical material contained therein and the facts stated therein is evidence under S. 45 and the Court may in conjunction with other evidence and circumstances take into consideration in adjudging the dispute in question, namely, whether Kalika Mataji temple was a public trust, though it may not be treated as conclusive evidence: A.I.R. 1995 S.C. 167.

Register Sikni being a duly kept record by the official of the department, its contents are admissible in evidence under S. 35: 1976 Punj.L.J. 43.

An entry in Khana Shumari Register not having been shown to carry a presumption of correctness, *held*, is not admissible under S. 32: A.I.R. 1974 P.&H. 343: (1974) 76 Punj.L.R. 444: 1974 Rev.L.R. 334 (D.B.).

It is extremely doubtful whether Inter-departmental Secretariat notes are admissible in evidence and whether they should have been allowed to be exhibited. It cannot be stated clearly as to under what section of the Evidence Act these Inter-departmental Secretariat notes are admissible. They do not come within the purview of S. 35, Evidence Act: I.L.R. (1952) Cut. 109: A.I.R. 1952 Ori. 289.

A report prepared by the State Statistical Department on out turn of winter rice based on sample survey method may not be appropriate for other purposes; the report is not necessarily a safe guide for assessing market value of any particular plot acquired. On the other hand, in the context evident mistakes found in the Departmental report, the receipts of rent given to the *adhiars* are more certain of the land yield when nothing on record rendered the receipt to be incorrect: A.I.R. 1975 S.C. 1905: (1975) 2 S.C.C. 645.

As to value of entries in *fahrist-tabdilat*, *see* I.L.R. (1945) Nag. 331: A.I.R. 1944 Nag. 314. Register of information at pargana watandars: (1937) 39 Bom.L.R. 288. Entries in village crime book: I.L.R. (1937) Nag. 315: A.I.R. 1937 Nag. 17 (F.B.). Entries in public record consequent on a decree are admissible: I.L.R. 16 Pat. 258: A.I.R. 1937 P.C. 69: (1937) 2 M.L.J. 631 (P.C.). *See* also 1939 Pat.W.N. 577: A.I.R. 1939 Pat. 591; Police records: A.I.R. 1937 Nag. 17 (F.B.).

The following are examples of books, registers and registered records in India which come within the purview of this section:—Log books (*see* Ss. 103-108, Act I of 1879 and Ss. 280-285 of the Merchant Shipping Act 17 and 18 Vict., C. 194); Marriage registers, *see* Ss. 28, 32 and 54 and Schedules III and IV, Act XV of 1872, 14 and 15 Vict., C. 40: Act XV of 1865 (Parsees); and Act III of 1832; S. 44, Act V of 1865, S. 6 and Schedule of Act Registers directed by Part XI of the Indian Registration Act, 1908; Registers of printing presses: newspapers, and books published in India, Act XXV of 1867; of Copyright Act, Act XX of 1847; Act III of 1914 of new inventions, designs, patterns, etc.; S. 11, Act XV of 1859; Act XIII of 1872 of literary, scientific and charitable societies, Act XXI of 1860; of joint stock companies, etc., under the Indian Companies Act VI of 1882 (I.L.R. 9 All. 366): of British ships S. 4, Act X of 1841; 17 and 18 Vict., C. 104; registers prescribed by the various Municipal Acts, Proceedings of Registered Companies and Municipal Committees recorded in accordance with the provisions of the particular Act applicable thereto of vessels on the river Indus, Act I of 1863(B.C.); Record-of-rights; (*see* 23 Pat.L.T. 345: A.I.R. 1942 Pat. 466); S. 14 of the Punjab Land Revenue Act XXXIII of 1871, and Ss. 94-106 of the North-Western Provinces Land Revenue Act XIX of 1873, the settlement record prescribed by Cl. 9; S. 9, Bengal Regulation VII of 1822; Registers of Chakeran land, W.R. 1864, 358; Quinquennial registers in the Bengal Presidency, 7 W.R. 14; Registers of tenure under the Chota Nagpur Tenure Act II of 1869 (B.C.): I.L.R. 19 Cal. 91; Register of Mahomedan Marriages Act I of 1976 (B.C.): I.L.R. 10 Cal. 607. Revenue registers in the Madras Presidency: I.L.R. 15 Mad. 19; Rennel's Maps: 181 I.C. 824: A.I.R. 1940 Cal. 539; 72 Cal.L.J. 320: A.I.R. 1941 Cal. 193; A.I.R. 1941 Cal. 520; Khewat entry: A.I.R. 1926 Oudh 427; Register under the Bengal Land Registration Act, VII of 1876 (B.C.)—Entry is no evidence of title though it may be of possession: I.L.R. 8 Cal. 853; I.L.R. 9 Cal. 431: 12 C.L.R. 12. Entries in canal papers are admissible in evidence of possession, but the value of the evidence is entirely a matter for the Court of facts: I.L.R. 24 Pat. 379: A.I.R. 1945 Pat. 453; A.I.R. 1958 Pat. 353. An entry in the Goshwara Register is admissible in evidence in view of the provisions of S. 35 of the Evidence Act: A.I.R. 1951 J.&K. 6.

Measurement books can be accepted as evidence without further proof: (1983) 56 Cut.L.T. 21.

Relevancy of decisions of *Nyay Panchayat*. *See* 1985 R.D. 462.

Where certain persons were tenants on the lands when the Karnataka Land Reforms Act, 1962 came into force and they admittedly continued to be as such in possession in and

under S. 25 of the Land Reforms Act their landlords were prohibited entry on the lands unless the tenants had—and they never did—surrendered the lands, *held*, the Court below must have presumed that the tenants were, and continued to be, in possession and entitled to injunct their landlords from committing trespass; merely because the landlords had produced levy demand notice with numbers noted thereon in their favour which were no record of rights, no presumption of truth was attached to them: A.I.R. 1975 Karn. 111: (1974) 2 Karn.L.J. 484: I.L.R. (1975) Karn. 739.

Transcripts of newspapers produced to prove the Chief Minister's statements that there were very few big landlords in Goa, *held*, are not relevant: A.I.R. 1979 Goa 21.

Entries in public records consequent upon a decree are admissible under S. 35: I.L.R. 16 Pat. 258: A.I.R. 1937 P.C. 69: (1937) 2 M.L.J. 631 (P.C.).

A letter from Superintendent, Archives Office explaining character of certain land, as to whether it is agricultural or residential, *held*, is admissible: 1976 W.L.N. (U.C.) 416 (Raj.).

Entry of records in native State. *See* 99 I.C. 307: A.I.R. 1927 Bom. 11: (1926) 28 Bom.L.R. 716. Mutation register, *see* I.L.R. 1 Luck. 529: A.I.R. 1926 Oudh 594.

An extract from a list prepared by or under the directions of a Maharaja for the purpose of assisting in the preparation of the lists under the Oudh Estates Act, though kept as a separate file with the official records by the Board of Revenue, cannot be treated as an official paper and consequently is not admissible under S. 35 of the Evidence Act. There was no duty imposed upon the Maharaja to prepare such a list and he could not be expected to have personal knowledge of the claims of all the taluqdars in Oudh: I.L.R. 22 Luck. 522: A.I.R. 1948 Oudh 307.

Admissibility of *hukumnama* whereby land was donated for charitable purpose. *See* A.I.R. 1977 Pat. 23: 1977 Pat.L.J.R. 25: 1976 B.L.J.R. 640: 1976 B.B.C.J. 509 (D.B.).

Panchnamas containing confession, how to be used: 144 I.C. 772: A.I.R. 1933 Sind 220. *See* also 1939 Mad.W.N. 465:A.I.R. 1939 Mad. 76.

Any entry in a register of previous convictions where the conviction is relevant is admissible and can be proved by a certified copy under S. 65 and upon it accused might be asked if he admitted the conviction. On this section, *see* A.I.R. 1922 Cal. 654; A.I.R. 1925 All. 79; A.I.R. 1924 Rang. 135. Report of Kanungo on criminal complaint is admissible: 1 I.C. 259: A.I.R. 1927 Oudh 323. *See* also I.L.R. (1937) Nag. 315: A.I.R. 1937 Nag. 17 (F.B.); 1936 R.D. 479 (Patwari papers).

Statement as to relationship made by Kanungo Settlement Officer if admissible: I.L.R. 3 Luck. 326: A.I.R. 1928 Oudh 307.

Recital of ekrarnama and its terms in ancient public document like Rubakari whose authority has not been doubted furnishes a strong evidence of the existence and genuineness of the ekrarnama and its terms: I.L.R. (1954) Cut. 398: 1954 S.C.R. 842: A.I.R. 1954 S.C. 139.

Register of persons converted to Buddhism—Register not regularly maintained—Signatures of converted person not taken according to dates of conversion—Signing in register by every converted person not obligatory—Absence of a person's signature in such register would not necessarily negative his being converted to Buddhism: (1965) 2 S.C.A. 85: A.I.R. 1965 S.C. 1179.

Adhivasi rights—Conferment of—Record of occupation as distinguished from fact of occupation material—Conflicting entries in Revenue registers—Entry cannot form basis of Adhivasi right: 1964 All.L.J. 1127.

Where execution of a registered adoption deed was denied by its executant and it was duly proved by one of the attesting witnesses as required by law, *held*, the burden shifted on the executant to disprove its execution by expert evidence if he could; there was no burden cast on the plaintiff to examine the other attesting witness. However, if the Court felt it necessary to satisfy its own conscience to examine the other attesting witness nothing in law could stop it but no burden was cast on the plaintiff to produce the second witness: A.I.R. 1978 All. 472.

R. 72 of the Madras Registration Rules requires the Registrar to place on record a summary of the evidence taken by him when enquiring under S. 41(2), Registration Act, into the execution of a will or authority to adopt. This summary would be admissible, *quantum valet*, under S. 35: 1933 Mad.W.N. 1148.

Registration of will—Registrar's certificate containing recital that testator admitted execution—Thumb-impression of testator affixed—Recital in endorsement mentioning that signature could not be affixed because of testator's physical incapacity—Fact that testator was duly identified mentioned—But no signatures of identifying witnesses taken because soon after testator became unconscious—Endorsement held was admissible to prove execution—Facts recorded therein could be presumed to be correct—Fact that no deposition of testator why he could not sign, was taken as required by Standing Order 675 of the Madras Registration Manual was utmost an irregularity curable under S. 87—No adverse inference could be drawn because of the non-examination of the Sub-Registrar: A.I.R. 1962 Andh. Pra. 178.

Entry in account books made by deceased admissible, but decree cannot be passed unless transaction is proved: 1961 M.P.L.J. (Notes) 287: 1961 Jab.L.J. 393.

Correspondence from a Government Officer to his superior in due performance of duty—Copies filed with plaint—Statements contained therein made before institution of suit—Documents are evidence under S. 35: (1965-66) 70 Cal.W.N. 452: A.I.R. 1967 Cal. 191.

A letter of the Government of India in which Anaesthesine is included in the list of recognised preparations is not admissible: 42 I.C. 166: 32 P.W.R. 1917 (Cr.).

Entries in Ledger account of High Commissioner for India in London—If relevant facts from which inference of liability of defendant can be drawn—Presumption under S. 114 that official acts have been regularly performed and common course of business has been regularly followed can serve to strengthen acceptability and reliability of entries: A.I.R. 1960 J.&K. 136.

Where certain item of property is a puduval registry in the name of a certain person who also holds the adjoining items of properties on mortgage, the normal presumption is that he is the owner of that property. The mortgagor who claims that the item is an accretion to the mortgage holding has to make out the case by clear and convincing evidence: A.I.R. 1958 Ker. 335.

Kotwari book kept in serial and chronological order—Some pages torn—Evidentiary value of entries: 1958 M.P.L.J. (Notes) 135.

Right to compensation—Proceeding under Hyderabad Land Acquisition Act—Grant of land in 1930 with reservation of tamarind grove—Entry in revenue register—*Held*, on construction, that tamarind grove did not pass with grant—Agreement in 1945 that if grantee paid Rs. 25,000 he would be allowed to cut and remove tamarind trees—Non-payment of that sum—Grantee could not acquire any title to those trees—Their value less than Rs. 25,000 amount payable to grantor deductible—Grantee not entitled to compensation in respect of tamarind trees: (1967) 1 Mys.L.J. 159.

Custom—Hindu Jats of Jullunder District—Divorce by husband recognised: A.I.R. 1968 S.C. 142.

Irrigation slips are good evidence of the fact of possession: 1951 All.W.R. (Rev.) 140: 1951 R.D. 119.

The certificate of marriage issued by the Devanathaswamy Temple's Executive Officer who is a public servant, *held*, is legal evidence in prosecution for contracting second marriage during the subsistence of the first marriage; its contents stand proved by mere production of its original: (1988) 2 Hindu L.R. 783 (Mad.).

Certificate of marriage in the Hyderabad State are of particular importance and cannot be lightly brushed aside in view of the many circulars or orders issued by the Ecclesiastical Department of the State laying down stringent rules to safeguard against the preparation of false or incorrect marriage certificates: I.L.R. (1952) Hyd. 7: A.I.R. 1952 Hyd. 3.

Endorsement by Sub-Registrar may be treated as sufficient proof of the execution—Specific denial of execution is necessary before the document is required to be proved. [A.I.R. 1940 Nag. 382; A.I.R. 1946 All. 178; A.I.R. 1948 Nag. 155, Foll.]: 1952 A.M.L.J. 33: A.I.R. 1953 Ajmer 19.

As to Bankers' Books, *see* Bankers' Book Evidence Act (XVIII of 1891). As to books of Post Office Savings Bank, *see* Act I of 1893.

As to hat chitta books, *see* 1 Jur. (N.S.) 358. As to Hutabandi papers, *see* I.L.R. 55 Cal. 1167: A.I.R. 1928 Cal. 854.

As to hastaband papers, *see* 9 W.R. 105. As to Kanungo papers, *see* 7 W.R. 533; 2 W.R. (Act X Rul.) 13; 8 W.R. 517.

36. Relevancy of statements in maps, charts and plans.—Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of the [1][Central Government or any State Government,] as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts.

1. Substituted by A.O. 1948 and A.O. 1950.

Register of pargana watandars: (1937) 39 Bom.L.R. 288: I.L.R. (1937) Bom. 464: A.I.R. 1937 Bom. 307.

Sarikam papers: A.I.R. 1936 Pat. 400. *See* also A.I.R. 1936 Pat. 142.

Purohit's books—Entries in purohit's books as to the relationship of the pilgrims are admissible in evidence: (1928) 30 Punj.L.R. 1922: A.I.R. 1929 Lah. 380.

Isam navasi papers *i.e.*, returns submitted by the Police in respect of lands held by Ghatwals are admissible: 9 W.R. 158; 8 B.L.R. 504: 14 M.I.A. 259; 8 W.R. 232.

Settlement behari and awar gha papers how far admissible, *see* 9 W.R. 239. As to entries in Settlement Register, *see* I.L.R. 5 Oudh 161 (Rev.); 1936 R.D. 173.

As to income-tax papers held admissible against and not in favour of the person whom they may concern, *see* 9 W.R. 275. As to hawazima papers, *see* 2 Beng.L.R. App. 37: 11 W.R. 162. *See* also 6 M.I.A. 88.

Income-tax documents—Suit to recover business dues—Plaintiff claiming defendant to have transacted through intermediaries—Income-tax assessment order against a plaintiff's witness produced to show dealings by defendant through intermediary—Such order being a public document within the meaning of S. 74, its certified copy is admissible under S. 65(*a*)—Yet it cannot be used as evidence against the defendant: 1967 Ker.L.J. 237.

Extracts of village records—Admissibility: 1965 All.W.R. (H.C.) 367.

Land—Land recorded as 'Gair Mumkin land' is not 'land'—Burden to displace presumption of entry: A.I.R. 1966 Punj. 185 (F.B.).

The statement taken by the Tehsildar who has given a certificate that it was read over, explained and admitted to be correct by the deponent is admissible under S. 35; refusal to admit the same is illegal: (1974) 40 Cut.L.T. 35: 1974 Cr.L.J. 215.

When a Tehsildar has not been authorised by the Tamil Nadu Act 50 of 1982 to issue any income certificate, *held*, a certificate issued by him to that effect cannot be taken into account unless the Tehsildar figured as a witness and testified to his certificate: (1993) 2 M.L.J. 462.

Section 36—Notes.

Maps and surveys made in India for revenue purposes or official documents prepared by competent persons and with such publicity and notice to persons interested will be admissible and are valuable evidence of the state of things at the time they are made. They are not conclusive, and may be shown to be wrong but in the absence of evidence to the contrary they may be properly judicially received in evidence as correct when made: 68 Cal.L.J. 293. *See* A.I.R. 1923 P.C. 1: 45 M.L.J. 444 (P.C.); 9 Cal.L.J. 415: 2 I.C. 648; (1942) 44 Bom.L.R. 295: A.I.R. 1942 Bom. 161.

There is nothing wrong in the operation of superimposition of maps and plan from the legal point of view and the Court may rely on a plan which is superimposed, provided both these plans are brought to the same scale and no cogent reasons have been shown for rejecting the plan: 1959 An.L.T. 305.

Where the Thak and Revenue survey maps differ and the Thak map agrees with the local land-marks, the Thak map and the boundary shown in it can be accepted in preference to the Revenue survey map and the boundary ascertained by the pleader Commissioner upon its basis: 73 Cal.L.J. 47: A.I.R. 1939 Cal. 148. As to evidentiary value of Thak map, *see* (1926-27) 31 Cal.W.N. 472: A.I.R. 1927 Cal. 403; 68 Cal.L.J. 293. As to reliability of Rennel's map, *see* 56 Cal.L.J. 369: A.I.R. 1933 Cal. 222.

The maps of Rennel published in 1914 were withdrawn and the sales of copies printed in 1914 were stopped under orders of Government. They are, therefore, not admissible: A.I.R. 1941 Cal. 193: (1939-40) 44 Cal.W.N. 935; (1941-42) 46 Cal.W.N. 218: A.I.R. 1941 Cal. 520.

So far as river surveys and road surveys are concerned Rennel's maps (1769-71) are

scientific and accurate ones, only the village sites shown in his maps are approximate. Rennel's maps can be made the basis for adjudication of land revenue: 197 I.C. 5: A.I.R. 1941 Cal. 520: (1941-42) 46 Cal.W.N. 218. Maps prepared under Calcutta Survey Act: (1926-27) 31 Cal.W.N. 419: A.I.R. 1927 Cal. 345; 68 Cal.L.J. 293: A.I.R. 1939 Cal. 148. Entry in Revenue Survey Map, *see* 98 I.C. 166: A.I.R. 1926 Rang. 204; A.I.R. 1928 Pat. 36: 1 Pat.L.T. 817; A.I.R. 1939 Cal. 148.

For determining a plot's distance from the deep stream of a river, *held*, a map prepared by Education Department is admissible and cannot be rejected merely because it was not prepared by the revenue authorities: 1986 All.W.C. 701.

Ex parte statements in Survey maps should be regarded not as primary proof but merely corroborative proof—but if they relate to distant times or no direct evidence is available, their value assumes greater proportion: 113 I.C. 703: A.I.R. 1928 Pat. 284.

Plots or properties where atleast three walls or three sides meet, commonly known as 'Sihadda' should be taken as fixed points for purpose of measurements while preparing survey maps; corners of houses where only two walls meet ought not to be taken as fixed points because the position of such walls could change during reconstructions. If measurements taken on the basis of a fixed point do not tally with entries in the *khasra* and the survey map, that fixed point should be given up and another fixed point be fixed: 1982 All.L.J. 561.

Where in a survey map, the various boundaries were plotted and surveyed and not the constructions within those boundaries, though they were shown within the respective boundaries, the question whether a well was in the concerned plot should be decided from what such plot was shown to contain and not whether the well was marked as being near the boundary or far from it: 1982 All.L.J. 561. *See* also 1982 All.L.J. 533.

Even if a plan prepared by a Commissioner is not an integral part of the trial and appellate judgments, it is admissible in evidence to render those judgments intelligible: 1959 Ker.L.T. 1110: I.L.R. (1960) Ker. 7: A.I.R. 1960 Ker. 127.

Site plan prepared for a case has very little probative value on question of title: A.I.R. 1930 All. 26. An entry in the current settlement record carries with it a strong presumption of correctness unless it is rebutted: 22 Pat.L.T. 699: A.I.R. 1941 Pat. 260.

Criminal trial—Site plan prepared by Police Officer—Nothing shown therein is admissible evidence against accused unless deposed to by witness: I.L.R. (1962) 2 All. 843: (1964) 1 Cr.L.J. 78 (S.C.).

Where in order to prove distance between scene of occurrence and the village of dacoity, map kept in the library was relied on, *see* 1977 All.W.C. 671: 1977 All.Cr.R. 468.

Ss. 36 and 83: *Proof of Maps*.—A map which is not a published map generally offered for public sale nor one made under the authority of Government, is not within S. 36. It is on the contrary within the provision of S. 83, that maps made for the purposes of any cause must be proved to be accurate: I.L.R. 16 Pat. 258: A.I.R. 1937 P.C. 69: (1937) 2 M.L.J. 631 (P.C.). *See* also A.I.R. 1941 Cal. 193: (1939-40) 44 Cal.W.N. 935.

Printed maps prepared by Government of the different wards of a city and coming from the office of a Government Officer are admissible in evidence: I.L.R. (1942) Bom. 357: A.I.R. 1942 Bom. 161.

Where the diara operations extend over a very wide area and the diara map is not prepared with reference to any particular survey trijunction of certain mouzahs named, the presumption of correctness of the diara map is in no sense rebutted by the mere fact that that particular trijunction has not been located: A.I.R. 1937 Cal. 574.

A map by itself is nothing but statements made by the maker by means of lines and pictorial representation instead of by word of mouth as to the state or configuration of a particular site and the objects standing thereon. To admit in evidence a map without calling the maker thereof is the same as admitting in evidence statements made by a third party who is not called as a witness.

In other words, it amounts to admitting hearsay. The Evidence Act having prepared all rules of evidence not contained in any statute or regulation, the party seeking to put any document in evidence must show under which section of that Act such evidence is admissible. A map prepared in connexion with a previous suit between the defendant and another in which there was no dispute as

37. Relevancy of statement as to fact to public nature contained in certain Acts or notifications.—When the Court has to form an opinion as to the existence of any fact of a Public nature, any statement of it, made in a recital contained in any Act of Parliament [1][of the United Kingdom], or in any [2][Central Act Provincial Act, or [3][a State Act], or in a Government notification or notification by the Crown Representative appearing in the Official Gazette or in any printed paper purporting to be the London Gazette or the Government Gazette of any Dominion, colony or possession of His Majesty is a relevant fact.]

[4][* * * * * * *]

---

1. Inserted by A.O., 1950.

2. The original words "Act of Governor-General of India in Council, or of the Governors in Council of Madras or Bombay, or of the Lieutenant Governor in Council of Bengal, or in a notification of the Government appearing in the Gazette of India, or in the Gazette of any L.G. or in any printed paper purporting to be the London Gazette or the Government Gazette of any colony or possession of the Queen, is a relevant fact" were successively amended by Act 10 of 1914, A.O. 1937, A.O. 1948 & A.O. 1950 to read as above.

3. Substituted by Act 3 of 1951, S. 3, for "an Act of the Legislature of a Part A or a Part C State".

4. The last paragraph of S. 37 which was added by Act 5 of 1889 has been omitted by Act 10 of 1914, S. 3 and Sch. II.

---

to the lands in dispute in the present suit, is not admissible in evidence under S. 13 or S. 32 or S. 36: (1944-45) 49 Cal.W.N. 791: A.I.R. 1945 Cal. 492.

S. 36 of the Evidence Act mentions two kinds of maps, *viz.* (*1*) published maps or charts generally offered for public sale, and (2) maps or plans under the authority of Government. The first kind is considered relevant because the publication being accessible to the whole community and open to criticism of all, the probabilities are in favour of any inaccuracy being challenged and exposed. But the statements made in such a map are merely relevant. There is no presumption as to accuracy. On the other hand, S. 83 of the Act lays down that the Court shall presume that maps or plans purporting to be made by the authority of the Central Government or any State Government were so made and are accurate but maps or plans made for the purposes of any cause must be proved to be accurate. The onus of proving that such a map is accurate lies on the party who produces it: A.I.R. 1965 Cal. 282.

Maps prepared by private persons and not under authority of Government—Are irrelevant unless proof of fact that they were generally offered for public sale is given—So also no presumption in favour of the accuracy of such maps can be drawn under S. 83: A.I.R. 1966 S.C. 644.

Section 37—Notes.

[*See* also Ss. 78 and 81, *infra*].

It clearly follows from Ss. 37, 78, 81 and 114(*e*) that issuance of a notification in the eye of law is notice or imputed knowledge of its contents to the citizens in general; that obviously cannot be so in the case of a mere order or decision of the Government; an order derives its sanction or source when the authority vested with lawful power to pass it appends its signature thereto but it is only the factum of its proclamation or publication in the gazette or by other prescribed modes which alone would impress it with the *indicia* or requisite stamping of a notification; till then it remains a mere order or decision cloistered in the knowledge of its author and of no legal effect: A.I.R. 1984 P.&H. 87: (1983) 85 Punj.L.R. 741: 1983 Punj.L.J. 549: 1984 Rev.L.R. 1: I.L.R. (1984) 1 P.&H. 78 (F.B.).

The statement of facts contained in the Official Gazette on private affairs or historical facts in some cases is the best evidence of facts stated therein; though entitled to due consideration, it is not conclusive of the matters requiring judicial adjudication; in an appropriate case where the evidence on record is not sufficient to prove the fact in issue, the statement of such facts in the Official Gazette may be relied upon without further proof as corroborative evidence. Thus, where the question in issue was whether Dhangars (by caste) of Bombay Province, were governed by the

38. Relevancy of statements as to any law contained in law books.—When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

HOW MUCH OF A STATEMENT IS TO BE PROVED

39. What evidence to be given when statement forms part of a conversation, document, book or series of letters or papers.—When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book, or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

Banaras School of Hindu Law, *held*, the facts stated in the Indore State Gazette regarding their social status and habitation may be relevant and may in an appropriate case presumed to be genuine but not conclusive; however, in complete absence of evidence to prove the party's family or ancestors' migration from Mathura area, the Indore State Gazette could not be accepted as sufficient to prove such migration for connecting Holkars of Indore with Dhangars of Bombay Province: (1990) 1 Hindu L.R. 306 (S.C.).

Section 38—Notes.

[*See* also S. 84, *infra*].

Proof of foreign law.—Certified copy of Burma Gazette before Court—Copy attested as true copy by seal of Court in Burma—*Held*, this was no satisfactory proof of Act published in that Gazette: A.I.R. 1954 Raj. 135.

The only effect of Ss. 38 and 84 read together is that the Court may take judicial notice of a publication containing a foreign law, if it is issued under the authority of the foreign Government concerned and may accept the law as set out in such publication as a law in force in the particular foreign country at the relevant time. But such a publication cannot be evidence that what is contained in it is the whole law. What the whole law of a foreign country at a particular point of time is cannot, therefore, be proved except by calling in an expert, as provided for in S. 45, Evidence Act: A.I.R. 1956 Cal. 48.

Hidayat Ghair Mansukshuda, Sigha Dewan, bearing Kota Coat of Arms, purporting to have been published under authority of His Highness of Kota, is presumed to be genuine—Law of Limitation contained therein is relevant: 1959 Raj.L.W. 323.

Going strictly by S. 38 of the Evidence Act, the report of a judgment in a case in a newspaper does not appear to be relevant, because a newspaper cannot be regarded as a book purporting to be a report of the rulings of the Courts. The presumption under S. 84 of the Evidence Act cannot also arise, strictly speaking. All the same, a report of a case reported only in the newspaper 'Salesman' was allowed to be relied upon: (1968-69) 73 Cal.W.N. 547: 1969 Cr.L.J. 1120: A.I.R. 1969 Cal. 451.

Section 39—Notes.

S. 39 cannot be invoked for the purpose of letting in a confession in respect of which the bar created by Ss. 24, 25 and 26, has not been removed by S. 27: I.L.R. 10 Lah. 283: A.I.R. 1929 Lah. 344 (F.B.).

Only pertinent and not all recitals in the admitted document are admissible: A.I.R. 1930 All. 299.

'Statement'—Meaning of. *See* Evidence Act, 1872, S. 157: (1959) 1 M.L.J. (S.C.) 101: A.I.R. 1959 S.C. 356: 1959 M.L.J. (Cr.) 105.

Where in a prosecution for murder, the appellant, in the appellate Court, produced a book by Professor of an Agriculture University, but its author was not examined, *held*, no reliance could be placed on it: 1979 Cr.L.J. (N.O.C.) 89 (All.) (D.B.).

JUDGMENTS OF COURTS OF JUSTICE WHEN RELEVANT

40. Previous judgments relevant to bar a second suit or trial.—The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial.

Section—40 Notes.

Ss. 40 to 43—A judgment is conclusive evidence for or against all persons whether parties, privies or strangers only of its own existence, date and legal effects distinguished from the accuracy of the decision rendered; in other words, the law attributes unerring verity to the substantive as opposed to the judicial portions of the record except upon matters of a public nature in which they may be evidence, though not conclusive, of that which they state. As between the same parties or those claiming under them a judgment is admissible also as *res judicata* or as proof of the particular point which it decides but in any case not of the recitals made therein and under certain circumstances and in certain cases a judgment in a previous suit to which one of the parties in a subsequent suit was not a party may be admissible in evidence for certain purposes and with certain objects in the subsequent suit. All these principles are founded on the assumption that a judgment is a public transaction of solemn nature and as such should be taken to be faithfully recorded and also that the record of a Court of justice has two portions: (*1*) the substantive portion and (2) the judicial portion. In the substantive portion of the record, the Court records or attests its own proceedings and acts while in the judicial portion the Court expresses its judgment or opinion on the matter in question and in forming that opinion it is bound to have regard only to the evidence and arguments adduced before it by the respective parties to the proceedings. The questions as to whether the pleader guardian did or did not appear on behalf of minor defendants at the trial stage or as to whether any written statement was or was not filed on their behalf or as to whether guardian *ad litem* appointed in the case did or did not appear and make any submission in the High Court are questions which relate to the course of proceedings, or in other words, are matters connected with the substantive portion of the record and not with the judicial portion. Therefore, the aforesaid facts endorsed in the judgment may be used in evidence if they are found relevant under one or other of the provisions of the Evidence Act. S. 35 cannot be held relevant for the admissibility of such a judgment but it is admissible under S. 13 and also under Ss. 11 and 5. The point in issue being whether there is any previous judgment against the minor the provision of S. 5 is at once attracted and so also the provisions of Ss. 13 and 11, S. 13 to prove that in the former litigation the guardian *ad litem* had not as such exercised his right on behalf of the minors and S. 11 to establish that the facts stated in the judgments are inconsistent with the fact in issue to the effect that the guardian *ad litem* had not done anything that he should have done on behalf of or in the interest of the minors: A.I.R. 1958 Pat. 477.

The actual decision and the findings arrived at in a previous judgment cannot be used as evidence to decide the points which are in issue in a different case except in cases coming under Ss. 40 to 42: A.I.R. 1933 Pat. 690.

Ss. 40 to 44—Scope—Judgment *in rem* and judgment *in personam*—Estoppel: (1959) An.W.R. 72: A.I.R. 1959 Andh. Pra. 280.

See also (1979) 2 M.P.W.N. 132.

Ss. 40 to 42 deal with judgments which are *res judicata, in rem* and relating, to matters of public nature; but they raise no presumption that prior judgments embody correct adjudications; the law only prohibits going behind them in certain cases on the ground of public policy; judgments *qua* judgments and as expression of the pronouncing Court's opinion are relevant only under Ss. 40 to 42; if they do not fall under any of the sections, they are inadmissible; thus, findings in *non-inter partes* judgments about title and possession of property are not admissible in suits for injunction to restrain inference with the plaintiff's possession: A.I.R. 1972 Ker. 196: 1971 Ker.L.J. 578.

The principles of admissibility of judgments are: (*1*) a judgment *in rem* is always admissible; (2) a judgment *in personam* in *inter partes* is not at all admissible except f

three limited purposes of proving as to who were parties thereto, what was the decree passed and what were the properties involved therein; (3) where neither of the parties were parties in the earlier judgments *in personam*, the recitals or finding or genealogies referred to in the judgment *in personam* are wholly inadmissible; (4) the probative value of documents, however ancient, is precious little if they do not disclose the sources of their information or have not attained sufficient notoriety; and (5) no statements or declarations or depositions made *post litem motam* are inadmissible: A.I.R. 1983 S.C. 684: (1983) 3 S.C.C. 118: (1983) 96 Mad.L.W. (S.N.) 93.

Judgment referred to in S. 40 is relevant only when its existence bars Courts from taking cognizance of suit or deciding it, namely, when it operates as *res judicata*, and not otherwise: (1990) 1 Karn.L.J. (S.N.) 52 (D.B.).

S. 40 applies to a case in which the Court has jurisdiction to decide a matter and one party says it should not do so because that matter has been decided before. [I.L.R. 6 Cal. 171, held not good law in view of I.L.R. 23 Cal. 533 (P.C.); I.L.R. 19 All. 277 (P.C.) and I.L.R. 25 Cal. 522 (P.C.)]: (1928-29) 33 Cal.W.N. 795: A.I.R. 1929 Cal. 374 (F.B.).

See also (1916) 18 Bom.L.R. 185: I.L.R. 41 Bom. 1.

S. 40 does not lay down that the judgment must prevent the Court from taking cognizance of the entire suit as against all the parties. If the judgment prevents the Court from taking cognizance of the suit so far as it relates to some of the parties thereto then also S. 40 would apply. Accordingly, a judgment passed in a previous suit against some of the defendants is admissible in evidence under the section in a subsequent suit filed against them as well as others: (1940-41) 45 Cal.W.N. 420.

An appellate order modifying imposition of punishment awarded in disciplinary proceedings does not fall under any of Ss. 40 to 42 as it is neither an *inter partes* judgment nor judgment *in rem* nor relatable to matters of public nature; it may, if at all, fall under S. 43 and be conclusive evidence for or against all persons, parties or privies to it. But a statement therein that a person was actually enjoying certain lands since the specified time, will not be admissible evidence under S. 43: (1993) 2 M.L.J. 662.

As to evidentiary value of judgment, *see* 19 Sind L.R. 370: A.I.R. 1926 Sind 161; 43 Cal.L.J. 135: A.I.R. 1926 Cal. 698 (decision in previous rent suit admissible); decision as to age in guardianship proceedings—Admissibility in suit by ward for property. *See* 7 I.C. 505.

Previous judgment—Relevancy and admissibility of—Words 'right' and 'transaction'—Interpretation of: A.I.R. 1964 Pat. 66.

Previous decision as to part of matter in controversy by competent Court—Would be binding in subsequent stage of the same proceeding: 1968 Cr.L.J. 50: A.I.R. 1968 Del. 13.

Though S. 40 does not use the term *res judicata*, it nevertheless refers to its consequences; it is because of S. 40 that the previous judgment relied upon in the subsequent suit to raise the plea of *res judicata* becomes relevant and admissible. S. 44 has, however, the overriding effect as it permits the other party to show that the earlier judgment was incompetent or without jurisdiction or was obtained by fraud or collusion and rendered irrelevant and inadmissible: A.I.R. 1984 All. 216: 1984 All.C.J. 141: 1984 All.W.C. 230 (D.B.).

A previous judgment between the same parties even if it does not operate as *res judicata* is good evidence which cannot be ignored: (1946) 48 Punj.L.R. 195: A.I.R. 1946 Lah. 387.

Finding in previous suit *inter partes*—Finding not operating as *res judicata* —Still party against whom finding is given is bound to displace that finding: 1959 Ker.L.T. 1110: I.L.R. (1960) Ker. 7: A.I.R. 1960 Ker. 127.

Previous judgments are relevant under S. 40 to bar a second suit or trial as *res judicata*; such judgments would ordinarily be between the same parties as in the second suit; the earlier judgment can, thus, be shown by the adverse party as not of a competent Court or having been obtained by fraud or collusion. It is only judgments relevant under Ss. 41 and 42 that even a third party can impeach them under S. 44: A.I.R. 1986 P.&H. 197: (1985-2) 88 Punj.L.R. 593.

Judgments in earlier mortgage suit and appeal therefrom are admissible in a suit to declare mortgage decree as not binding: (1973) 2 Mys.L.J. 176.

Where in prosecution for murder by administering 'dhatura' mixed in a 'laddu', a judgment of the accused's conviction for an earlier pick-pocketing by resorting to similar trick of 'dhatura' poisoning in 'laddu' under S. 328 read with S. 392 of the Indian Penal Code was relied upon to show the accused's

character, *held*, as the judgment in that case was rendered subsequent to the incident in question, that subsequent decision was not covered by Ss. 40, 41 and 42; it could not be relied upon: 1976 Raj.L.W. 450: I.L.R. (1976) 26 Raj. 655: 1976 W.L.N. 478 (D.B.).

Judgment is not admissible to prove that the plaintiff has filed a false case: (1962) 3 Guj.L.R. 107: (1962) 2 Cr.L.J. 55: A.I.R. 1962 Guj. 214.

The decision in prior proceedings under S. 9, Specific Relief Act, is admissible in a later suit for possession between the same parties: I.L.R. 60 Cal. 1171: A.I.R. 1933 Cal. 923.

An award or compromise made in a Criminal Court assigning certain property for maintenance is not admissible in a later civil suit to prove title: I.L.R. 21 Pat. 601: A.I.R. 1942 Pat. 432. Decree for confirmation of possession not conclusive proof of actual possession: I.L.R. 15 Pat. 336: A.I.R. 1936 Pat. 537. *See* also 19 Nag.L.J. 285.

Obtaining of possession after passing of the decree in accordance therewith, even if without execution, amounts to satisfaction to the decree for possession; if the decree holder is dispossessed thereafter, he can file a second suit on a fresh cause of action; the judgment in the earlier case will be admissible to establish his title: A.I.R. 1971 P.&H. 106: 1970 Punj.L.J. 837: (1971) 73 Punj.L.R. 88 (D.B.).

Where the revisional order against the striking out of defence was neither filed nor challenged, *held*, it is not relevant under Ss. 40 to 43; if it was taken note of by the Courts below and not challenged in the High Court, the High Court cannot ignore it: 1981 B.L.J.R. 637.

On a question whether a judgment passed by the British Indian Association in 1859 which had not been filed in the Court of Financial Commissioner within 6 months after passing of the Oudh Estates Act was admissible, it was *held*, that Ss. 40 to 43 are not applicable so as to make it relevant: I.L.R. 18 Luck. 346: 1942 O.W.N. 657: A.I.R. 1943 Oudh 91.

Where there are two decrees the earlier decree upholding a party's right and the later decree negativing that right, the earlier decree cannot be deemed to be subsisting as a valid and enforceable decree. It has been superseded by the later decree. In order to render the earlier decree inoperative it is not necessary that it should be reversed or superseded by proceedings arising out of the same case. On the other hand, it may be collaterally superseded and rendered ineffective even by some ulterior and independent proceedings. What is material is that the parties to the first decree must also be parties to the subsequent proceedings so that the decision in such subsequent proceedings may be binding on them. The rights and liabilities covered by the decree must also have been considered and adjudicated upon in the subsequent proceedings. When there have been two adjudications binding on the same parties in respect of the same right the later adjudication has to prevail over the earlier one. It cannot be said that so long as the earlier decree has not been reversed or superseded in express terms the executing Court is bound to enforce that decree. Where the existence of the later decree having the effect of superseding the earlier decree is brought to the notice of the execution Court, it is bound to realise that the earlier decree has become inoperative and unenforceable and thus to refuse to execute it: A.I.R. 1952 Trav.-Co. 294: I.L.R. (1952) Trav.-Co. 252.

Judicial precedents—Binding nature: A.I.R. 1967 All. 414.

Judgment in writ proceedings—Binding character of: A.I.R. 1960 Ori. 46. *See* also I.L.R. (1984) 2 Karn. 1546.

There does not appear to be anything in the Evidence Act to warrant the view that the statement of facts in a previous judgment can be admissible in a subsequent case and used as evidence in a subsequent case to decide the points which are in issue in that case: I.L.R. 2 Pat. 890: A.I.R. 1951 Pat. 340.

The prosecution for an offence of failure to furnish the return due under R. 11(1) of the Madras General Sales Tax Act, Rules punishable under S. 15(*a*) of the Act, ended in an acquittal on the ground that the prosecution had failed to prove the guilt of the accused beyond reasonable doubt. On subsequent assessment based on the same questions, *held*, (1) that Ss. 40 to 43 of the Evidence Act may be taken as embodying primary and fundamental principles governing admissibility of judgments and unless the assessees are able to bring their case within the permissible ambit of the said provision, they may not be heard to rely on their success in the criminal Court. Neither the Sales Tax Act nor the Rules provide for an election between the two courses

criminal prosecution and the making of an assessment. Both courses were open concurrently to the department. Action in respect of one of the sanctions was no bar to proceedings in the other direction; (*ii*) that, the assessees could not seek shelter under the doctrine of *autre-fois-acquit*. That principle can apply only to a second prosecution for the same offence; (*iii*) that the principle of *res judicata* embodied in S. 11, C.P.Code, could have no application as its operation is limited to civil actions; nor could the department be precluded from proceeding with the assessment on the ground of acquiescence in the Magistrate's finding and decision: (1958) 1 An.W.R. 405: A.I.R. 1958 Andh. Pra. 371.

Where in an earlier decision the Court had given adequate and cogent reasons for rejecting the prosecution's case, *held*, on the basis of same facts, the accused cannot be convicted in a later case: (1985) 1 Crimes 186 (Del.).

Discharge under S. 253(1), Cr.P.Code, in earlier case—Subsequent suit for malicious prosecution—Copy of first information report of earlier case not filed nor proved otherwise—*Held*, that the judgment in question would not be relevant or admissible to prove the contents of the First Information Report: 1978 All.W.C. 63: 1978 All.L.J. 1391.

Autre-fois-acquit—Applicability—Plea when arises—Two different trials for distinct offences arising out of different transactions—Common object in both cases different—Acquittal in one does not bar conviction in another—Reasoning of judgment of acquittal not admissible as evidence: (1965) 1 Cr.L.J. 116: 1965 M.L.J. (Cr.) 781: A.I.R. 1965 S.C. 83.

Evidence of dishonest intention of accused—Previous judgment convicting accused for same offence is relevant and admissible to prove such intention: (1961) 2 Cr.L.J. 787: A.I.R. 1961 Manipur 43.

Principle of *res judicata*—Applicability—Dacoity—Several persons apprehended, tried and acquitted—After conclusion of trial two more persons connected with same dacoity and who were absconding arrested and tried separately—Finding given in previous trial not binding in second trial: A.I.R. 1964 All. 139: (1964) 1 Cr.L.J. 378.

Acquittal in trial on charge of attempt to murder—Judgment—Relevancy in subsequent trial on charge of murder. *See* I.L.R. 23 Pat. 95: A.I.R. 1944 Pat. 247.

Accused cutting certain neem trees standing on the land which is with the usufructuary mortgagee—Trial Court holding that the mortgagor was entitled to the trees on redemption and that the accused had cut them with the intention to cause wrongful loss to mortgagor convicting the accused—In revision against conviction subsequent judgment of civil Court recognizing right of accused to cut and remove the trees brought to the notice of Court—Judgment of civil Court should be admitted as additional evidence in the interests of justice by the revisional Court and the accused acquitted as the judgment showed that the right claimed by him was justified and even a *bona fide* claim of right would rule out criminal intention on his part: (1964) 2 M.L.J. 583.

Relevancy of criminal Court's judgment in civil case.—A judgment of acquittal in a criminal Court is irrelevant in a civil suit based on the same cause of action, just as a judgment of conviction cannot, in a subsequent civil suit, be treated as evidence of facts on which the conviction is based: I.L.R. (1962) 12 Raj. 202: 1962 Raj.L.W. 77: A.I.R. 1962 Raj. 127.

Though reasons for acquittal in earlier case nor evidence on record is relevant in a later case. The previous judgment is relevant and admissible. [(1965) 1 Cr.L.J. 116 (S.C.), Rel. on]: 1975 Cr.L.J. 345 (All.) (D.B.).

It is wrong for a civil Court to rely too much on decisions in criminal cases when deciding questions of title in civil suits: 21 Pat.L.T. 873. *See* also I.L.R. 21 Pat. 601: A.I.R. 1942 Pat. 432 (awarded in criminal Court in maintenance proceedings). The findings of a Magistrate in a criminal case, far from operating as *res judicata* between the parties, are not relevant even in any other dispute between the parties. Such findings are wholly inadmissible. A judgment in a previous criminal case can only be admissible in evidence to establish two facts; the first being that there was such a case and the second being that in the case the accused were or were not convicted as the case may be: (1949-50) 54 Cal.W.N. 186.

Judgment of civil Court in title suit which is not final can be admitted in criminal proceedings as proof of fact of possession of disputed property: (1965) 2 Cr.L.J. 578: A.I.R. 1965 All. 511.

The judgment of criminal Court is not admissible in a civil Court as proof of the point decided by the criminal Court. The judgment

of a criminal Court convicting a person is relevant in a civil Court only to show that there was such a trial resulting in conviction and sentence. A civil Court is not bound to adopt the finding of the criminal Court and must find the facts for itself and independently of what was decided by the criminal Court. The judgment of conviction cannot in a subsequent civil suit be treated as evidence of facts on which the conviction is based: I.L.R. (1966) Guj. 500: (1966) 7 Guj.L.R. 662.

Decision of criminal Court—It cannot be relied on as one binding in civil action: (1966) 79 Mad.L.W. 107: (1966) 1 M.L.J. 348: 1966 Mad.W.N. 47: A.I.R. 1966 Mad. 425.

A finding on certain facts by a civil Court in an action *in personam* is not relevant before the criminal Court when it is called upon to give a finding on the same facts and *vice versa*. To hold that when a party has been able to satisfy a civil Court as to the justice of his claim and has got a decree which is finally binding upon the parties it would not be open to criminal Courts to go behind the findings of the civil Court is to place the latter without any valid reason in a much higher position than what it actually occupies in the system of administration and to make it master not only of cases in which it is called upon to adjudicate but also of cases in which it is not called upon to determine and over which it has really no control. There is no reason why the decision of the civil Court particularly in an action *in personam* should be allowed to have greater sanctity: 217 I.C. 284: 46 Cr.L.J. 296: A.I.R. 1945 Lah. 23 (F.B.).

Where a judgment in a civil suit has simply been used for the purpose of showing that the civil suit was dismissed on a finding that the agreement was forged and the Sessions Judge has examined the evidence adduced in the case independently and come to the finding that the document was forged, the Judge cannot be said to have committed any illegality: 21 Cut.L.T. 296: A.I.R. 1955 Ori. 156.

The judgment of a criminal Court and the depositions of the witnesses therein are inadmissible in a civil suit, to prove the liability of defendants: 106 P.R. 1915: 32 I.C. 18. *See* also 117 P.R. 1912: 16 I.C. 491. On a question as to the caste of a particular family evidence of members and decisions in previous litigation are relevant: I.L.R. 48 Mad. 1: A.I.R. 1925 Mad. 497.

Criminal proceedings against employee ending in his acquittal—Judgment of criminal Court admissible in evidence in the civil proceedings for the purpose of showing that there was a criminal case of identical charges, ending in acquittal: 1968 Lab. I.C. 1074: A.I.R. 1968 Pat. 300.

Criminal proceeding—Conviction or acquittal has no evidentiary value in a subsequent civil proceeding—Findings of criminal Court are inadmissible: I.L.R. (1968) 49 Pat. 1305: 1968 B.L.J.R. 197.

Relevancy of criminal Court's decision in departmental enquiry.—Where the acquittal of a delinquent workman in a criminal case is being proceeded with by way of domestic enquiry for the misconduct based on the same occurrence, *held*, the judgment of acquittal does not take away or fetter the employer's power and discretion to continue with the domestic enquiry though it has to be taken into consideration as a factor for the exercise of the power and discretion vested in the employer. [A.I.R. 1984 S.C. 626, Foll.]: (1986) 99 Mad.L.W. 99 (D.B.); (1980) 18 Del.L.T. 369. *See* also Constitution of India, Art. 311, N. 35 (Volume 13 of this Manual).

Relevancy of criminal Court's judgment in case for damages.—Judgment of criminal Court not admissible in subsequent suit for damages: I.L.R. 2 Rang. 549: A.I.R. 1925 Rang. 143. Judgment in civil suit giving rise to criminal trial—Not legally admissible in a trial for the offence: I.L.R. 6 Cal. 247.

In a suit for damages for malicious prosecution, the judgment of the criminal Court can only be used to establish the fact that an acquittal has taken place as a fact in issue in the civil suit. The grounds upon which that acquittal was based are inadmissible: I.L.R. 56 Mad. 641: A.I.R. 1933 Mad. 429: 65 M.L.J. 146. *See* also 41 Mys.H.C.R. 283; A.I.R. 1959 Manipur 32.

Scope—Suit for malicious prosecution—Criminal Court's judgment—Admissibility of—Civil Court must go into evidence and decide for itself whether want of reasonable and probable cause or malice existed or not: A.I.R. 1960 Ori. 29.

Malicious prosecution—Suit for damages—Criminal Court's judgment as to acquittal of plaintiff—Value of: A.I.R. 1970 Ori. 91: 35 Cut.L.T. 835: 1970 Cr.L.J. 819: I.L.R. (1969) Cut. 821 (D.B.).

The judgment of the criminal Court is admissible in evidence in the civil suit for damages caused by such negligence but only as a *prima facie* evidence of negligence: 1972 Acc.C.J. 115 (D.B.).

Where an occurrence resulted in criminal proceedings as well as a civil suit for damages and the accused were ultimately acquitted, *held*, the judgment of the criminal case is not relevant in the civil suit; the standard of proof for imposing liability is widely different between the two proceedings; while a defendant in a civil suit can be made liable on probabilities or on mere consideration of the burden of proof if there is no other evidence, no accused can be convicted on such uncertain grounds: A.I.R. 1982 Ker. 238: 1982 Ker.L.T. 49.

Relevancy of criminal Court's judgment in motor accident claim case.—A Motor Accident Claims Tribunal is not bound by the judgment of the criminal Court about the accident having been occasioned due to the vehicle driver's negligence; judgments of the criminal Court do not fall under the ambit of Ss. 40 to 42: A.I.R. 1977 Goa 15.

Decision in civil suit—Order in claim case—Use of in criminal case—Legality. *See* A.I.R. 1956 Ori. 212, cited under S. 11, *supra*.

Judgment of criminal Court determining guilt or innocence of driver of vehicle is not binding on Claims Tribunal under Motor Vehicles Act: A.I.R. 1970 Punj. 137: (1969) 71 Punj.L.R. 452: I.L.R. (1970) 1 Punj. 617 (D.B.).

In case of a motor accident, the judgment in the criminal Court is not relevant in the claim petition under the Motor Vehicles Act, and certainly not for establishing the fact in issue, by virtue of Ss. 40 and 43. Similarly, the judgment in the claim petition is equally not relevant in the criminal case and certainly not for establishing the guilt of the accused therein; thus, proceedings in the claim petition cannot be stayed pending disposal of the criminal case: A.I.R. 1992 All. 28: 1992 All.L.J. 318: (1991) 18 All.L.R. 585. *See* however 1979 Acc.C.J. 282 (Karn.) (D.B.) [Fact of conviction before criminal Court is relevant before the claims Tribunal].

While a finding of the criminal Court that the accused was guilty of having driven the vehicle rashly and negligently may be taken as *prima facie* evidence by the Motor Accidents Claim Tribunal in a compensation claim, the reverse is not true; the acquittal of the accused by the criminal Court is of no relevance in the compensation case where the degree of proof required is much lower: (1989) 3 Del. Lawyer 320: A.I.R. 1990 N.O.C. 40 (Del.).

Acquittal in a criminal trial for rash and negligent driving, *held*, has no effect on a motor accident claim case arising from the same accident: A.I.R. 1980 S.C. 1354: (1980) 93 Mad.L.W. (S.N.) 28: (1980) 3 S.C.C. 437. But it is admissible to prove who were parties, date of order and what order was passed: A.I.R. 1979 Pat. 204: 1979 B.L.J.R. 348: 1979 B.B.C.J. 273 (D.B.).

Where the Motor Accidents Claim Tribunal had declined to dismiss the claim merely because certain witnesses whose evidence was cogent and convincing and who were disinterested and direct witnesses of the fatal accident, had not been examined in the criminal case; the Tribunal had rightly declined to give primacy to the criminal judgment of acquittal of the vehicle driver: A.I.R. 1990 Andh. Pra. 162.

Magistrate's judgment under S. 145/144 Cr.P.Code.—A Magistrate's judgment under S. 145 of the Code of Criminal Procedure is not relevant as a previous judgment barring a second suit and trial; it is a Police order and does not operate as *res judicata*; it may be relevant under S. 42 but only to show that there was a dispute between the parties as to the factum of possession decided by the Magistrate in a particular manner: A.I.R. 1971 P.&H. 4: I.L.R. (1971) 1 Punj. 474.

The decision of the Magistrate in a proceeding under S. 145, Cr. P. Code in favour of the defendant on the question of possession is not binding on the civil Court dealing with a suit for declaration of title and possession. The civil Court is entitled to come to different finding altogether: A.I.R. 1959 Pat. 406; 1981 B.B.C.J. 212.

It is settled law so far as the Patna High Court is concerned, that the judgment of a Magistrate under S. 144, Cr.P.Code, is not evidence of the possession of the party in whose favour the proceeding terminated. The report of a Magistrate deputed by the Court to make a local inquiry is only evidence of the fact that the Magistrate was deputed to make the inquiry and that, on his inquiry, he came to the conclusion that a certain party was in possession. The report itself is not evidence of

41. Relevancy of certain judgments in probate, etc., jurisdiction.—A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Such judgment, order or decree is conclusive proof—

that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;

that any legal character, to which it declares any such person to be entitled accrued to that person at the time when such judgment, [1][order or decree] declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment, [1][order or decree] declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, [1][order or decree] declares that it had been or should be his property.

---

1. Inserted by Act 18 of 1872, S. 3.

---

possession: I.L.R. 24 Pat. 379: A.I.R. 1945 Pat. 453; (1945) 47 Bom.L.R. 997: A.I.R. 1946 Bom. 184.

Since proceedings under S. 145 of the Code of Criminal Procedure are not in the nature of trial and do not determine any criminal liability, *held*, judgments of acquittal in an earlier instituted criminal trial for trespass in the property of a party to the proceedings have no relevance in the proceedings under S. 145 of the Code: (1983) 1 Bom.C.R. 313. *See* also (1984) 1 Crimes 128 (All.).

Section 41—Notes.

On this section, *see* 2 Mys.H.C.R. 276; 14 M.I.A. 367; I.L.R. 6 Bom. 703; 7 W.R. 388 (F.B.); A.I.R. 1954 All. 8.

A judgment is conclusive proof, as against persons and privies, of facts directly in issue in the case, actually decided by the Court, and appearing from the judgment itself to be the ground on which it was based. But there are certain exceptions to this general rule and the provisions contained in S. 41 are by way of exceptions. This section consists of two parts. The first one makes certain judgments, orders of decrees relevant, and the second one makes those judgments conclusive evidence in certain matters. In order that a judgment should come within the purview of S. 41, it must be (1) of a competent Court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction; and (2) it must (*a*) confer upon or take away from any person any legal character, or (*b*) declare any person to be entitled to any such character, or (*c*) to be entitled to any specific thing, not as against any specified person but absolutely. Under S. 4(2) of the Provincial Insolvency Act, a decision of an Insolvency Court is final between a debtor and the debtor's estate on the one hand and all claimants against him or it and all persons claiming through or under them or any of them on the other hand. Thus, a decision is not binding on the plaintiff who were not debtors or claimants as against the debtors inasmuch as they were not parties to the insolvency case or the appeal arising therefrom. S. 4(2) of the Act is not at all attracted to the case: 196 B.L.J.R. 544: 1969 Pat.L.J.R. 343: A.I.R. 197 Pat. 138.

To fall within the ambit of the section (1) the judgment must be a final judgment or decree of a competent Court; (2) it must have been exercised in probate, matrimonial, admiralty or insolvency jurisdiction; (3) it must confer upon or take away from any person any legal character or declare any person to be entitled to any such character or specific thing

absolutely, not merely against specified persons but the entire world: A.I.R. 1972 Raj. 180: 1972 Raj.L.W. 169: 1972 W.L.N. 49.

It is well settled that a judgment *in rem* like in proceedings for probate, insolvency, matrimonial causes and guardianship etc., are admissible whether or not they are *inter partes*: A.I.R. 1983 S.C. 684: (1983) 3 S.C.C. 118: (1983) 96 Mad.L.W. (S.N.) 93.

Under S. 41 only four kinds of judgments (rendered in exercise of probate, matrimonial, admiralty or insolvency jurisdiction) as specified therein are *in rem* and are binding on the whole world; other judgments are *in personam* and are binding on the parties thereto alone. Thus, a judgment of eviction not against all but only some of the joint tenants is not, and cannot be, a judgment *in rem*; it does not bind the joint tenants who were impleaded in the eviction proceedings: A.I.R. 1977 All. 239: (1977) 3 All.L.R. 147. *See* also A.I.R. 1972 Ker. 196: 1971 Ker.L.T. 578, cited under S. 40, *supra*.

An appellate order modifying imposition of punishment awarded in disciplinary proceedings does not fall under any of Ss. 40 to 42 as it is neither an *inter partes* judgment nor judgment *in rem* nor relatable to matters of public nature; it may, if at all, fall under S. 43 and be conclusive evidence for or against all persons, parties or privies to it. But a statement therein that a person was actually enjoying certain lands since the specified time, will not be admissible evidence under S. 43: (1993) 2 M.L.J. 662.

No judgment except that passed by a Court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction upon any matters indicated in S. 41 can have the effect of a judgment *in rem* and, therefore, a judgment holding that *A* is not the adopted son of *B* is not conclusive against the whole world: 26 All.L.J. 797: A.I.R. 1928 All. 395.

A judgment under S. 92 of the Code of Civil Procedure removing the Pujari and directing him to deliver possession of the public temple and its properties to the Trust is not delivered in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction; it is, thus, not a judgment *in rem*; it binds only those whose interest in the subject-matter is akin to those of the plaintiff or the defendant: A.I.R. 1972 Raj. 180: 1972 Raj.L.W. 169: 1972 W.L.N. 49.

The principles of admissibility of judgments are: (*1*) a judgment *in rem* is always admissible; (*2*) a judgment *in personam* not *inter partes* is not at all admissible except for three limited purposes of proving as to who were parties thereto, what was the decree passed and what were the properties involved therein; (*3*) where neither of the parties were parties in the earlier judgments *in personam*, the recitals or finding or genealogies referred to in the judgment *in personam* are wholly inadmissible; (*4*) the probative value of documents, however ancient, is precious little if they do not disclose the sources of their information or have not attained sufficient notoriety; and (*5*) no statements or declarations or depositions made *post litem motam* are inadmissible: A.I.R. 1983 S.C. 684: (1983) 3 S.C.C. 118: (1983) 96 Mad.L.W. (S.N.) 93.

The meaning of 'legal character' means something equivalent to legal status, in the nature of a decision announcing to the whole world what the legal status of the person is; and the 'legal character' must be narrowly construed as any decision thereof would be a judgment *in rem*: (1975) 88 Mad.L.W. 445.

The term 'legal character' used in the section means something equivalent to status; it must be narrowly construed because an action *in rem* is not an action against a thing but availing against all the world: A.I.R. 1972 Raj. 180: 1972 Raj.L.W. 169: 1972 W.L.N. 49.

The legal characters that can be conferred or taken away in the exercise of the jurisdiction mentioned in S. 41 do not include the state of being a partner: 22 Sind L.R. 105: A.I.R. 1928 Sind 121.

The words 'not as against any specified person but absolutely' only mean that the finding also binds persons who are not parties and are not entitled to challenge it; it has to be treated as having been given against the whole world: (1975) 88 Mad.L.W. 445.

(Per *Hidayatullah, J.*, in a dissenting judgment): Conclusiveness, from the point of view of the law of evidence, will attach to a judgment, order or decree, only if it falls within the categories mentioned in S. 41. Once a judgment, etc., falls within it, the law dispenses with the proof of the fact and the conclusion of the former judgment, etc., about the legal character which it confers or declares, together with the declarations of property arising from that legal character, is final. The status of being joint or separate in relation to a Hindu coparcenary property is not one of the legal

characters mentioned in it: (1963) 3 S.C.R. 22: A.I.R. 1963 S.C. 1.

Compromise decree with regard to easements of light and air between owners of adjacent houses—It is not judgment *in rem*—Such decree cannot be executed against third party purchasing house after decree, although decree provided that it shall bind assignees of parties—Such provision not valid under law of execution: 1967 Mah.L.J. 985: (1967) 69 Bom.L.R. 749 .

An injunction order restraining the other party from interfering with the possession of the plaintiff is a judgment *in personam*, not *in rem*; it is, thus, not competent for the civil Court, even in exercise of its inherent powers, to direct the Police for providing protection to the plaintiff; it is rather for the plaintiff to produce a copy of the order before the Police and seek protection; the Court cannot fetter the discretion of the Police or Magistrates to deal with the situation as deemed fit; Police officials are not like members of the Court's staff: (1991-1) 107 Mad.L.W. 513.

Interveners permitted to intervene after rejecting their application for impleading themselves in the application—Interveners do not become parties—Judgment in the application cannot be judgment *in rem*: A.I.R. 1968 Del. 6.

Order under—Nature of—Order is not order *in rem*: I.L.R. (1968) 47 Pat. 1.

Judgments *in rem* declare, define or otherwise determine the status of a person or of a thing, that is their jural relationship to the world generally: A.I.R. 1972 Raj. 180: 1972 Raj.L.W. 169: 1972 W.L.N. 49.

Judgments mentioned in S. 41 are usually referred to as 'judgments *in rem*'; though the phrase used is not defined, yet it has always meant to be a judgment which is conclusive not only against the parties thereto but also against the whole world: A.I.R. 1972 Raj. 180: 1972 Raj.L.W. 169: 1972 W.L.N. 49.

Judgment *in rem* and *in personam*.—There is a broad distinction between the effect of a judgment *in rem* and a judgment *in personam*. The point adjudicated upon in a judgment *in rem* is always as to the status of the *res* and is conclusive against the world as to that status, whereas in a judgment *in personam* the point whatever it may be, which is adjudicated upon (it being as to the status of the *res*), is conclusive only between the parties or privies: 22 Sind L.R. 105: A.I.R. 1928 Sind 121.

Judgment *in rem*.—No Court can pronounce a judgment *in rem* outside the State in which the Court exercises jurisdiction unless such judgment affects either a thing situate, or a person domiciled, within such State. Where the Court of a State gives a judgment affecting the status of a person domiciled within its territory, such judgment is treated by the comity of nations as analogous to a judgment *in rem*. There is no rule of international law which requires a British Indian Court to accept the judgment of the Supreme Court of His Britanic Majesty Alexandria, as the law of domicile of a deceased, which is the domestic law of British India, as binding outside the limits of that Court's jurisdiction. S. 41 cannot be read as going further than the rule of international law applicable elsewhere. The section clearly deals with what are known as judgments *in rem* though that expression is not used in the section. The words 'competent Court' in S. 41 mean the Court of any country which is competent to pass a judgment *in rem*: I.L.R. (1938) Bom. 529: A.I.R. 1938 Bom. 394.

Wadia, J.—In order to be a judgment *in rem* binding on the world, there must be a finding on status which is not only the foundation of the judgment but is necessary for it. It cannot be conclusive if it relates to a matter which need not have been controverted or which was not material or which only came collaterally into question or which was only in identity cognizable. The only judgment *in rem* as to status absolutely is the judgment pronounced not only according to the law of domicile but also by the Court of domicile: A.I.R.1938 Bom. 394: I.L.R. (1938) Bom. 529. *See* also I.L.R. (1939) Mad. 507: A.I.R. 1939 Mad. 693: (1939) 1 M.L.J. 499.

A decree likely to be passed in a suit for declaration of title to land binds only the parties thereto; it will be a judgment *in personam* and not *in rem*: (1992-2) 102 Punj.L.R. 81.

Where two Division Benches of the same High Court had taken two contrary views on the same point, *held*, neither the decision of the earlier Bench could be deemed as a judgment *in rem* nor the later decision be characterised as without jurisdiction and *non est* or *per incurium*: 1982 Lab.I.C. 1389: (1982) 1 Sim.L.J. 228 (F.B.).

A judgment regarding the validity of an anti-adoption agreement between the

adopting mother and the natural father of the adopted son will not come in the category of a judgment *in rem* so as to be binding against the whole world: 1956 Madh. B.L.J. 822: A.I.R. 1957 Madh. Bh. 159.

A decree granted by a Court not exercising matrimonial jurisdiction, in a suit under S. 42 of the Specific Relief Act, that the plaintiff in that suit was no longer the wife of the defendant is not a judgment *in rem* to which S. 41 of the Evidence Act will apply. Such a decree is one which falls under S. 43, Specific Relief Act: I.L.R. 59 Bom. 278: (1934) 36 Bom.L.R. 1021: A.I.R. 1935 Bom. 5. So also a decision in a suit for restitution of conjugal rights: I.L.R. 11 Rang. 198: A.I.R. 1933 Rang. 250. So also an order in lunacy: I.L.R. 56 Mad. 904: A.I.R. 1933 Mad. 624: 65 M.L.J. 279.

But it is still relevant and binding upon the parties thereto and those who claim under them just like any other judgment of a civil Court: A.I.R. 1933 Mad. 624: I.L.R. 56 Mad. 904: 65 M.L.J. 279.

Where a daughter of a deceased coparcener sued on behalf of all his reversioners for declaration of title and lost and later on the son of her sister sued for the same declaration, *held*, though the decision in the earlier suit was binding on all the reversioners, it was nevertheless not a judgment *in rem*; the earlier judgment does not fall under S. 41; it does not fall under S. 42 either as it did not relate to matters of public nature: A.I.R. 1972 Mad. 269: (1972) 85 Mad.L.W. 263: (1972) 2 M.L.J. 112.

Where petitioners in execution proceedings were not parties to another case against same judgment-debtors, *held*, Order passed in that execution case could not be held to be a judgment *in rem* binding on other decree holders: 1979 B.L.J.R. 688: 1979 B.B.C.J. (H.C.) 663.

Partition suit—Judge declaring right of party to share in property—Force of—Is not a judgment *in rem*: A.I.R. 1952 Trav.-Co. 176.

Orders passed in the guardianship proceedings cannot be treated as a judgment *in rem* as in the case of a grant made under the Succession Act. Even though an order is not a judgment *in rem* or *inter partes* it may be admissible only to prove that such an order had in fact been made but not to prove its contents. The certified copies of the orders passed by the Court in the guardianship proceedings are not, therefore, available even as being judgments to prove the age of the minor: A.I.R. 1950 Cal. 533. *See* also A.I.R. 1959 Mad. 410.

A judgment *inter partes* in a heirship proceeding is not a judgment *in rem* so as to be binding on a stranger: A.I.R. 1933 Bom. 126: (1933) 35 Bom.L.R. 118. Decision as to custom—Relevancy. *See* (1938) 40 Punj.L.R. 29: A.I.R. 1938 Lah. 309.

See also 1976 Raj.L.W. 450: I.L.R. (1976) 26 Raj. 655: 1976 W.L.N. 478 (D.B.), cited under S. 40, *supra*.

Foreign judgments.—The section applies to the foreign judgments of a competent Court no less than to domestic judgments: I.L.R. 54 Mad. 727: A.I.R. 1931 Mad. 474: 61 M.L.J. 774. *See* also 43 Mad.L.W. 75: A.I.R. 1936 Mad. 197; A.I.R. 1950 Mys. 57.

A foreign judgment declaring that a person is the adopted son of a Hindu widow is binding on the Courts in India in a suit relating to immovable property in India belonging to that widow. It is true that the judgment of the foreign Court declaring the party to be the adopted son is not a judgment *in rem* under S. 41, but inasmuch as the Courts of India recognise the validity of the declaration of status by a foreign Court in a matter of succession to movable property in India because the personal law applies, the same should be recognised in a matter of succession to immovable property where the law requires the personal law to be followed. Treating the personal law as the *lax situs*, the Courts of the country of domicile are best able to decide questions of status. The comity of nations treat such a declaration by a Court affecting the status of a person domiciled within its territory as being analogous to a judgment *in rem*: I.L.R. (1939) Mad. 507: 1939 Mad.W.N. 180: (1939) 1 M.L.J. 499. *See* also I.L.R. (1938) Bom. 529: A.I.R. 1938 Bom. 394.

A foreign judgment is not binding on High Court particularly in a case where conviction is based on the accused's pleading guilty: 1957 Cr.L.J. 537: (1957) 59 Punj.L.R. 282: A.I.R. 1957 Punj. 86.

What the law or custom in a foreign State is, is a question of fact to be proved by evidence, and there can be no better evidence as to the state of the customs prevailing in that foreign country than a judgment of the highest tribunal in that state. Though the judgment as a judgment cannot bind the parties to a suit in India, it is sufficiently cogent

evidence against the parties who are governed by the law of that State: I.L.R. (1942) Bom. 467: A.I.R. 1942 Bom. 185.

The judgment of foreign Courts which declare the status of persons domiciled within their territory are by the comity of nations treated in India as analogous to judgments *in rem*. It is difficult to predicate what are all the matters comprehended by the term 'status'. The status of a person means his 'personal legal condition', that is to say a man's legal condition only so far so his personal rights and burdens are concerned, to the exclusion of his 'proprietary relation'. An adjudication on adoption will in law amount to a declaration of status and is decided according to the law of domicile of the party making the adoption. But the claim to succession is not a matter of status in this sense and would relate to the 'proprietary relation' of the claimant with reference to the deceased estate-holder and hence, will not be decided according to the law of domicile: A.I.R. 1965 Mys. 97.

Judgment of foreign Court adjudicating on question of title to immovable properties lying beyond its jurisdiction—Extent of conclusiveness of judgment. *See* C.P.Code (1908), S. 13: A.I.R. 1965 Mys. 97.

'Court'—Foreign Court. *See* Limitation Act (1908), S. 14: A.I.R. 1959 Raj. 149 (F.B.).

A Hindu marriage solemnised in India and annulled by a decree of divorce obtained by the husband from a foreign Court having jurisdiction in the husband's place stands validly dissolved if neither the foreign Court's competence is impeached nor the decree is assailed as having been obtained by fraud or collusion: A.I.R. 1971 P.&H. 80: (1970) 72 Punj.L.R. 235: 1971 Cr.L.J. 399: I.L.R. (1971) 2 Punj. 147.

Probate and administration.—The judgment of a Probate Court granting probate of a will in favour of the petitioner must be presumed to have been obtained in accordance with the procedure prescribed by law and it is a judgment *in rem*: A.I.R. 1957 S.C. 875.

Judgment of Probate Court is one *in rem*; it binds not only the party to proceedings but also other persons: 1983 Mah.L.J. 830.

Judgment in Probate Court, is a judgment *in rem* and binding on all parties and is final: 9 P.R. 698; 1951 Ker.L.T. 53: A.I.R. 1951 Trav.-Co. 229.

A judgment of a Court of Probate which confers the status of administrators, of the estate, is, on the face of it, a judgment *in rem* which is binding not only on the parties to it but upon all other persons and all Courts regarding the legal character involved, till it is set aside: A.I.R. 1950 Mys. 57.

The decision of a Probate Court must be considered to be a judgment *in rem*. The action of the Probate Court in admitting the will to probate so long as the order remains in force is conclusive as to the due execution and validity of the will, and a party to those proceedings cannot be permitted to contest the will unless the grant of probate is revoked: A.I.R. 1956 Nag. 209: 1956 Nag. L.J. 524; (1958-59) 63 Cal.W.N. 615: A.I.R. 1959 Cal. 715.

A final judgment or order of a Court in exercise of its probate jurisdiction, referred to in S. 41 of the Evidence Act, is the probate as defined in S. 2(*f*) of the Succession Act, for it is the grant which declares or confers the legal character on the propounder or the applicant. Parole evidence and even evidence of conduct is admissible to prove grant of probate under the seal when the document bearing the seal of the Court is lost, destroyed or cannot be produced. There is nothing in S. 41 of the Evidence Act which excludes proof by secondary evidence or by evidence of conduct in respect of matters dealt with in that section: (1958-59) 63 Cal.W.N. 615: A.I.R. 1959 Cal. 715.

As to admissibility of decision of Probate Court upholding adoption: I.L.R. 38 Bom. 272. judgment of Probate Court on question of status, *see* (1910) 1 U.B.R. 61: 10 I.C. 987; I.L.R. 5 Pat. 777: 8 Pat.L.T. 510: A.I.R. 1927 Pat. 61.

Judgment of Probate Court—Effect—Refusal to grant probate. *See* I.L.R. 38 Bom. 309: (1914) 16 Bom.L.R. 5.

Grant of probate of will, value of, as proving execution of will: I.L.R. 5 Pat. 777: 8 Pat.L.T. 510: A.I.R. 1927 Pat. 61.

As to the legal effect of grant of letters of administration, *see* I.L.R. 4 Rang. 251: A.I.R. 1926 Rang. 202. Grant of letters of administration—Its effect on contentions that might be raised in title suit. *See* A.I.R. 1955 Trav.-Co. 177: I.L.R. (1955) Trav.-Co. 704. Such grant is no bar on matters not in issue in administration proceedings: A.I.R. 1924 Oudh 104.

A judgment of the Probate Court is inadmissible in a proceeding under S. 193, Penal Code for perjury committed in a testamentary suit: 76 I.C. 417: A.I.R. 1924 Cal. 104; I.L.R. 5 Pat. 777: 8 Pat.L.T. 510: A.I.R. 1927 Pat. 61; 5 Mys.L.J. 107.

Where letters of administration based on a will were granted by the High Court of Ma laya and an ancillary probate under S. 228 of the Indian Succession Act were also granted by a Court in India, *held*, they constitute judgments *in rem*; the truth validity, genuineness and due execution of the will stands established conclusively; it binds not only the parties thereto but the whole world. The probate Court is a Court of exclusive jurisdiction; it is a Court of conscience; it does not decide rights between the parties; once it renders its decision, that will take precedence over the decisions of the Courts of ordinary jurisdiction at all levels. This proposition is so well known that it needs no authorities in its support: A.I.R. 1992 Mad. 136: (1991) 2 M.L.J. 86: (1991-2) 108 Mad.L.W. 487: (1992) 1 Hindu L.R. 397 (D.B.).

Where a will was executed by an Indian then working in the United Kingdom and letters of administration had been issued on that basis by the High Court of Justice at Birmingham, *held*, that constituted a judgment *in rem*; it conclusively proved execution of the will; it bound not only the parties but the whole world; the matter of the will could not be gone into or reopened in a Court in India; the letters operated as *res judicata*: A.I.R. 1979 P.&H. 250: 1979 Punj.L.J. 543: (1979) 81 Punj.L.R. 709: 1979 Rev.L.R. 693.

Where a judgment *in rem* in a probate matter had finally determined that the widowed married daughter had no legally enforceable right of maintenance against her father or brother or their heirs, *held*, the binding nature of that judgment cannot be affected by a fresh suit by her where some more persons are impleaded in the suit as trespassers in the disputed property; even if the earlier judgment is not binding and does not operate as *res judicata*, it is relevant and possesses considerable evidentiary value: A.I.R. 1982 Raj. 119.

Under S. 41, judgments of Probate Courts are conclusive only with respect to the various legal characters or declarations within the scope of the proceedings; the civil Court has no jurisdiction to decide that a document is forged for the purposes of criminal trial and it cannot bind the criminal Court; the judgment of the Probate Court is not admissible in evidence in a criminal case. [I.L.R. 6 Cal. 247, Foll.]: 1978 Mah.L.J. 698: 1978 Cr.L.J. 1434 (D.B.).

Locus standi to file caveat and *locus standi* to file appeal against order granting probate—Criterion to determine—Person's intervention by filing caveat refused—Such person whether has *locus standi* to file appeal against order granting probate: (1961-62) 66 Cal.W.N. 879: A.I.R. 1964 Cal. 41.

Letters of administration or probate once granted constitute a judgment *in rem*; they bind all, whether parties thereto or not, unless revoked by a Court of competent jurisdiction in accordance with the procedure provided in the Succession Act: 1994 Punj.L.J. 358.

As to the finality of order granting letters of administration on condition of appellant executing bond. *See* (1938-39) 43 Cal.W.N. 824.

Matrimonial matters.—Though S. 41 makes a final judgment of a competent Court of matrimonial jurisdiction conclusive as to the legal character it confers or takes away but it must be, as laid down in S. 44, a 'competent' Court having jurisdiction over the parties and the subject-matter; even a judgment *in rem* is open to attack on the ground that the Court delivering the judgment *in rem* had no such competence. Judgments *in rem* are, therefore, not inviolable. [A.I.R. 1963 S.C. 1, Rel. on]: A.I.R. 1975 S.C. 105: 1975 Cr.L.J. 52: (1975) 1 S.C.C. 120.

A Subordinate or District Judge while exercising jurisdiction vested in them under the Hindu Marriage Act, act in exercise of matrimonial jurisdiction; their final orders or decrees are judgments *in rem*; they bind not only the parties thereto but the entire world. [A.I.R. 1963 Andh. Pra. 158, Foll.]: A.I.R. 1971 Bom. 183: 1970 Mah.L.J. 788 (D.B.).

If a finding on judicial separation by the matrimonial Court admittedly declares the status of the parties and thereby their legal character, *held*, there can be no logic or reason to contend that when the wife is found entitled to live separately in the proceedings for restitution of conjugal rights, it would not amount to a declaration of status or legal character under S. 41: (1975) 88 Mad.L.W. 445.

The judgment in a matrimonial case for restitution of conjugal rights, though not a judgment *in rem*, is binding on the parties *in personam* and admissible under S. 41 without further proof: A.I.R. 1992 Karn. 211: (1992) 1 Karn.L.J. 42.

Where the husband's earlier petition for restitution of conjugal rights was dismissed for the reason that he had treated the wife with cruelty and committed adultery whereafter the wife sued him for dissolution of marriage under S. 10 of the Divorce Act, *held*, the findings in the earlier case are relevant though they do not operate as *res judicata*; marriage dissolved on the basis of evidence on record: A.I.R. 1975 Karn. 23: (1974) 2 Karn.L.J. 422 (S.B.).

Though the husband had already obtained an *ex parte* decree under S. 9 of the Hindu Marriage Act but did not disclose this fact in his written statement in the wife's subsequent suit for the same relief but raised the plea of *res judicata* by way of amending his written statement, *held*, the plea was available to him and the *ex parte* decree constituted a bar under S. 11 of the Code of Civil Procedure to the wife's subsequent suit: A.I.R. 1982 All. 138: 1981 All.W.C. 830: (1982) 2 D.M.C. 181.

Where in response to the wife's suit for maintenance under S. 18 of the Hindu Adoption and Maintenance Act, the husband sued her for restitution of conjugal rights under S. 9 of the Hindu Marriage Act pleading that he neither maltreated the wife nor did any thing entitling her to live separately but during the pendency of the maintenance proceedings, the husband's case for restitution was dismissed and, on appeal being filed, its judgment given in the exercise of matrimonial jurisdiction became final, conclusive and binding on all the world; it is not permissible for the husband to challenge it nor for the Courts in the maintenance proceedings to ignore it, much less to come to a different conclusion: (1975) 88 Mad.L.W. 445.

Where during the pendency of a petition for maintenance by the wife in which illtreating and desertion on the part of the husband was proved, the husband obtained divorce on the ground of desertion by wife, *held*, the wife was still entitled to maintenance: 1983 Cr.L.J. 36 (Cal.). *See* also 1979 Cr.L.J. 1301 (Cal.).

Previous decision in maintenance suit by wife—Does not operate as *res judicata* in subsequent petition by husband under S. 10, Hindu Marriage Act, 1955—Judgment falls under S. 41, Evidence Act and is judgment *in rem*: (1962) 2 An.W.R. 259: A.I.R. 1963 Andh. Pra. 158.

A decree of divorce under the Hindu Marriage Act on the ground of the wife living in adultery, *held*, constitutes conclusive proof of the wife having been divested of her status as such; it is no conclusive proof of the reasons for which she was divested. Thus, in proceedings for enhancement of maintenance by the divorced wife under S. 127(2) of the Code of Criminal Procedure, the husband has to prove his defence independently that she had committed adultery; the judgment of the matrimonial Court would not be taken as evidence thereof: (1991) 2 Hindu L.R. 627 (Andh. Pra.).

Where a husband had obtained an *ex parte* decree of divorce and the wife after his death sought to set it aside under O. 9, R. 13, of the Code of Civil Procedure, *held*, the proceedings for setting aside the *ex parte* decree were competent; the *ex parte* decree was a judgment *in rem*; it could be set aside under S. 44 on the ground of the Court's lack of competence or having been obtained by fraud; there was, thus, no reason why it could not be set aside under O. 9, R. 4 if grounds therefor were made out: A.I.R. 1987 Karn. 241: (1987) 2 D.M.C. 208 (1987) 2 Hindu L.R. 312: I.L.R. (1987) Karn 1955.

Where a decree for divorce was granted to the wife on the ground of cruelty by her husband, *held*, it is a judgment *in rem*, binding on all the world; it is, thus, not open to the husband to contend in revision against grant of inadequate maintenance under S. 125 of the Code of Criminal Procedure that he had not contested the divorce proceedings because the wife had consented to accept lower maintenance: (1991) 44 Del.L.T. (S.N.) 29 (D.B.). Where marriage between the complainant and the accused had been declared as void by a matrimonial Court because of subsistence of first marriage, *held*, in a trial for offence under Ss. 493, 495 and 496, I.P.Code, the first marriage need not be proved: (1992) 2 Crimes 44 (P.&H.).

Decision of Admiralty Court.—The decision of the Admiralty Court restoring the certificate of an officer of a ship which has been suspended is a judgment *in rem* so far a

the status and certificate of that officer is concerned. The decision is not binding on a person who was not a party to the suit: A.I.R. 1939 Sind 349.

Order of Insolvency Court.—An order adjudicating a person as an insolvent and vesting his property in the Official Receiver no doubt operates as a judgment *in rem* but the grounds on which the order is based have no such effect: 110 I.C. 730(1): A.I.R. 1928 Sind 121; 46 M.L.J. 580 (order of adjudication is a judgment *in rem*). Refusing to adjudicate a person a bankrupt is not a judgment *in rem*. *See* 46 M.L.J. 580: A.I.R. 1924 Mad. 622. So also order vacating order of adjudication against one partner: A.I.R. 1928 Sind 121.

The judgment of a High Court declaring a person to be a partner of an insolvent firm would not operate as a judgment *in rem* under S. 41 of the Evidence Act: A.I.R. 1951 Sau. 37.

A declaration of a legal right is a different thing from a declaration of a legal character. The word 'character' means status, it is something more than a mere right. The declaration of a person's right operates as against a particular person or group of persons against whom the right is claimed, whereas a man's status is something which defines his position not in relation to any particular person or group of persons but in relation to the rest of the world; his status distinguishes him from the rest of the world. To say that a person is not a partner of a firm is not to declare his status or legal character; it is merely to declare his position with respect to the particular firm. Therefore, a finding of the Insolvency Court that a certain person is not a partner of the insolvent firm does not confer upon or take away from him any legal character within the meaning of S. 41 and hence is not a judgment *in rem*: 190 I.C. 537: A.I.R. 1940 Cal. 225.

The adjudication of a person as an insolvent has the effect of taking away from that person his legal character of being not insolvent. An order by which such adjudication is made would thus, be clearly covered by S. 41. When on appeal the order adjudicating a person insolvent is set aside, the effect of the judgment of the appellate Court is to declare that person to be entitled to the legal character of being not insolvent and the judgment should be deemed to fall within the ambit of S. 41 of the Indian Evidence Act. It is thus a judgment *in rem* only in respect of matters before insolvency Court. Where, therefore, the question as to whether the gift by a person against whom insolvency proceedings have been instituted, was made with a view to defraud and delay the creditors, had not come up for adjudication before Insolvency Court then and the judgment of Insolvency Court could not operate as a judgment *in rem* in that respect, the judgment was relevant only to show that donor was not insolvent at the time the proceedings to adjudicate him insolvent took place. The question as to whether the gift was made with a view to defraud and delay the creditors, would have to be determined by the intention of donor at the time of making the gift and in the light of facts then existing and not in the context of subsequent period. The finding of Insolvency Court given 6 years after gift was made related to the time when the proceedings to adjudicate donor as insolvent took place and not to the state of affairs as they existed six years before that finding was given and as such could not form a good basis for upsetting the finding of facts of the Courts below which runs contrary: I.L.R. (1965) 1 Punj. 160: A.I.R. 1965 Punj. 206.

Debtor adjudged insolvent—Petitioning creditor applying under S. 53, Provincial Insolvency Act for annulment of certain transfers by insolvent—Transferee cannot challenge order of adjudication on ground that petitioning creditor was not creditor of the insolvent: I.L.R. (1963) Bom. 173: A.I.R. 1963 Bom. 212.

In order that declaration of title to a specific thing should have the conclusive character as against the whole world, it is not enough to show that under the judgment of the Insolvency Court, one has become entitled to a specific thing, but his title to such a thing must have been declared not as against any specified person but absolutely. A decree declaring that *A* is entitled to a debt is not an absolute declaration but only made against a specified person; so it is not conclusive proof of title to a debt: I.L.R. 54 Mad. 601: A.I.R. 1931 Mad. 541: 61 M.L.J. 229 (S.B.).

Scope—Insolvency—Effect of adjudication order—Parties same—It is conclusive only as regards status and not as regards grounds on which order of insolvency passed: 1959 Nag.L.J. (Notes) 46.

42. Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41.—Judgments, orders or decrees other than those mentioned in section 41, are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

Illustration

A sues *B* for trespass on his land. *B* alleges the existence of a public right of way over the land, which *A* denies.

The existence of a decree in favour of the defendant, in a suit by *A* against *C* for a trespass on the same land, in which *C* alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

Section 42—Notes.

On this section, *see* I.L.R. 22 Cal. 533 (P.C.); I.L.R. 25 Cal. 522 (P.C.); I.L.R. 19 All. 277 (P.C.) and A.I.R. 1929 Cal. 374 (F.B.); 163 I.C. 924: A.I.R. 1936 Lah. 929. The provisions of Ss. 42, 43, 57, 74 and 84 deal with matters such as relevancy of the judgment, the mode of proof, the presumption as to the genuineness to be drawn and so on, but they do not deal with the question of the binding nature of the judgments, or even of the effect of those judgments: 1955 Nag.L.J. 498: A.I.R. 1955 Nag. 236.

Ss. 40 to 42 deal with judgments which are *res judicata*, *in rem* and relating, to matters of a public nature; but they raise no presumption that prior judgments embody correct adjudications; the law only prohibits going behind them in certain cases on the ground of public policy; judgments *qua* judgments and as expression of the pronouncing Court's opinion are relevant only under Ss. 40 to 42; if they do not fall under any of the sections, they are inadmissible; thus, findings in *non-inter partes* judgments about title and possession of a property are not admissible in suits for injunction to restrain inference with the plaintiff's possession: A.I.R. 1972 Ker. 196: 1971 Ker.L.T. 578.

Where earlier judgments not *inter partes* were not *res judicata* but they determined the legal character of a defendant *qua* suit property, *held*, they are relevant under S. 42: (1985-2) 88 Punj.L.R. 486: 1986 Rev.L.R. 34.

A judgment not *inter partes* is inadmissible except for the limited purpose of ascertaining the parties thereto, the decree passed therein and subject-matter thereof; they cannot be used to establish the title of the contending parties in the suits wherein those judgments are produced. [(1854-57) 6 Moo Ind. App. 494; (1870-72) Moo Ind. App. 367; (1881) I.L.R. 6 Cal. 171; A.I.R. 1941 Cal. 193; A.I.R. 1937 P.C. 69; A.I.R. 1942 P.C. 40; A.I.R. 1922 Mad. 71, Considered]: A.I.R. 1983 S.C. 684: (1983) 3 S.C.C. 118: (1983) 96 Mad.L.W. (S.N.) 93.

An appellate order modifying imposition of punishment awarded in disciplinary proceedings does not fall under any of Ss. 40 to 42 as it is neither an *inter partes* judgment nor judgment *in rem* nor relatable to matters of public nature; it may, if at all, fall under S. 43 and be conclusive evidence for or against all persons, parties or privies to it. But a statement therein that a person was actually enjoying certain lands since the specified time, will not be admissible evidence under S. 43: (1993) 2 M.L.J. 662.

When a question of status is in issue, judgment and orders between the parties in mutation proceedings, succession certificate cases, rent suits and suits for possession, etc., are admissible in evidence. They are of high evidentiary value and constitute proof sufficient to shift the burden: A.I.R. 1924 Nag. 387.

Where a daughter of a deceased coparcener sued on behalf of all his reversioners for declaration of title and lost and later on the son of her sister sued for the same declaration, *held*, though the decision in the earlier suit was binding on all the reversioners, it was nevertheless not a judgment *in rem*; the earlier judgment does not fall under S. 41; it does not fall under S. 42 either as it did not relate to matters of public nature: A.I.R. 1972 Mad. 269: (1972) 85 Mad.L.W. 263: (1972) 2 M.L.J. 112.

A judgment in which a custom has been judicially recognised is admissible as evidence of the custom: 3 Sind L.R. 5; 1 I.C. 937.

A previous judgment is relevant under S. 42 for the purpose of proving a custom: 190 I.C. 35: A.I.R. 1940 Pesh. 31. On a question of custom a decision in a case as regards the

43. Judgments, etc., other than those mentioned in sections 40 to 42, when relevant.—Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of this Act.

Illustrations

(*a*) *A* and *B* separately sue *C* for a libel which reflects upon each of them. *C* in each case says that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither.

A obtains a decree against *C* for damages on the ground that *C* failed to make out his justification. The fact is irrelevant as between *B* and *C*.

(*b*) *A* prosecutes *B* for adultery with *C*, *A*'s wife.

B denies that *C* is *A*'s wife, but the Court convicts *B* of adultery.

---

existence or non-existence of a custom is good evidence in other cases: 1954 All.L.J. 726: A.I.R. 1955 All. 59 (F.B.).

Ss. 42 and 13—Judgment as to existence of family custom—Relevancy. *See* A.I.R. 1950 Lah. 6.

In order to make a judgment admissible under S. 42 on the question of custom, it is not obligatory that it should have been pronounced before the commencement of the controversy although what weight should be attached to such a judgment is a different matter: I.L.R. (1955) 5 Raj. 32: A.I.R. 1956 Raj. 51. Judgments not between parties are inadmissible. *See* 12 All.L.J. 837: 25 I.C. 30. Also 4 I.C. 997 and 8 I.C. 897; I.L.R. 25 Bom. 433 (a copy of a judgment of a Swiss Court was held inadmissible against third party).

Competent Court—Order of Superintendent of former Mandi State during settlement operations—Right of villagers of certain villages to graze their cattle in disputed land recognised—Relevancy for proving customary right: A.I.R. 1962 Him. Pra. 28.

Previous judgment relating to wakf property is relevant in a suit bearing on the property though not between the same parties. It is true that it is not conclusive proof but it can be used to add to the probative value of the evidence led in the suit: (1934) 36 Punj.L.R. 106: A.I.R. 1935 Lah. 64.

Judgments are not under S. 42, relevant evidence of the facts mentioned in them: 1940 R.D. 402: 1940 All.W.N. (B.R.) 214.

The probative value of a finding in a previous suit between the parties depends upon the nature of the finding and of the issues involved in that suit and in the subsequent suit: I.L.R. 19 Pat. 172: A.I.R. 1940 Pat. 341.

Where on an application under S. 12-A (1), West Bengal Bargadars Act, for restoration to cultivation, the Sub-Divisional Officer orders restoration of possession, the order of the Sub-Divisional Officer is relevant only to the extent that by virtue of that order the applicant got restoration of possession. That order cannot be used for the purpose of supporting a finding that he was a bargardar on the basis of recital thereon: (1958) 1 Cal.L.J. 76.

Inquest Report—Admissibility in evidence—Mere recitals in inquest report, not substantive evidence: (1965) 1 Cr.L.J. 173: A.I.R. 1965 Ker. 44.

The decision of the Coroner under the Coroner's Act is not a decision, but a *prima facie* opinion and stands on no higher footing than an order of commitment to the Sessions. It is not a judgment, much less a judgment *inter partes*; nor can it be admitted as an opinion since it represents the opinion of laymen often arrived at even before the Police investigation is complete. It is, therefore, a piece of relevant evidence admissible under S. 42, or any other section: (1945) 47 Bom.L.R. 997: A.I.R. 1946 Bom. 184.

See also 1976 Raj.L.W. 450: I.L.R. (1976) 26 Raj. 655: 1976 W.L.N. 478 (D.B.), cited under S. 40, *supra*.

Section 43—Notes.

See 168 I.C. 109: A.I.R. 1937 Pat. 86. When a judgment in a previous case is not relevant under Ss. 40, 41 and 42 of the Evidence Act and it cannot be shown to be relevant under any other section of the Act, it cannot be produced as a piece of evidence. S. 43 of the Act lays down that such a judgment, even if it relates to a fact in issue in the subsequent case, is not relevant at all: A.I.R. 1952 Pepsu 76.

Afterwards, *C* is prosecuted for bigamy in marrying *B* during *A*'s lifetime. *C* says that she never was *A*'s wife.

The judgment against *B* is irrelevant as against *C*.

(*c*) *A* prosecutes *B* for stealing a cow from him, *B* is convicted.

A, afterwards, sues *C* for the cow, which *B* had sold to him before his conviction. As between *A* and *C*, the judgment against *B* is irrelevant.

(*d*) *A* has obtained a decree for the possession of land against *B*. *C*, *B*'s son, murders *A* in consequence.

The existence of the judgment is relevant, as showing motive for a crime.

[1][(*e*) *A* is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue.

(*f*) *A* is tried for the murder of *B*. The fact that *B* prosecuted *A* for libel and that *A* was convicted and sentenced is relevant under section 8 as showing the motive for the fact in issue.]

---

1. Inserted by Act 3 of 1891, S. 5.

S. 43 excludes all judgments as irrelevant in a former suit if they are not *inter partes* unless the existence of such judgment is a fact in issue or is relevant under some other provision of the Act. The existence of the judgment may be relevant but not the decision of the Judge or the opinion expressed by him. It is immaterial if the defendant in both cases is the same and the decision of the Privy Council in I.L.R. 22 Cal. 533 is no authority for the general proposition that a judgment against a party can always be used against him in a subsequent suit by another person: (1929-30) 34 Cal.W.N. 1113; A.I.R. 1931 Cal. 239. *See* also 59 Cal.L.J. 320: A.I.R. 1934 Cal. 788.

A judgment is not admissible to prove the truth of the fact which it states, nor is any fact stated as part of the reasoning in arriving at the fact in issue, evidence of the truth of that fact. But in cases where the right of a party has already been concluded by previous judgment, that fact can be proved by the production of the judgment, since the existence of that judgment, itself is relevant: 1938 Nag.L.J. 466: A.I.R. 1939 Nag. 72: I.L.R. (1940) Nag. 699.

The words 'other provisions of this Act' in S. 43 do not include S. 13: A.I.R. 1983 S.C. 684: (1983) 3 S.C.C. 118: (1983) 96 Mad.L.W. (S.N.) 93.

Under S. 44, a party or its successor-in-interest is permitted to avoid the effect of a decree obtained by fraud or collusion by the other party as a basis for the plea of *res judicata* under S. 40; however, since S. 44 does not override S. 43, a collusive decree can still operate as estoppel if requisite ingredients thereof are made out. [A.I.R. 1927 All. 494; A.I.R. 1971 All. 439, Overruled]: A.I.R. 1984 All. 216: 1984 All.W.C. 230 (D.B.).

An appellate order modifying imposition of punishment awarded in disciplinary proceedings does not fall under any of Ss. 40 to 42 as it is neither an *inter partes* judgment nor judgment *in rem* nor relatable to matters of public nature; it may, if at all, fall under S. 43 and be conclusive evidence for or against all persons, parties or privies to it. But a statement therein that a person was actually enjoying certain lands since the specified time, will not be admissible evidence under S. 43: (1993) 2 M.L.J. 662.

In a suit for perpetual injunction to restrain the defendant from interfering with the plaintiff's possession, the judgment of the President of the Municipal Council is relevant under S. 13 or S. 43 for establishing the transaction that permission to raise new construction was accorded by the Municipal Council but the reasons and the finding of fact set out in such judgment are not relevant: A.I.R. 1976 Raj. 91: 1975 Raj.L.W. 561: I.L.R. (1975) Raj. 959: 1975 W.L.N. 563.

Where a specific provision deals with admissibility of a document, the Court cannot resort to the general provisions to determine its admissibility; thus, if a judgment was not admissible as it did not fall under Ss. 40 to 42 and did not fulfil the conditions of S. 43, it is not relevant under S. 13; the words "other provisions of this Act" do not cover S. 13 which does not at all deal with judgments

A.I.R. 1983 S.C. 684: (1983) 3 S.C.C. 118: (1983) 96 Mad.L.W. (S.N.) 93.

In prosecution for offence under S. 420 of the Indian Penal Code regarding sale of shares resulting in hidden loss in the previous year to the Company, *held*, a finding of the Board for Industrial and Finance Reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985 negativing such loss is relevant though not conclusive: 1992 Cr.L.J. 1448 (Cal.).

Where Directors of a Company were convicted for the offence of non-implementation of awards given under the Industrial Disputes Act by the Company with their knowledge and consent and they were thereafter again tried for that very offence as a continuing breech, *held*, the earlier judgment of conviction was not relevant under S. 43; judgments other than those mentioned in Ss. 40 to 42 are relevant unless the existence thereof was a fact in issue or is relevant under some other provision of the Act; the appreciation of evidence and findings by the Court in the earlier judgment are not relevant in the subsequent trial; earlier criminal judgments are not relevant in the subsequent criminal trials merely because they are *inter partes*: 1978 Raj.L.W. 488.

An order of the Board of Revenue is not evidence in a case before the High Court but the latter should not pass any decree in dissonance with the Board's decision without fully considering the reasons and grounds advanced in the impugned decision: 3 P.L.J. 188: 43 I.C. 393.

A judgment in respect of another sale agreement for another portion of the same building owned by the defendants where the plaintiffs in the two suits were different, *held*, is not relevant under any of the Ss. 40, 41 and 42; it is, thus, clearly irrelevant under S. 43: (1993) 50 Del.L.T. 671: (1993-2) 104 Punj.L.R. 51.

A judgment in land registration proceedings is no evidence of the facts mentioned therein, more particularly when the proceedings were not between parties to a subsequent suit, in which the judgment is sought to be admitted in evidence: I.L.R. 16 Pat. 84: A.I.R. 1937 Pat. 73. As to judgment in guardianship proceedings, *see* A.I.R. 1941 Mad. 569: (1941) 1 M.L.J. 492.

Where the decree of the Calcutta High Court not relevant under Ss. 40 and 42, Evidence Act was a fact in issue, and as a matter of fact, an issue was specifically raised about its existence and also its effect on the suit, the decree is relevant under S. 43 of the Evidence Act: I.L.R. (1960) 10 Raj. 94.

Where a judgment, not *inter partes*, was sought to be adduced as an additional evidence to show that a certain allottee of land was only a non-existent, fictitious, person, *held*, the judgment was not relevant under any of Ss. 40 to 43; only such non *inter partes* judgments are relevant which are either *in rem* or bar the second suit or trial: 1989 Punj.L.J. 711.

Plaintiff's title to suit property challenged—Initial burden to prove his *prima facie* title discharged by plaintiff—Burden shifts on to defendant—Judgments not *inter partes*—Evidentiary value of: 1962 Ker.L.J. 1277.

Though orders passed in maintenance proceedings are not relevant under S. 40 or S. 41 or S. 42, but in proceeding under Hindu Marriage Act they can be relevant under any other provision of the Evidence Act. Under S. 43, an order though not relevant under Ss. 40, 41 and 42 may be relevant under other sections of the Act. Where documents of maintenance proceedings were relied upon by wife in proceeding under S. 10 of Hindu Marriage Act initiated by husband to show the conduct of latter towards former, they were relevant and admissible under S. 8 of Evidence Act: 1966 Cr.L.J. 1438: A.I.R. 1966 Him. Pra. 70.

A was the Managing Director of a Co-operative Bank, which went into liquidation. As a result of certain proceedings taken against *A* by the liquidator of the Bank, a payment order was made by the Deputy Registrar of Co-operative Societies. In the findings given by the Deputy Registrar in his payment order, the liability of *A* was, *inter alia*, based on a breach of trust. In pursuance of this order a bungalow belonging to *A* was attached and sold. In a suit brought by a son of *A* for partition of joint family property and possession of his separate share it was contended that the debt incurred by *A* was avyavaharika. In support of his contention, the son attempted to prove that the debt fell within the term avyavaharika by relying upon the payment order and the findings given by the Deputy Registrar in the payment order. *Held*, that any opinion given in the order of the Deputy Registrar as to the nature of the liability of *A* could not be used as evidence in the present

case to determine whether the debt was avyavaharika or otherwise. The order was not admissible to prove the truth of the facts therein stated and except that it may be relevant to prove the existence of the judgment itself, it would not be admissible in evidence: A.I.R. 1959 S.C. 282.

Where in a proceeding for revocation of the grant of probate under S. 263, Succession Act, the question is whether the son of the testator murdered him, it cannot be assumed on the basis of a previous judgment of a criminal Court convicting the son for the murder of his father and sentencing him to transportation for life that the son was the murderer of the testator.

The judgment of the criminal Court is relevant only to show that there was such a trial resulting in the conviction and sentence of the son to transportation for life. It is not evidence of the fact that the son was the murderer of the testator. That question was to be decided on evidence: (1955) 2 S.C.R. 270: A.I.R. 1955 S.C. 565. Magistrate's finding in criminal case is irrelevant in civil proceedings: A.I.R. 1955 Nag. 269: I.L.R (1955) Nag. 860.

Different items of properties mortgaged—Liability contribute towards payment of mortgage-debt—Fixation of price of mortgage properties to be with respect to date when properties were mortgaged—Evidence as to: A.I.R. 1962 Pat. 236.

Admissibility of judgment 'inter partes'—*See* 1 Cal.W.N. 146; 7 P.R. 1895 (Cr.); 11 B.H.C.R. 90; 9 C.P.L.R. 8 (Cr.). Previous judgment in main suit—Admissibility in subsequent execution proceedings: A.I.R. 1934 Rang. 212. Where all the persons who are parties to a present case were parties to a former litigation, the judgment in the former proceedings is certainly evidence of what were the points in issue between the parties in that suit and of what was the result of the suit: 168 I.C. 109: A.I.R. 1937 Pat. 86.

Admissibility of judgment not 'inter partes'—In a suit to contest a notice of ejectment the only evidence of a lease was a judgment in a suit not *inter partes*. *Held*, that the lease could not be held binding between the parties to the ejectment suit: 54 I.C. 574. On this section, *see* also 9 C.P.L.R. (Cr.) 8: (1907) 9 Bom.L.R. 1134; 72 Cal.L.J. 320: A.I.R. 1941 Cal. 193; (1904-5) 9 Cal.W.N. 402; 1939 R.D. 162: 1939 All.W.R. (B.R.) 161 (Rent suit).

Previous judgment not *inter partes* though not *res judicata* is valuable proof of title and admissible in evidence: 101 I.C. 774. Suits not *inter partes*—Finding of fact in one—Admissibility in evidence in another in which that fact is in issue: A.I.R. 1929 P.C. 99: I.L.R. 56 Cal. 1003: 56 M.L.J. 562: 56 I.A. 119 (P.C.).

Findings in previous judgment are not admissible: 96 I.C. 998: (1925) 27 Punj.L.R. 544. *See* also I.L.R. 16 Pat. 84: A.I.R. 1937 Pat. 73.

Though the recitals and findings in a judgment not *inter partes* are not admissible such a judgment and decree are admissible to prove the fact that a decree was made in a suit between certain parties and for finding out for what lands that suit had been decreed: (1939-40) 44 Cal.W.N. 935: A.I.R. 1941 Cal. 193. Judgment in a previous suit not *inter partes* is not admissible as evidence of an admission said to have been made by one of the parties in the course of that suit. The judgment is no better than any other hearsay evidence of the admission: (1915-16) 20 Cal.W.N. 648: 30 I.C. 821. *See* also 101 I.C. 774: A.I.R. 1927 Nag. 359; (1939) 41 Bom.L.R. 561: A.I.R. 1939 Bom. 313; 202 I.C. 203: A.I.R. 1942 P.C. 40 (P.C.); I.L.R (1945) Kar. 40: A.I.R. 1945 Sind 57.

Judgment not *inter partes*—Redemption suit—Evidentiary value of previous decisions. *See* Evidence Act (1872), S. 13: (1969) 71 Punj.L.R. 735.

Judgment upholding right of dependant as adopted son is relevant though plaintiffs not parties to that judgment: 1965 Raj.L.W. 168.

Where an adopted son, the next heir, was sought to be excluded from succession to his adoptive father's property on the ground that he had murdered his adoptive father when he had been convicted and sentenced for homicide not amounting to murder under S. 304 of the Indian Penal Code, *held*, the Criminal Court's judgment in subsequent succession proceedings is only relevant to show that the adopted son had been tried, convicted and sentenced; the judgment does not bind the civil Court to enter the finding of homicide not amounting to murder; the civil Court has to find out on evidence adduced before it as to whether it was a case of murder. [A.I.R. 1955 S.C. 566, Foll.]: A.I.R. 1980 P.&H. 164: 1980 Rev.L.R. 24.

Finding regarding right in previous suit not *inter partes*—Right cannot be proved on basis of such finding: A.I.R. 1964 All. 302.

Judgment not *inter partes*—Relevancy of and value of: (1960) 62 Bom.L.R. 322: A.I.R. 1961 Bom. 169; 97 I.C. 282: A.I.R. 1926 Pat. 577; 93 I.C. 321: A.I.R. 1926 Sind 161; 202 I.C. 203: A.I.R. 1942 P.C. 40; (1938-39) 43 Cal.W.N. 935: A.I.R. 1941 Cal. 193; A.I.R. 1960 Bom. 78; (1956-57) 61 Cal.W.N. 970. *See* also and Notes under S. 11.

It is relevant though not conclusive: I.L.R. 8 Pat. 783: A.I.R. 1929 Pat. 739. *See* also A.I.R. 1938 Sind 198 (Binding nature of finding of fact in previous judgment).

Judgment not *inter partes* fixing market value of contiguous land—*Held* admissible in evidence: A.I.R. 1965 Him. Pra. 18.

Precedents—Judgment of High Court—Not binding on Judges of same High Court or of other High Courts. (1964) 2 Cr.L.J. 541: A.I.R. 1964 Guj. 223.

Precedents—Judgment of High Court—Not binding on another Judge of the High Court: A.I.R. 1963 Guj. 305.

Judgment of High Court in previous Criminal Case—Use by Court to prove possession of land—Evidence *quantum valebat*—Though not relevant under S. 43 relevant under S. 13: 1969 Cr.L.J. 1197: A.I.R. 1969 Pat. 317.

Prior suits between some of the parties to the present suit—Subject-matter being same, judgments in those suits admissible to test acceptability of the case in the present suit: 1969 Pat.L.J.R. 4.

Where a litigant's earlier suit for declaration of title against two other contenders was dismissed on the ground that she could not prove her title to the property, *held*, the judgment therein cannot operate as *res judicata* as between the two contenders thereof in a fresh suit for declaration of title between them; it was not necessary in that suit to decide the contention between the two co-defendants; however, the earlier judgment in so far as it negatived the claim of one of the co-defendants is relevant as evidence of an instance under S. 43: A.I.R. 1972 Andh. Pra. 132.

Question whether trade mark is identical or deceptively similar to trade mark of opponent—Opponent citing judgments in which parties, facts and trade-marks were entirely different—Such judgments or facts cannot be used against applicant: A.I.R. 1969 Cal. 80.

A judgment not *inter partes* is admissible only as showing that certain observations were made on certain facts found in a certain judgment but is not admissible as evidence of the truth of the facts found or observation made: A.I.R. 1952 Cal. 368.

Judgments in previous suits as regards the value of entries in revenue papers are admissible: 7 L.R. 10 (Rev.).

A judgment given in a proceeding between the owner and the tenant of the first degree is admissible in evidence in an application against the latter by the sub-tenant for standardisation of his rent, for the purpose of proving that the rents of the premises concerned were standardised at a particular rate by the appropriate authorities though it is not *inter partes*: (1953-54) 58 Cal.W.N. 607.

A judgment of criminal Court is admissible to prove only, who the parties to the dispute were and what order was passed. Facts therein stated, or statements of the evidence of the witnesses examined in the case, or the findings given by the Court, are not admissible at all. Technically, such judgments are inadmissible as not being between the same parties, the parties in the prosecution being the State on the one hand, and the prisoner on the other, and in the civil suit the prisoner and some third party, because the issues in a civil and criminal proceedings are not the same, and the burden of proof rests in each on different shoulders. Even an admission cannot be proved by a recital in such a judgment. Therefore, a proceeding of a criminal Court is not admissible as evidence, a civil Court is bound to find the facts for itself: 1955 B.L.J.R. 705: A.I.R. 1956 Pat. 49.

The decision of an Income-tax Officer holding that an assessee was separate from his joint family and had separate business is a mere opinion and is irrelevant in a civil suit involving a dispute as to whether a particular property is separate property or joint family property: 19 Nag.L.J. 287.

Ss. 43 and 44—Judgment appointing guardian for minor is not open to attack collaterally: (1941) 1 M.L.J. 492: A.I.R. 1941 Mad. 569.

Where a suit for permanent injunction was instituted against the *Karta* of a Joint Hindu Family neither in his capacity of *Karta* nor as representative of the family, and the injunction, under law, being operative only against the person actually sued, *held*, a subsequent suit by the *Karta's* wife and two sons against

the decree holder for cancellation of the earlier decree is not barred by *res judicata*; the judgment in the earlier suit is not relevant under S. 43 either: 1981 Hindu L.R. 566 (Madh. Pra.).

Where in a suit for partition between a father and his two sons their respective shares in the property were ascertained, in the absence of any contract or other material on record, on the basis of their wealth and income-tax assessment orders containing their respective admissions, *held*, though the orders were not admissible under Ss. 40 to 42 but they were certainly admissible under S. 43: A.I.R. 1991 Del. 325.

Where a confession for misappropriation of three items was obtained on oath by a person who had no power to administer oath which by itself amount to a concealed threat and it was found in an earlier trial to be not voluntary and, therefore, inadmissible, *held*, the earlier judgment containing the finding was admissible in the subsequent trial for misappropriation of the third item; the confession's veracity having been shaken to a very great extent, it could not be used against the accused as sole basis for conviction: A.I.R. 1979 S.C. 1080.

Where a person is charged with criminal breach of trust as regards certain items and the question of civil liability about the same items has been determined by a competent civil Court, the judgment of that Court would be the best evidence of the civil rights of the parties and hence a relevant fact: I.L.R. 41 Bom. 1: (1916) 18 Bom.L.R. 195.

Where a criminal case was instituted against an exporter of handloom cloth for having tampered with the bails, exported under two invoices but the case was split into two according to the invoices and he, acquitted in the first trial, sought quashing of his second trial, *held*, it is not the requirement of law that after acquittal in the first case, trial in the other case would be illegal; the second trial could not be quashed merely because the judgment in the first trial was of acquittal: A.I.R. 1978 S.C. 1017: (1978) 2 S.C.R. 460: 1978 Cr.L.J. 775: (1978) 2 S.C.C. 514.

Where in a woman's suit for declaration of her status as unmarried on the ground that the certificate of her marriage under the Special Marriage Act was obtained by fraud and forgery by the 'husband' and she had never married him and she sought to support he case by the report of Government handwrit ing experts submitted to the criminal Court a evidence in a criminal case under S. 466 of th Indian Penal Code but proved afresh in th civil suit, *held*, as no provision of law had bee cited to show that it is inadmissible, no objec tion to its being read as evidence is competen even though it was not made at the plaintiff' instance: A.I.R. 1978 All. 515.

Discharge under S. 253(1), Cr.P.Code, i earlier case—Subsequent suit for maliciou prosecution—Copy of first information re port of earlier case not filed nor proved other wise. *Held*, that the judgment in questio would not be relevant or admissible to prov the contents of the first information repor 1978 All.W.C. 63: 1978 All.L.J. 1399.

Record and judgment in a trial in which th principal was convicted of breach of the peace if admissible against surety. [I.L.R. 25 Cal. 44 Dis.]. *See* 32 P.R. 1903 (Cr.); 12 Cr.L.J. 404: 1 I.C. 588.

It is true that the judgment of the crimina Court cannot be used for the purposes t prove that whatever has been written in this correct as S. 43 clearly lays down that they ar irrelevant unless comes under exceptions cov ered by Ss. 40, 41 and 42 and, thus, it is no necessary to consider, whether any of th exceptions can be invoked or not, when th admission in the criminal proceedings wa not on the question of law but on question fact: 1986 Raj.L.W. 217.

Proceedings or judgments of a crimina Court constitute no evidence in civil proceed ings; plaintiff alleging fraud and collusion ha to independently plead with requisite pa ticulars and prove by evidence, oral and docu mentary: (1991-2) 108 Mad.L.W. 436. *See* als 1982 Lab.I.C. 1920: (1982) 2 A.P.L.J. 200: (198 2 An.W.R. 376.

Judgment of conviction by Magistra though admissible in civil proceeding to prov the fact of conviction of accused in that case, not strictly admissible to prove the facts co stituting the offence, in another case, in whic the party against whom the judgment in th criminal case was sought to be admitted wa not a party to the criminal case. [A.I.R. 19 S.C. 566, Rel. on]: A.I.R. 1972 Bom. 117: 19 Mah.L.J. 974: (1971) 73 Bom.L.R. 418.

The judgment of a criminal Court is on relevant about conviction and acquittal. Th

44. Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved.—Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

---

findings recorded by the criminal Courts cannot be received as a piece of evidence: 1972 All.L.J. 15: 1972 R.D. 35.

Where a tenant was sought to be evicted from a premises on the ground that his wife had used the premises for possession of illicit liquor and the judgment of the Magistrate recording her conviction was produced by the landlord as evidence, *held*, the judgment of conviction was admissible only to prove the factum of the wife's conviction and not the facts which led to her conviction; eviction set aside: A.I.R. 1972 Bom. 117: 1971 Mah.L.J. 974: (1971) 73 Bom.L.R. 418.

Where the accused were neither the prosecutors nor accused in the counter case which resulted in acquittal, the judgment of acquittal is not relevant in the accused's trial; they cannot object to the Court taking cognizance of the offence and proceeding with their trial: 1988 B.B.C.J. (H.C.) 86: 1988 Cr.L.J. (N.O.C.) 9 (D.B.).

Judgment in respect of adjoining lands in land acquisition cases.—A judgment in a land acquisition case not *inter partes* is not *in rem* but *in personam*; unless it falls within the ambit of Ss. 40 to 43, it would be irrelevant unless the judgment itself is a fact in issue or is relevant under some other provisions; even then, the judgment's contents would not be relevant. Thus, where nothing on record or in the judgment itself shows that the land under acquisition and the land in the judgment were materially similar, no benefit of the judgment's contents can be availed by the party producing it in evidence: A.I.R. 1980 Ker. 176 (D.B.).

For determination of the quantum of compensation for the land acquired, *held*, judgments not *inter partes* fixing compensation of adjoining lands acquired at the same time are admissible in evidence: A.I.R. 1986 All. 172: 1985 All.W.C. 733 (D.B.); (1974) 1 Karn.L.J. (Jr.) 21 (S.N.) 70; (1976) 2 Karn.L.J. 189 (S.C.); I.L.R. (1978) Karn. 1522.

Where in a land acquisition case two earlier judgments of the District Judge were produced to substantiate the claim for enhanced compensation and the lands in the three cases were similar and acquired under the same scheme, *held*, the judgments were relevant and admissible to determine the valuation of the land under acquisition: A.I.R. 1984 Pat. 40: 1983 B.B.C.J. (H.C.) 673: 1984 B.L.J. 16: 1983 Pat.L.J.R. 723: 1984 B.L.J.R. 18: 1984 Bih.L.T. (Rep.) 140 (D.B.).

Determination of compensation—Market value—Award of Court fixing market value of comparable lands, both in time and quality, serves as piece of evidence and can be looked into Civil Appeal No. 176 of 1962, dated 10th April, 1963 (S.C.), Foll.—But where no attempt is made by claimant in trial Court to produce award of trial Court in respect of land sought to be relied on as comparable with lands under acquisition, he cannot be allowed to produce as additional evidence, appellate judgment of High Court in that case, in appeal filed against award of trial Court—Such evidence was not allowed either under O. 41, R. 27, Nor could, on facts of case; be admitted under S. 151 of the Code: (1967) 8 Guj.L.R. 37.

Section 44—Notes.

S. 44 applies both to civil and criminal proceedings. A private complainant has a definite role assigned in him under the Code of Criminal Procedure. In cognizable cases brought on private complaint, the Magistrate no doubt controls the proceedings. But even in such cases it is possible for a private complainant to collude with the accused and obtain an acquittal by perpetrating fraud upon the Court. Such an acquittal is a nullity in view of S. 44: 1956 Cr.L.J. 1246: A.I.R. 1956 Vindh. Pra. 30. Section is subject to S. 11, C.P.Code: (1953-54) 58 Cal.W.N. 819: A.I.R. 1954 Cal. 506.

The Court's discretion under S. 44 is not a mental discretion to be exercised *ex gratia*; it is legal discretion to be exercised in conformity to law; the section is remedial; it is intended to provide a simple, speedy and efficient means of relief in a most worthy class of cases: (1980) 1 An.W.R. 295.

S. 44 empowers Courts to ignore orders issued by Courts without authority: I.L.R. 57

Pat. 456; (1933) 35 Bom.L.R. 630: A.I.R. 1933 Bom. 398.

A decree cannot be set aside as fraudulent on the ground that it was imposed on the Court by letting in perjured evidence; it is dangerous to allow such exercise because the passion for litigation prevailing in the country might turn it into almost incurable mania which might go on alternately *ad infinitum*: (1980) 1 An.W.R. 295.

S. 44 contains inbuilt safeguards to salvage orders obtained by fraud and collusion: A.I.R. 1979 Ker. 194.

Previous judgments are relevant under S. 40 to bar a second suit or trial as *res judicata*; such judgments would ordinarily be between the same parties as in the second suit; the earlier judgment can, thus, be shown by the adverse party as not of a competent Court or having been obtained by fraud or collusion. It is only judgments relevant under Ss. 41 and 42 that even a third party can impeach them under S. 44: A.I.R. 1986 P.&H. 197: (1985-2) 88 Punj.L.R. 593.

Though S. 40 does not use the term *res judicata*, it nevertheless refers to its consequences; it is because of S. 40 that the previous judgment relied upon in the subsequent suit to raise the plea of *res judicata* becomes relevant and admissible. S. 44 has, however, the overriding effect as it permits the other party to show that the earlier judgment was incompetent or without jurisdiction or was obtained by fraud or collusion and rendered irrelevant and inadmissible: A.I.R. 1984 All. 216: 1984 All.C.J. 141: 1984 All.W.C. 230 (D.B.).

Where a party puts in evidence a decree and relies on it, it is open to the opposite party to avoid its effect by challenging its genuineness in the same proceeding itself: 1952 All.L.J. (Rev.) 86: 1952 R.D. 114.

A decree can undoubtedly be attacked successfully, without going in appeal, for having been procured by fraud or collusion; a Court's decision whether on construction of documents or inferences from or trustworthiness of evidence, even if wrong, can only be corrected by appeal or review; therefore, the ground for fraud or collusion must be extraneous to everything which has been adjudicated on in the decision. Ground of fraud or collusion for attacking the judgment is not an exception to *res judicata*; it is really a defence, rather independent and outside the scope of that principle because only a judgment not obtained by fraud can be a foundation for *res judicata*: A.I.R. 1993 Ker. 273: (1993) 2 Ker.L.T. 969 (D.B.).

S. 44 clearly says that it is well open to a party to contend that the judgment relied upon by the other party was obtained by fraud; it does not mean that the Court can set aside that decree on such a ground; the section merely relates to procedure and confers no substantive rights: A.I.R. 1978 Mad. 223: (1977) 90 Mad.L.W. 718: (1978) 1 M.L.J. 5.

S. 44 lays down not merely a rule of evidence but also of procedure; it provides not only for impeaching a conclusive judgment on the ground of fraud or collusion but also in the same suit or proceeding in which the judgment has been produced as evidence of its contents; it is not necessary that the judgment should first be set aside in a separate suit or proceeding: (1974-75) 79 Cal.W.N. 936 (1975) 2 Cal.L.J. 209.

S. 44 would apply in any proceeding, civil or criminal, if the decree sought to be challenged is proved by the adverse party. It can not be said that it applies only in a suit for revocation. A judgment in a probate suit is no doubt a judgment *in rem*, but it can be contested on the ground of fraud or collusion. A stranger to a suit in which a decree *in rem* has been passed may impeach that decree for fraud and have it set aside if the fraud be proved. Under S. 44, it is not necessary for the party against whom a judgment is set up to bring a separate suit to have it set aside; he may show in the suit or proceeding in which it is set up against him that it was obtained by fraud. It would be open to a party offering evidence of forgery of a will to prove that the probate decree was obtained by fraud if it were set up against him by the other side instead of admitting the probate and the title of the executor: I.L.R. (1940) Bom. 403: (1940) 42 Bom.L.R. 231: A.I.R. 1940 Bom. 131. *See* also (1944-45) 49 Cal.W.N. 354.

But *see infra*. A grant of a probate is not a decree. It is not a judgment or order and hence S. 44 has no application. The grant cannot be revoked except by the Court which granted it. Therefore, it is not open to a party to adduce evidence to show in another proceeding that the grant of probate was obtained by fraud and that the will in respect of which it was

granted is a forgery: I.L.R. 22 Pat. 756: A.I.R. 1944 Pat. 182.

S. 44 of the Evidence Act is not exhaustive of the grounds on which a decree can be set aside. It deals only with cases in which a party to a suit or other proceeding has been properly represented. The section, therefore, does not cover cases of decrees passed against dead persons and against minors and lunatics who are not represented before the Court in the manner required by law or against whom a decree has not been duly obtained. So a decree can be set aside also on one of these further grounds. Further, in the case of a compromise decree, it can be set aside on the ground of misrepresentation, undue influence, etc.: 1951 All.W.R. (H.C.) 407: 1951 R.D. 203.

Where a party relies on a proceeding of a Tribunal or Court to substantiate his claim, *held*, the opposite party is entitled to show that the proceeding was incompetent and without jurisdiction or was obtained by fraud or collusion: A.I.R. 1982 Ker. 38: 1981 Ker.L.T. 721 (D.B.).

'Fraud' has not been defined in the Act; under S. 25 of the Indian Penal Code, a person does a thing 'fraudulently' if he does it with the intent to defraud but not otherwise; fraud, infinite in variety, defies exact definition; the human mind's fertility in devising new modes of fraud is great; it is not possible to delimit or delineate it; broadly speaking, fraud includes all acts, omissions and concealments involving breach of legal or equitable duty, trust or confidence justly reposed but unduly and unconscientially taken advantage of; deception and deceit is its decisive element. A mediated and intentional contrivance to keep the parties and the Court in ignorance of material facts to obtain the decree amounts to fraud; but a decree cannot be set aside as fraudulent because the claim was false or based on perjured evidence: (1980) 1 An.W.R. 295.

Fraud does not make a judicial act or transaction void but only voidable at the instance of the party defrauded. The judicial act may be impeached on the ground of fraud or collusion in an active proceeding for rescission by way of suit or application for review. But the judgment may also be impeached in a collateral proceeding in which fraud may be set up as a defence to an action on the judgment or as an answer to a plea of estoppel or *res judicata* founded upon the judgment. Where one of the main issues in the case was concerned with the title of the plaintiff to redeem the property mortgaged and the defendants relied upon a previous decree in a money suit and the sale certificate as plea in bar either as estoppel or as *res judicata, held,* S. 40 would apply and the plaintiff would be entitled under S. 44 to show that both the decree and sale in the execution proceedings were vitiated by fraud of the mortgagee and should be ignored and treated as a nullity in the present suit. *Reuben, J.* (*Contra*): The point at issue was whether the mortgagor's reversionary interest in the suit property was still vested in the mortgagor. The defendants denied it and in support of their denial tendered in evidence the sale certificate and the writ of delivery of possession to show that the interest claimed by the plaintiff had been sold in execution and had been purchased by them. There was no attempt here to prevent the Court from taking cognizance of the suit. This was not for supporting a plea of '*res judicata*' but to explain how the property came to be sold in execution. It was admissible for this purpose under S. 43, Evidence Act and, therefore, did not attract the application of S. 44. Further the certificate of sale was not a judgment, order or decree within the meaning of S. 44. The order of the executing Court under O. 21, R. 92, making the sale absolute, if it had been put in evidence, it would not come within the mischief of S. 44. S. 44, therefore, had no application and the plaintiff could not challenge the validity of the execution sale either on the ground of fraud in the execution proceeding or on the ground of fraud in obtaining the decree: A.I.R. 1955 Pat. 66.

Though S. 125 of the Kerala Land Reforms Act, 1963 bars the civil Courts' jurisdiction in the matters decided by the authorities under that Act, *held*, it does not debar the civil Court from deciding whether or not those orders have been obtained by fraud or collusion; most solemn proceedings stand vitiated by the presence of fraud and collusion. To say that a Tribunal or statutory authority can hear a case involving fraud to which that authority itself is a party, is shocking to judicial conscience; if such a view is accepted, it would tantamount to conceding that such orders are above Art. 141 of the Constitution: A.I.R. 1979 Ker. 194.

The plea of *res judicata* presupposes that there is a decree or judgment which has legal

existence or validity. If the decree is a nullity and non-existent in the eye of law, no plea of *res judicata* can be founded upon it, the defendant in the suit in which the decree was passed, just as much as any stranger to the suit, being free under S. 44 of the Evidence Act to show that it is so: I.L.R. (1951) 1 Cal. 168.

A judgment/decree obtained by false evidence or by suppression of evidence is not sufficient ground for setting it aside; Court commits no illegality or irregularity in exercise of its jurisdiction in refusing to record evidence to contradict proof of document which had been duly proved in another suit between same parties and thereby nullify effect of judgment decree in that suit: (1979) 1 Ren.L.R. 446 (Del.).

Where an eviction order under S. 14(1)(*j*) of the Delhi Rent Control Act, was passed on the ground of causing substantial damage to the demised premises without affording an opportunity to the tenant to remove the damage and in execution the objector claiming to be the sub-tenant raised the plea that the eviction order was a nullity, *held*, his *locus standi* to challenge the validity of the eviction order under S. 44 could not be disputed: A.I.R. 1986 Del. 305: (1985) 28 Del.L.T. 418.

Where an employee having purchased a property on behalf of his employer had thereafter released the same in the name of the employer by a registered deed but sued for partition of the property and obtained a preliminary decree without disclosing that he had so released his rights in the property, a fact which came to the knowledge of the defendants when final decree proceedings were pending, *held*, basing his case on fraud, the employee could be summarily thrown out of Court at any stage; he was bound to produce all documents executed by him relevant to the litigation; by with holding the transfer deed, he was guilty of playing fraud on the Court as well as on the opposite party; preliminary decree stood vitiated: A.I.R. 1994 S.C. 853.

Where a deed creating a religious trust was capable of two views as to the nature of dedication and a compromise decree obtained by the parties based on one of the views, not beyond the orbit of reasonable possibility, *held*, could not be impeached as having been obtained by fraud or collusion: A.I.R. 1978 S.C. 1329: (1978) 3 S.C.C. 215.

Where a purchase certificate is issued to a person during the pendency of an appeal under the Kerala Land Reforms Act, 1964 *held*, the appellate authority is competent to decide at the instance of the opposite party under S. 44 that the certificate was issued by an incompetent authority or that it was obtained by fraud or collusion; the appellate authority can also direct the lower authority to ignore the certificate: A.I.R. 1982 Ker. 38 1981 Ker.L.T. 721 (D.B.).

A Hindu marriage solemnised in India and annulled by a decree of divorce obtained by the husband from a foreign Court having jurisdiction in the husband's place stands validly dissolved if neither the foreign Court's competence is impeached nor the decree is assailed as having been obtained by fraud or collusion: A.I.R. 1971 P.&H. 80: (1970) 72 Punj.L.R. 235: 1971 Cr.L.J. 399: I.L.R. (1971) 2 Punj. 147.

Where the High Court in a case of land acquisition issued certain directions to the Government under its writ jurisdiction but the State Government instead of complying therewith issued a fresh notification to initiate fresh acquisition proceedings, *held*, the decision of the writ petition is binding on, and *res judicata* between, the parties unless it could be shown to have been obtained by fraud or collusion: A.I.R. 1988 All. 309: (1988) 14 All.L.R 497: 1988 All.W.C. 1082 (D.B.).

Where a husband had obtained an *ex parte* decree of divorce and the wife after his death sought to set it aside under O. 9, R. 13 of the Code of Civil Procedure, *held*, the proceeding for setting aside the *ex parte* decree were competent; the *ex parte* decree was a judgment *in rem*; it could be set aside under S. 44 on the ground of the Court's lack of competence or having been obtained by fraud; there was thus, no reason why it could not be set aside under O. 9, R. 4, if grounds therefor were made out: A.I.R. 1987 Karn. 241: (1987) 2 Hind L.R. 312.

Where a person transferred his properties for consideration to a third party when dispute about their title was pending in a suit or appeal and later, on compromise in the litigation, ceded half their share to the opposite party and the Consolidation Court and Appellate Authority found him guilty of fraud *held*, the High Court under Art. 226 of the Constitution declined to interfere as it was

concurrent finding of fact, of the Courts below: (1981) 7 All.L.R. 578.

Where a judgment, not *inter partes*, was sought to be adduced as an additional evidence to show that a certain allottee of land was only a non-existent, fictitious, person, *held*, the judgment was not relevant under any of Ss. 40 to 43; only such non *inter partes* judgements are relevant which are either *in rem* or bar the second suit or trial: 1989 Punj.L.J. 711.

Where in a suit for partition of property decree was alleged to have been obtained by suppression of evidence but it was not proved, *held*, decree could not be set aside: (1979) 2 Cal.L.J. 219.

Scope—Certificate of sale obtained by fraud—Whether can be challenged in collateral proceedings by way of defence: A.I.R. 1959 Pat. 508.

Two decrees on same cause of action—Suit to set aside one on ground of mistake not maintainable—S. 44, Evidence Act not applicable—Later decree prevails: A.I.R. 1963 Ker. 217.

S. 44 does not enable an individual creditor to bring a suit for his benefit alone to set aside a transaction contained in a decree on the ground of its being a fraudulent transfer or preference: I.L.R. (1940) Bom. 526: (1940) 42 Bom.L.R. 486: A.I.R. 1940 Bom. 289.

Where the existence of certain evidence was stoutly denied and was afterwards discovered, it is ground for setting aside decree: (1927) 29 Bom.L.R. 1046: A.I.R. 1927 Bom. 510.

Companies Act (1956), Ss. 433, 434, 466—Inability to pay debts—Disputed debts—Company Court if can consider legality of a debt—Procedure to be adopted in the event of genuine dispute regarding a debt in winding-up proceedings—Decretal debt stands on the same footing as any ordinary debt: (1967) 1 Comp.L.J. 172 (Cal.).

Modifies principle, of *res judicata* in S. 11, C.P.Code—That principle will not apply if any of the three grounds mentioned in this section exists: A.I.R. 1967 Ker. 97.

Applicability—Identity of parties—Suit in which one person is authorised to represent others—Such others are parties to the litigation—Decision is binding on all whom such person represented in a suit in subsequent suit, unless former decision can be shown as vitiated under S. 44: A.I.R. 1969 Ker. 26.

A fraud can be impeached collaterally as a defence to an action. Therefore, where a mortgagee refused to accept mortgage money on the ground that he had already purchased the equity of redemption in execution of a previous decree, and in a suit for redemption there was a concurrent finding that the said decree and sale were fraudulent. *Held*, that as the mortgagee had set up the previous decree as a bar to the suit for redemption, it could be impeached collaterally and it was not incumbent upon the mortgagor to have that decree set aside before seeking the redemption: 1957 B.L.J.R. 127.

Judgment—Validity of adoption—Evidence of: A.I.R. 1924 Pat. 298. Applicability and scope of section. *See* I.L.R. 34 All. 150: 13 I.C. 80; 18 Cal.L.J. 264: 21 I.C. 938; 6 I.C. 98; I.L.R. 37 Bom. 563: 20 I.C. 530.

Entry in record-of-rights procured by a fraud—Separate suit to set aside—Necessity for. *See* (1913-14) 18 Cal.W.N. 27.

Right of stranger to a decree affecting his right to show in a subsequent suit that the decree was invalid on the ground of fraud—Maintainability of subsequent suit without setting aside decree. *See* (1916-17) 21 Cal.W.N. 594: 40 I.C. 607. *See* also (1944-45) 49 Cal.W.N. 354.

Fraud—On whom.—A decree obtained by playing fraud on the Court as well as the opposite party, *held*, is a nullity: A.I.R. 1980 N.O.C. 50 (Guj.) (D.B.).

Decree—Setting aside of, on ground of fraud—Fraud must be external and collateral to adjudication and must be of person who secured judgment: 1962 Ker.L.T. 1019: A.I.R. 1963 Ker. 26.

'Any person'.—The expression, 'any party to a suit or other proceeding' occurring in S. 44, must be given a restricted meaning, and must be limited to a person or persons other than one who asserts the fraud or collusion: 1950 Nag.L.J. 226.

A party cannot plead his own collusion to avoid a decree to which he was himself a party: 6 Nag.L.R. 177: 8 I.C. 1179. *See* also 1958 Ker.L.T. 1021: A.I.R. 1959 Ker. 206. But *see infra*. *(Jha, C.J.)*:—S. 44 is wide enough to allow a party to set up even his own fraud to defeat the effect of a judicial order: A.I.R. 1955 Pat. 66. Under S. 44, a party or its successor-in-interest is permitted to avoid the effect of a decree obtained by fraud or collusion by the other party as a basis for the plea of *res judicata* under S. 40; however, since S. 44 does not override S. 43, a collusive decree can still operate as estoppel if requisite ingredients thereof are made out. [A.I.R. 1927 All. 494;

A.I.R. 1971 All. 439, Overruled]: A.I.R. 1984 All. 216: 1984 All.W.C. 230 (D.B.).

Negligence—Whether amounts to fraud or collusion.—S. 44 is the only provision of law under which a judgment or an order or a decree which is sought to be proved with a view to establish the plea of *res judicata* can be avoided. Under that section, a decree can be avoided on the ground that it was obtained by fraud or collusion. The section makes no mention of negligence. Consequently, no decree can be avoided on the ground of negligence, even if negligence be of a very serious character. The protection of minors against negligent actions of their guardians is a special one and the principle cannot be extended to cases of gross negligence by parties litigating on behalf of public trusts. Fraud, like any other fact, can be proved by circumstantial evidence and if the circumstances are such as from which no other inference except that of fraud can be deduced, a plea of fraud cannot be thrown out merely because no direct proof of it was furnished. A party alleging fraud is bound to establish it by cogent evidence and suspicion cannot be accepted as proof. It is not sufficient for him to prove constructive fraud, but he must prove actual positive fraud. Mere want of good faith cannot establish fraud. [A.I.R. 1940 P.C. 98 and A.I.R. 1941 P.C. 93, Ref. to]: A.I.R. 1949 East Punj. 141. Principle of S. 44 cannot be extended to cases of gross negligence—Decree against minor represented by guardian *ad litem*—Gross negligence of guardian—If can form basis of suit by minor to set aside decree—Proof of fraud and collusion—Necessity. *See* I.L.R. 24 Pat. 441 (F.B.). *See* also A.I.R. 1946 Lah 233 (F.B.); 53 Mys. H.C.R. 322 (*Ramaswami, J.*, agreeing with *Jha, C.J.*).

A decree in a suit where a minor is properly represented cannot be avoided merely because of negligence or gross negligence of the minor's next friend or guardian; it does not by itself amount to fraud or collusion. (Case law extensively discussed): A.I.R. 1972 Raj. 241: 1972 W.L.N. 23: 1972 Raj.L.W. 659 (D.B.).

In cases where an inference of fraud or collusion can be drawn from the negligence or gross negligence of the next friend, it would be permissible for a minor to avoid the judgment or decree passed in the earlier proceeding by invoking S. 44 of the Evidence Act without taking resort to a separate suit for setting aside the decree or judgment. Thus, where what was required to be considered was whether the judgment in the earlier declaratory suit fell within the ambit of S. 44 of the Evidence Act, *held*, for that purpose it was necessary to examine whether an inference of fraud or collusion could be drawn from the gross negligence on the part of the next friend of the appellant in conducting the earlier declaratory suit. If such an inference could be drawn he would not be bound by the judgment in the earlier declaratory suit but if such an inference could not be drawn he would be bound by the said judgment till it is set aside by the competent Court in an appropriate proceeding: A.I.R. 1995 S.C. 1440.

Where the earlier suit for partition between the parties was dismissed, despite objection of partial partition, eventually on merits and the plea that the interest of the then minor plaintiff suing through his mother as next friend was not properly protected was negatived, *held*, the judgment in the earlier suit would operate as *res judicata*: (1987-1) 91 Punj.L.R. 424.

S. 44 in terms provides for avoiding a previous decree between the parties on the ground of fraud or collusion; the ground of gross negligence on the part of the minor's next friend or guardian is also such ground. But where the guardian had engaged a senior Counsel to represent the minor and also placed all the relevant material before the Counsel who, however, did not raise a plea available and lost the case, *held*, there was no gross negligence on the part of the minor's guardian; the earliest judgment could not be avoided: (1979) 2 An.L.T. 70 (D.B.).

Non-service of summons.—Simply the fact that a person was not served with the summonses in the previous suit, would not be sufficient to set aside the decree in that suit. Similarly, the fact alone that the previous suit was unfounded, would not be sufficient to set aside that decree. If it is proved that in the previous suit, summonses were not served and the previous suit was false, the Court would have reason to hold that the decree was fraudulently obtained. If it is proved that the summonses in the previous suit were not served and that the defendant of the subsequent suit (plaintiff of the previous suit) abatted the making of a false return, there would be sufficient ground for the Court to hold that it was through the fraud of the present defendant that summonses in the previous suit could not be served on the plaintiff's of this suit (Defendants of the previous suit) and a show was made to the Court that service had been effected with the result that the

Court proceeded *ex parte* and without giving an opportunity to the plaintiff of this suit to be heard, decided the previous suit: 1959 Raj.L.W. 114.

In a suit to set aside a decree obtained by fraud there was a concurrent finding of both the lower Courts that the summons in the previous suit was not served on *A*. It was clear that the signature on the back of the summons was forged by somebody. There was an additional circumstance that in the written statement, *B* said that *A* did receive the summons on 5th March, 1949 and that since that very day, *A* had been in the know of the previous suit. This was verified by *B* from his personal knowledge. *Held*, that if *B* had personal knowledge about the service of summons, it must have been within his knowledge that the signature on the back of the summons was not that of *A* but that it had been put down by some other person and *B* ought not to have suppressed that fact from the Court but it was *B*'s duty to inform the Court that *A* had not put his signature on the back of the summons. That *A* suffered an *ex parte* decree to be passed against *A* in circumstances of this case goes a long way to show that it was through *B*'s complicity that false return was made and this would certainly mean a fraud of *B* in having the *ex parte* decree passed against *A*: 1959 Raj. L.W. 114.

Merely because in an earlier suit an *ex parte* decree was obtained by fraud in service of summons is not sufficient to attract S. 44; fraud envisaged in the section has to be an extrinsic collateral act *de hors* the matters adjudicated upon in the earlier suit; the fraud to be effective under the section must be deliberate, premeditated and positive to successfully keep the Court and the other parts unaware of the true facts; and the decree must be the consequence thereof. A fraud under S. 44 is totally different from the fraud under O. 9, R. 13 of the Code of Civil Procedure: I.L.R. (1977) Cut. 608 (D.B.).

Collusive decree—Binding nature of.—Where an *ex parte* decree was obtained by the plaintiff in collusion with all the defendants, *held*, does not bind the parties; it does not operate as *res judicata*; S. 44 is not an idle provision: A.I.R. 1978 Ori. 111: 45 Cut.L.T. 174: (1977) 2 Cut.W.R. 828.

Consent/compromise decree.—A consent decree by itself is not collusive; it is not inadmissible or irrelevant evidence; such a decree merits consideration on its own as a relevant evidence: A.I.R. 1985 Raj. 95: 1984 Raj.L.R. 385: 1984 Raj.L.W. 421.

Under this section a party to a compromise decree can show that his consent to it was obtained by misrepresentation and fraud without bringing a fresh suit to set it aside: 30 I.C. 639. *See* also 1 Mad.L.W. 208; (1913-14) 18 Cal.W.N. 601; 93 I.C. 385: A.I.R. 1926 Cal. 1. *Held*, that though under S. 44, Evidence Act, the party was entitled to show that the judgment was obtained by fraud, it was not open to him to plead that the compromise on which the judgment was based was vitiated by a mutual mistake as to a material fact: A.I.R. 1957 Cal. 59.

Competency of Court.—S. 44 has nothing to do with the competency of the former Court to try the subsequent suit. It is concerned only with the competency of the former Court to try the former suit and with such competency of that Court as a fact. It follows that if the former suit, as framed, was within the jurisdiction of the Court which tried it, the decree passed therein is a decree of a Court competent to pass it, such as it is. If a suit is subsequently brought for a declaration that the decree is void, having been passed by a Court not competent to try the suit in which the decree was passed, all that the plaintiff is entitled to show under S. 44 is that the former suit, as framed and laid and on the pleadings therein, was beyond the jurisdiction of the Court. If he cannot establish such want of jurisdiction with respect to the particular suit, such as it was, nor prove collusion or fraud, the decree will stand, concluding the matters determined by it. Two suits for ejectment of tenants in respect of tenancies said to carry rents of less than Rs. 500—Suits filed in Court of Small Causes under S. 16 of Rent Control Act—Landlord's case as to their being two separate tenancies not challenged—Suits decreed—Tenants subsequently filing suit for declaration of nullity in respect of previous decrees—*Held*, that decree could not be said to be decree of Court not competent to pass them: (1953-54) 58 Cal.W.N. 819: A.I.R. 1954 Cal. 506.

Though S. 41 makes a final judgment of a competent Court of matrimonial jurisdiction conclusive as to the legal character it confers or takes away but it must be, as laid down in S. 44, a 'competent' Court having jurisdiction over the parties and the subject-matter; even a judgment *in rem* is open to attack on the ground that the Court delivering the judgment *in rem* had no such competence. Judgments *in rem* are, therefore, not inviolable. [A.I.R. 1963 S.C. 1, Rel. on]: A.I.R. 1975 S.C. 105: 1975 Cr.L.J. 52: (1975) 1 S.C.C. 120.

OPINIONS OF THIRD PERSONS WHEN RELEVANT

45. Opinions of experts.—When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting [1][or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, [2][or in questions as to identity of handwriting] [1][or finger impressions] are relevant facts.

Such persons are called experts.

---

1. Inserted by Act 5 of 1899, S. 3.
2. Inserted by Act 18 of 1872, S. 4.

As S. 21 of the Code of Civil Procedure lays down that a decree passed by a Court having no territorial jurisdiction need not always be a nullity; it further provides that if objection as to lack of territorial jurisdiction is not taken at the earliest, it cannot be raised subsequently in appeal or revision; and even if such objection is raised in due time but disallowed, the decree can be set aside only if it has occasioned failure of justice. Therefore, the lack of jurisdiction in ignoring a previous judgement under S. 44 cannot be that of territorial jurisdiction; it must perforce be inherent lack of jurisdiction: A.I.R. 1972 Mys. 338: (1972) 2 Mys.L.J. 123.

The plea that a decree passed by a Court was made without jurisdiction is open to the objector under S. 44 and can be raised at any stage of the proceedings unless there is a bar of *res judicata* or any rule of equitable estoppel against him: I.L.R. 53 All. 747: A.I.R. 1931 All. 689.

Circumstances which restrict jurisdiction of Court—May be proved: A.I.R. 1967 Ker. 97.

Incompetency of a Court—May be proved: A.I.R. 1967 Ker. 97.

Execution proceedings.—S. 44 in terms applies to execution proceedings; thus, where an order obtained under S. 36(2) of the Bombay Tenancy and Agricultural Lands Act, 1958 was obtained with an intent to dispossess a third party in physical possession, *held*, the order could be assailed in execution by the third party and show that it was made upon mistake or fraud: A.I.R. 1973 Bom. 139: 1973 Mah.L.J. 726.

Limitation.—The right as given by S. 44 has not been fettered by any limitation whatsoever and it is manifest that such a right is quite independent of the right to get a judgment or decree, etc., set aside by bringing regular suit for the purpose. A decree or order can be challenged on ground of fraud in a collateral proceedings without any suit for setting aside the decree, irrespective of the time when the judgment was delivered or order or decree was passed: A.I.R. 1970 Pat. 13 (D.B.).

S. 44 is very wide and lays down not merely a rule of law relating to evidence but also a rule of procedure as to how the judgment should be impeached. It not merely declares that the judgment which is conclusive against a party may be impeached by such party on the ground of fraud or collusion. It also lays down that the party seeking to impeach it may impeach it in the very suit or proceeding in which the judgment is proved against him by his opponent. Grammatically, lack of jurisdiction and the taint of fraud or collusion are placed exactly on the same footing in wording of S. 44. There is, therefore, no reason why in the case of fraud or collusion any qualification or limitation should be read into the section and not in the case of want of jurisdiction. The contention that a party may impeach a judgment on the ground of fraud under S. 44 only within a period of three years as provided by Art. 95, Limitation Act, is, therefore, not acceptable: A.I.R. 1955 Pat. 66.

Where a plaintiff sued for setting aside a previous decree as having been obtained by fraud and consequentially possession of the suit property but losing the suit as time barred contended that the principle of S. 44 be followed, the decree be ignored as void and possession be granted to him, *held*, the suit had been so framed that it fell under Art. 95 of the Limitation Act; S. 44 could not be used to circumvent the law of limitation: A.I.R. 1974 Pat. 191.

Section 45—Synopsis.

1. Scope of section.
2. "Science or art"—Meaning of.
3. Expert evidence—General.
4. Expert evidence—Whether requires corroboration.

Illustrations

(*a*) The question is, whether the death of *A* was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which *A* is supposed to have died, are relevant.

(*b*) The question is, whether *A*, at the time of doing a certain act, was by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by *A* commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(*c*) The question is, whether a certain document was written by *A*. Another document is produced which is proved or admitted to have been written by *A*.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

---

5. Examination and cross-examination of experts.
6. Medical evidence—General.
7. Medical evidence—Of age.
8. Blood group test.
9. Conflict between medical/scientific opinion and oral evidence.
10. Report of Chemical examiner/Forensic science laboratory.
11. Nautical assessors.
12. Handwriting.
13. Section 45 *vis-a-vis* section 47.
14. When handwriting expert is not acquainted with language of writing—Effect.
15. Tape recorded voice.
16. Finger-print expert.
17. Thumb-impression.
18. Palm impressions.
19. Foot-print expert.
20. Identification of hair.
21. Dog tracking evidence—Admissibility.
22. Ballistic expert.
23. Type script.
24. Photographs.
25. Technical work.
26. Trade mark/Copyright.
27. Foreign law.
28. Expert opinion regarding value of land.
29. Report of public analyst.
30. Miscellaneous.

---

1. Scope of section.—By reason of the provisions contained in Ss. 73 and 45 of the Evidence Act and O. 3, R. 1, C.P.Code, the Court can direct a party to be present in Court to give a signature, handwriting or thumb impression for the purpose of comparison either by itself or for the purpose of obtaining the opinion of an expert by sending the same to him: A.I.R. 1975 Andh. Pra. 88: (1974) 2 An.W.R. 365: (1974) 2 A.P.L.J. 178; 1976 Rev.L.R. 648: 1976 Cur.L.J. (Civ.) 447 (P.&H.) (D.B.); (1988) 2 Hindu L.R. 1 (Cal.).

The Court can direct any of the parties at the instance of another to give his specimen thumb impression or handwriting, as the case may be; such request cannot be declined merely because it was made by a litigant and could be used as evidence by him. [1976 Cur.L.J. (Civ.) 447: 1976 Rev.L.R. 648 (P.&H.) (D.B.), Rel. on]: A.I.R. 1986 P.&H. 174: (1985) 87 Punj.L.R. 47: 1984 Rev.L.R. 453.

S. 73 read as a whole in the light of S. 45 make it clear that a Court holding an enquiry under the Code of Criminal Procedure into an offence triable by itself or the Sessions Court has the power to direct the accused, in the interest of justice, to give his sample writing for its comparison with his admitted or proved handwriting by an expert chosen or approved, by the Court irrespective of the fact whether his name was suggested by the prosecution or defence; the Court's purpose for adopting such a course is to enable the Court to make comparison between the admitted and questioned documents by the Court as and when the accused is ultimately put up for trial. [1975 Cr.L.J. 1756 (Del.) (D.B.), Reversed]: A.I.R. 1979 S.C. 14: (1978) 2 Kam.L.J. (S.N.) 39.

Protection against testimonial compulsion—Taking of finger impressions of accused

by Investigating Officer against his will—Taking specimen writing or signature in Court with consent of accused—Protection under Art. 20(3) not violated: (1962) 1 Cr.L.J. 19: A.I.R. 1962 Cal. 36. *See* also 1971 Cr.L.J. 1405 (Raj.), cited under Note 20, *infra*.

S. 293, Cr.P.Code prevails over S. 45 of the Evidence Act. *See* 1982 Cr.L.J. 2138: (1982) 84 Punj.L.R. 566.

It is true that the Courts of law are not to play the role of a handwriting or thumb-mark expert but where signature or thumb-mark does not appear to be similar to the one not in dispute the Courts can direct the party placing reliance on the signature or thumb-mark to prove its genuineness by examining an expert; and in other cases where the signature or thumb-mark does not appear to be forged, it is the duty of the party who wants the Court to give a finding to the contrary to prove his case by leading clear evidence including that of an expert: A.I.R. 1956 Bhopal 6.

Expert evidence—Admission of evidence of expert—Fact that he was competent to give expert evidence must be proved—Law does not permit assumption without evidence on material point of competence.

Medi-colegal jurisprudence—Medical expert performing post mortem examination 13 hours after death, reporting *rigor mortis*—No information if there was any element of *cadaveric rigidity* or *spasm present*—*Cadaveric spasm* occurs in cases in which death was immediately preceded by state of great nervous tension or excitement caused by terror or struggle—*Cadaveric spasm* is to be distinguished from *rigor mortis* and is not *rigor mortis*—Medical evidence of the expert, *held*, could not be relied upon—Medico-legal jurisprudence: A.I.R. 1969 Cal. 321.

As an opinion evidence, the evidence of a Sub-Inspector that particular words used in a slip were code words for particular figures cannot be received under S. 45, as the Court is not called upon to form an opinion on the point of Foreign Law, science, art or as to identity of handwriting nor can it be received under S. 49 as the Sub-Inspector did not claim to be an expert having special knowledge of the meaning of the words used in recording betting transactions in American futures: 1954 Cr.L.J. 1347: A.I.R. 1954 Madh. Bh. 145.

2. "Science or art"—Meaning of.—The words science or art in S. 45 of the Evidence Act are to be broadly construed, the term 'science' not being limited to the higher sciences and the term 'art' not being limited to the fine arts. In order to determine whether the particular question be one of a scientific nature or not, and consequently whether skilled witnesses may or may not pass their opinions upon it, the following tests may be applied—Is the subject-matter of inquiry such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without the assistance of experts? Does it so far partake of the character of a science or art as to require a course of previous habit or study in order to obtain a competent knowledge of its nature, or is it one which does not require such habit or study? The study of customs and manners of castes, the areas occupied by them and other connected matters come within the meaning of 'science or art' and persons who have made a special and systematic study of them are experts whose opinions expressed in books are admissible under S. 45 of the Evidence Act: 1947 Nag.L.J. 478: I.L.R. (1947) Nag. 781.

The word 'science' which has been defined in the Universal Dictionary of English language as great proficiency, dexterity, skill based on long experience and practice, is sufficiently wide to include the evidence of an expert. Hence, the world 'science' occurring in S. 45 should be held to be comprehensive enough to include the opinion of the expert in foot-print as well: 1959 B.L.J.R. 442: 1959 Cr.L.J. 1355: A.I.R. 1959 Pat. 534.

Gambling cannot be considered to be either an art or a science within the meaning of S. 45 so as to entitle a Police Officer to go into the witness-box and speak as an expert that in his view, based on experience in other cases, certain harmless documents such as slips, which he calls betting slips are instruments of gaming. Under S. 49 a Police Officer might give evidence that he had a long experience amongst people who indulged in satta gambling in a particular district, and from that experience supported by instances which he should be prepared to give so as to establish his means of knowledge, he was satisfied that a system or code prevailed among such persons, and he might then express an opinion (which would be relevant under the section) that the slips in question were prepared in accordance with that system or code and had a certain meaning. But he is not entitled merely

to express the opinion that unintelligible documents found in the room of a man charged with gambling must be records of gambling transactions. It is for the Court to decide what the documents means: I.L.R. (1937) Bom. 670: (1937) 39 Bom.L.R. 613: A.I.R. 1937 Bom. 385.

Telephony is a science or art and witnesses knowledge of the telephone and of engineering generally places them in a special position and makes them competent to express an opinion upon articles and matters which are largely in use in the department of the telephone and of engineering generally. The evidence of these witnesses is relevant and admissible as opinion of experts and the expert evidence of those witnesses is entitled to very considerable weight if they hold diploma in telephony and engineering and also have a great experience: 184 I.C. 36: A.I.R. 1939 Sind 245. *See* also I.L.R. (1947) Nag. 781.

3. Expert evidence—General.—Who are experts. *See* I.L.R. 32 Cal. 759; A.I.R. 1930 All. 587. An expert, if he sticks dogmatically to his opinion, is liable to be disbelieved. An expert is entitled to more credit if, when cogent reasons are put forth before him in his cross-examination, he revises his own opinion. After all, an expert has come to give his own opinion and not to state facts. An expert should always be prepared to revise his opinion if he finds any cogent reason suggested to him, and his evidence need not be disbelieved on this ground: A.I.R. 1958 Cal. 264.

An expert is one who has acquired special knowledge and skill in any science. His opinion based on observations or experiments is relevant in cases where questions relating to his science arise: (1968) 1 An.W.R. 178: 1968 M.L.J. (Cr.) 131.

The term 'expert' in law has a special significance; the Court has in each case to decide whether the 'expert' witness is, taking into account his skill, study and experience, really an expert; what is admissible under S. 45 is the opinion of an expert in the field wherein he or she has acquired special knowledge; outside his specialised field, his evidence ceases to be expert evidence and falls outside the purview of S. 45: 1987 M.P.L.J. 214.

Once the expert's opinion is accepted, *held*, it becomes finding of the Court: (1992) 3 S.C.C. 204: (1993-1) 41 B.L.J.R. 129.

The evidence of an expert must be based on his own observations, and what he finds. Hearsay evidence cannot be admitted: A.I.R. 1974 S.C. 1193: 1975 S.C.C. (Cr.) 530: 1974 Cr.L.J. 908.

The expert opinion is only an opinion evidence on either side and does not aid the Court in interpretation: A.I.R. 1994 S.C. 120.

How differs from ordinary evidence. *See* 3 Nag.L.R. 1: A.I.R. 1924 Nag. 183. When evidence, the basis of the expert's opinion, should be placed before the Court: I.L.R. 56 All. 428: A.I.R. 1934 All. 273.

The evidence of an expert witness has to be tested like that of any other witness for even expert witnesses are liable to make mistakes. At the same time, if a person with special professional qualifications, such as a doctor or an engineer, is called in to make professional examination of a person or a building, and is then asked to give the results of his examination as evidence in Court it is hardly fair to treat him as being on the same footing as those persons who may be said to make a profession of giving evidence nor is it necessary to suppose that he must necessarily be suffering from undue bias merely because he has professional qualifications: A.I.R. 1940 Lah. 505.

The experts' evidence is like any other evidence; ordinarily not conclusive, its weight has to be judged alongwith other evidence; it cannot be taken as substantive evidence; it merely corroborates other evidence: A.I.R. 1989 All. 133 (D.B.); 1980 All.W.C. 535: 1980 All.Cr.R. 358: 1980 All.L.J. 230; 1979 All.W.C. 12.

Expert opinion is called for if the Court requires it; but it does not mean that the procedure of examining the expert must be resorted to in every case, after all, an expert opinion is not a conclusive one: (1989-1) 103 Mad.L.W. 552 (D.B.).

Expert evidence can never be conclusive because after all it is an opinion evidence. The evidence of experts cannot be rejected simply because they are not decisive in their conclusions: A.I.R. 1966 Goa 17 (F.B.); A.I.R. 1960 Mys. 220.

Expert evidence is nearly always a weak type of evidence much more so in the case of an expert who has not sufficient knowledge on the subject: A.I.R. 1956 Bom. 129.

The opinion of an expert engaged by a party suffers from the defect that it is given by

a remunerated witness. He knows beforehand why he has been called and what the party calling him wishes to be proved. It is not improbable that he has an unconscious bias in favour of the party. These circumstances to great extent detract from the weight to be attached to such witness opinion: 1959 Cr.L.J. 893: A.I.R. 1959 Pat. 328.

Value of expert's opinion when one expert is contradicted by another: (1932) 34 Punj.L.R. 788 (2): A.I.R. 1933 Lah. 885.

Where two reports of the contents of an export consignment were contradictory, one based on scientific analysis and the other disclosing no basis, *held*, the report on scientific basis is to be preferred: 1985 Tax.L.R. 2584 (Mad.).

S. 45 does not say that an expert's opinion is conclusive; rather, it is well-recognised that an expert's evidence is only an opinion; it is upto the parties to let in evidence challenging correctness of the expert's opinion and upto the Court to form its own conclusion on evidence. When direct evidence is forth-coming, the Court is not precluded from acting on it in preference to the expert's report. The value of the evidence of an expert would vary according to circumstances and his reasoning in support; the value of an expert's opinion should be adjudged in the same way as the evidence of any other witness. The expert's reasons are always open to scrutiny and it is always open to the opposite party to place materials before the Court to shake the foundation on which the expert opinion is formed either in the form of his cross-examination or counter-evidence of another expert. The Court should not reject the request for sending the document for the opinion of another expert. [1961 Ker.L.T. 960, Rel. on]: 1978 Ker.L.T. 872.

Evidence of an expert, like any other witness, has to be appreciated in accordance with law and accepted only if found trustworthy. An opinion evidence of an expert after its acceptance by the Court becomes the decision of the Court and ceases to be an opinion evidence of the expert. Under the circumstances, evidence of an expert also has to be interpreted like any other evidence. In so doing, the effort should be made to explain the same and correlate with the evidence of eye-witnesses. It is only when the two become irreconcilable that the question of accepting one or the other arises and not otherwise: 1994 Cr.L.J. 494: 1994 M.P.L.J. 57 (D.B.).

If the oral evidence leads to a positive conclusion one way or the other, the opinions of experts have to yield or have to be accepted or rejected in accordance with the finding arrived at on an appraisal of direct oral evidence; it is only where there is no direct evidence that expert evidence becomes relevant, but if the direct evidence of the witnesses is clear and there is nothing improper or incredible about their evidence and the same is believed by the trial Court which had the opportunity of seeing the witnesses and watching the demeanour, and there is no other evidence on the basis of which the direct evidence of those witnesses could be discredited as false, the opinion of the experts cannot outweigh such direct evidence: A.I.R. 1982 All. 323.

When direct evidence is led and accepted it is hardly necessary to consider expert opinion, though direct evidence can be appreciated in the light of expert opinion: A.I.R. 1952 Kutch 4. The guilt or innocence of the accused has to be determined by the Tribunal appointed by law and not according to the test of anyone else: I.L.R. (1953) Mys. 171: A.I.R. 1953 Mys. 80.

Expert evidence not based on well-defined inexorable laws of nature cannot be taken as decisive—Especially when there is direct evidence opposed to it: 96 I.C. 641: A.I.R. 1926 Lah. 313. *See* also 29 O.C. 1: A.I.R. 1925 Oudh 413.

Expert evidence and direct evidence—Value: A.I.R. 1965 Madh. Pra. 107.

The expert's opinion does not take away the common man's judgment—They have the right to think and judge things from day to day experience: I.L.R. (1954) 6 Assam 428: A.I.R. 1956 Assam 15.

When trial Court permits the evidence of an expert to be brought on the record on a technical matter, it does not abdicate its function to judge to itself whether the opinion of an expert is correct or not on a matter at issue. [A.I.R. 1957 S.C. 49, Rel on; A.I.R. 1935 Lah. 555 and A.I.R. 1925 Cal. 485, Disting.]: A.I.R. 1980 All. 294.

Expert evidence is good even if not decisive; the Court is not bound by such evidence but must consider it alongwith other evidence and circumstances on record; the Court may not place any reliance on expert opinion if it is unsupported by reasons: 1987 M.P.L.J. 214.

It would be better if in the reports, reasons for the opinion expressed are given. This should be a simple matter as the expert must keep some note of the points where he finds tallying at the time when he makes his examination of the documents for the purpose of expressing his opinion. The setting out of the reasons at length will help to clarify his ideas and it will furnish a valuable guide to the parties and to the Court in testing the value to be attached to that opinion. It would also be fairer in the persons against whom the opinion is to be used that the reasons for that opinion are definitely expressed: 1953 B.L.J.R. 486: A.I.R. 1954 Pat. 131.

Opinion of experts—Opinions must be supported by reasons and it is the reasons and not *ipse dixit* which is of importance in assessing the merit of the opinion—Doctor's opinion in the form of reply to certain written queries made by Sub-Inspector—Doctor not examined as a witness—Nature of queries uncertain—*Held*, in the circumstances that the doctor's opinion without reasons, was not to be accepted: (1966) 68 Bom.L.R. 941: 1967 Mah.L.J. 25: 1968 Cr.L.J. 453: A.I.R. 1968 Bom. 127.

It is not necessary for an expert to give reasons at great length in support of his opinion. It is sufficient if the expert gives its reasons briefly: 1956 All.W.R. (H.C.) 724: 1956 All.L.J. 910: (1957) 2 L.L.J. 177: 1957 Cr.L.J. 108.

But depositions of expert witnesses as to the result to their opinions and as to the effect of them does not come within the domain of expert evidence at all: A.I.R. 1933 P.C. 26: 64 M.L.J. 193 (P.C.). Value to be attached to such evidence. *See* I.L.R. 11 Bom. 89; I.L.R. 29 Cal. 587; I.L.R. 15 Cal. 589; (1932) 34 Punj.L.R. 719: A.I.R. 1933 Lah. 561.

Expert should put before Court all the materials which induce him to come to the conclusion, so that Court, although not an expert, may form its own judgment on those materials: (1969) 10 Guj.L.R. 253: A.I.R. 1969 Guj. 48.

The expert witness is expected to place before the Court all materials including the data which induced him to come to the conclusion; he should also enlighten the Court on technical aspects of the case so that it may form its own judgment with due regard to the expert's opinion. [A.I.R. 1977 S.C. 1307, Rel. on]: (1992) 3 S.C.C. 204: (1993-1) 41 B.L.J.R. 129 (D.B.). *See* also 1989 Raj.Cr.C. 125.

Where the so-called 'expert witnesses' give no data in support of their opinions their evidence should be rejected: A.I.R. 1931 Lah. 364. *See* also 131 I.C. 771: A.I.R. 1931 P.C. 189 (P.C.); A.I.R. 1959 S.C. 488.

A Court cannot blindly accept a report of the expert. It is the duty of an expert to furnish the Judges the necessary criteria for testing the accuracy of his conclusions so as to enable the Judge to form his own independent judgment by application of the criteria to the facts proved in evidence: (1979) 5 All.L.R. 170: 1979 All.W.C. 209: 1979 All.Ren.Cas. 214: 1979 All.L.J. 38. *See* also 1979 All.Ren. Cas. 145.

A valuer must give basis for his opinion: (1976) 1 Karn.L.J. 1.

It is not for an expert to tell the Court what would be the chances of a man falling out of the window from which the assured was said to have fallen out: A.I.R. 1956 Bom. 633.

Where reliable and trustworthy evidence is available, much weight is not to be given to expert opinion: (1984) 4 Guj.L.H. 46.

The general rule is that though the Court should not lightly interfere with the opinion evidence of experts (including those belonging to academic bodies), it may interfere only where the expert view is such that no reasonable person would normally take: A.I.R. 1981 All. 287 (D.B.).

Where it finds the experts' conclusions as unsatisfactory, the Court are not bound to accept their report even if it is submitted by a Committee of Experts; while considering such opinions, it should bear in mind that "clearly it is not the province of the expert to act as Judge or jury"; the ultimate decision has to be by the Judge. Expert opinions must be supported by reasons; it is the reasoning and not the blank finding that is important; experts give evidence but do not decide the issue: A.I.R. 1994 Ker. 308 (D.B.).

Value and acceptability of the opinion depends upon facts upon which it rests and upon the validity of process by which the conclusion is reached: (1976) 1 Karn.L.J. 220.

What weight is to be attached to expert's opinion depends on its reasonableness and scientific quality and not on expert's practice length: A.I.R. 1984 N.O.C. 77 (All.).

Though the witness did not possess any technical qualifications inasmuch as he had neither obtained a degree nor a diploma in

photography, his experience for over 25 years in photography was sufficient enough to call him as an expert: 1958 M.L.J. (Cr.) 341: I.L.R. (1957) Mys. 177: A.I.R. 1958 Mys. 150: 1958 Cr.L.J. 1489.

Where, the handwriting expert was neither having such qualifications nor experience so as to accept him as a handwriting expert, *held*, as his deposition exceeded the limits of an expert and supported the party producing him in matters which were not within his province, same was liable to be rejected: A.I.R. 1977 S.C. 1694: 1977 U.J. (S.C.) 349: (1977) 2 S.C.C. 501: (1977) 3 S.C.R. 400.

Party can examine private expert on his own behalf without appointment by Court—Appreciation of such evidence: A.I.R. 1965 Pat. 29.

Generally speaking it is not permissible to call a witness to explain to the Court what a document means unless such witness is an expert. It is for the Court to ascertain what the document means though, no doubt, a witness may suggest methods by which an intelligent meaning can be given to the document: I.L.R. (1939) Bom. 434: (1939) 41 Bom.L.R. 548: A.I.R. 1939 Bom. 339.

Opinion must be of person specially skilled and expressed in Court—Opinion given in a letter is not relevant fact under S. 45: (1960-61) 65 Cal.W.N. 1206.

Scope. *See* Evidence Act (1872), S. 73: (1959-60) 64 Cal.W.N. 1067: A.I.R. 1961 Cal. 300.

Under S. 45, the opinion of an expert on any point of science is always admissible and the Deputy Director of Health Services and the Chemist are experts and the record of their opinion on the scientific point involved would be admissible when the persons concerned are themselves examined as witnesses: 1958 Cr.L.J. 574 (Cal.).

An expert can give his opinion as to the quality of jute. It is, however, difficult to follow how an expert can give an opinion as to whether it should be classified under one item or another of Schedule II of the Sea Customs Act. It is a matter either for the Court or the customs authorities or both:(1960-61) 65 Cal.W.N. 1206.

Where a person working in the Irrigation Department was specifically entrusted to assist the investigation, *held*, he is person having special knowledge about the jungle clearance work in the course whereof the offence under S. 6(1)(*b*) of the Prevention of Corruption Act was committed; he is, strictly speaking, not an 'expert' but in view of his special knowledge, his opinion would be of an expert under S. 45; when his opinion was not reduced into writing by the investigating agency but prepared by himself, it can be looked into as a technical report by the Court; S. 162 of the Code of Criminal Procedure is not attracted: (1992) 1 An.W.R. 16: 1993 Cr.L.J. 558.

Though certificate issued by the local Horticultural Officer to the effect that cultivation of paddy by the defendant would affect roots of fruit yielding trees on plaintiff's adjoining land, may not be treated as expert evidence, *held*, it can be used for arriving at a just decision when no objection was raised of its admissibility in the first appellate Court: (1981) 2 Karn.L.J. 124.

An Agriculture Extension Officer of the Panchayat Samiti who is required to deal with the fertilizer's supply to the cultivators and its use, *held*, can be termed as an expert within the meaning of S. 45: 1977 Cr.L.R. 164 (Raj.).

Where bars allegedly of gold were recovered and were confiscated under S. 111(*d*) of the Customs Act, 1962 and a criminal complaint was lodged before the District Magistrate for offences punishable under S. 135(*b*) of the Customs Act read with S. 85(*ii*) of the Gold (Control) Act, 1968, and in the trial, a goldsmith testified after rubbing the bars on the touchstone that they were of gold of 24 carats' purity, *held*, it could not be said that the prosecution had not established that the bars were of gold; it is well known that professional goldsmiths are able to find out whether a piece of metal is gold or not by examining the colour of the rubbing streak on the touchstone; even if such an assessment of its purity may not be exact and not a strictly scientific way of proving that the bars were of gold. [1973 Cr.L.J. 1551 (Ker.), Reversed]: A.I.R. 1983 S.C. 168: (1983) 1 S.C.C. 370: (1983) 12 E.L.T. 193: 1983 Cr.L.J. 225: (1983) 1 Crimes 629. *See* also (1971) 2 Mys.L.J. 422. *See* however (1979) 2 Karn.L.J. 458 (D.B.) [Where the prosecution examined a goldsmith to prove that what was seized was in fact gold, *held*, it should be shown that he is specially skilled or that he had made a special study of assaying gold].

A gold dealer is competent to testify about gold's purity; his opinion is entitled to some weight, even if he had not tested it like a regular scientist, unless something negatives his opinion: 1976 Cr.L.J. 165 (Ker.). *See* also 1987 Cr.L.R. 297 (Raj.).

Word used in gambling—Evidence of Police Officer and punter not admissible as

expert evidence—As gambling is not a science or art, section will not apply to the case: (1963) 2 Cr.L.J. 87: (1963) 4 Guj.L.R. 733. *See* also A.I.R. 1937 Bom. 385: I.L.R. (1937) Bom. 670: 39 Bom.L.R. 613, cited under Note 2, *supra*.

Bombay Prevention of Gambling Act (IV of 1887), Ss. 3 and 7—Instruments of gaming—There is nothing in Act IV of 1887 to suggest that in order to prove that articles seized are 'instruments of gaming' it is duty of prosecution to examine an expert in each and every case: 1966 M.L.J. (Cr.) 759: 1966 Cr.L.J. 1227: A.I.R. 1966 S.C. 1633.

The opinion of the Imperial Serologist is entitled to great weight: 34 Cr.L.J. 1009: A.I.R. 1933 Oudh 265. Validity of conviction based on expert evidence: 2 All.L.J. 44; I.L.R. 39 Cal. 245; I.L.R. 36 Mad. 159: 22 M.L.J. 270; 18 P.W.R. 1912.

Expert evidence on question of obscenity of books: (1965) 67 Bom.L.R. 506: (1965) 2 Cr.L.J. 8: A.I.R. 1965 S.C. 881.

Advice of elder brethren—Admissibility as expert evidence: (1956) 2 All E.R. 915.

Certificates, Reports by experts—Value of—Opinion of expert must be given orally and mere report or certificate by him cannot be evidence unless statute so provides—If party does not object to admission of such report of certificate, party can be said to have waived proof of it and not its relevance: (1967) 2 An.L.T. 141: A.I.R. 1967 Andh. Pra. 338.

Opinion of experts—Value of—Their depositions can be taken in evidence but not their certificates—Certificates are extra-judicial and can be used by witness only as an aid to his memory: 1970 Raj.L.W. 68: 1970 Acc.C.J. 267.

As to admissibility of opinion evidence of persons not experts. *See* 18 Punj. Re. 1915 (Cr.): 12 P.W.R. 1915 (Cr.); A.I.R. 1930 All. 587 (not admissible). As to Government experts, *see* 147 P.L.R. 1912: 13 Cr.L.J. 563.

Evidence of an Excise Inspector that liquor recovered from accused was illicit liquor is an expert opinion. *See* 1984 Tax.L.R. 2403: 1983 All.Cr.R. 141: 1983 All.W.C. 264: 1983 All.Cr.C. 194; 1995 Cr.L.J. 1128 (Ori.) [An Officer who has acquired sufficient experience as an official of the Excise Department can tender evidence that the liquid seized is illicitly distilled liquor.]

An Excise Inspector, with 21 years service as such and having tested lacs of samples of liquor and illicit liquor, *held*, he could be treated as an expert witness: A.I.R. 1974 S.C. 639: 1974 Cr.L.J. 590: (1974) 4 S.C.C. 247.

Where an Excise Inspector testified that liquid seized was liquor but the prosecution failed to prove that the training or length of service of witness had any direct connection with test of liquor, *held*, the failure of the prosecution to prove the same was fatal to the prosecution: 1977 Cr.L.J. 528 (P.&H.) (D.B.).

Constable claiming to be expert in testing liquor—No evidence about nature of training received by him—No qualifications mentioned—No data given from which he arrived at his conclusion—Evidence neither legal nor sufficient—[Bombay Prohibition Act (XXV of 1949), Ss. 66 (1)(*b*) and 83]: (1965) 67 Bom.L.R. 226: I.L.R. (1965) Bom. 257: A.I.R 1967 Bom. 61.

Where accused was convicted for carrying illicit liquor in motor tube but sample was not sent to chemical analyst instead it was examined by excise Sub-Inspector who was not specially skilled or trained Officer to come to any conclusion in that regard and conviction was based on his evidence alone, *held*, conviction was unsustainable: 1994 Cr.L.J. (N.O.C.) 350 (Ori.).

Tort—Negligence—Collision—Damage to launch waiting for repairs in dock—Suit for damages—Pre-collision value of launch—Onus to prove—Factors to be considered—Opinion of the expert—When accepted: A.I.R. 1967 Cal. 191.

Public document—Report of Stamp Expert as to date of issue of stamp—Not a public document: (1965) 7 Ori.J.D. 49.

Certificate of Central Food Laboratory expressing opinion—Data in certificate of no assistance in recording finding—Opinion not conclusive: (1964) 2 Cr.L.J. 125: A.I.R. 1964 All. 349.

Expert depending on probabilities and not on firm conviction in his ultimate opinion—Opinion carries little value: (1968-69) 73 Cal.W.N. 467: 1970 Cr.L.J. 403.

Possession of contraband opium—Evidence—Failure to subject article to chemical analysis not fatal to prosecution in every case—Seizure of coagulated juice of capsules of poppy—Persons familiar with article can prove that it is opium by ordinary tests of sight and smell: 1963 M.P.L.J. 830: (1964) 1 Cr.L.J. 44: A.I.R. 1964 Madh. Pra. 11.

Prosecution for possession of opium—Analytical examination of article seized not necessary in every case: (1964) 1 Cr.L.J. 453 (Madh. Pra.).

Proceedings for fixation of standard rent—Finding of fact by lower Court based not only on evidence but on proper consideration of entire material on record—Both Courts below exercising their discretion properly in refusing to permit a party to produce handwriting expert on grounds of delay—Remand: (1966) 68 Punj.L.R. 117: 1965 Cur.L.J. 896.

Nuisance—Proof—Expert evidence—Necessity: A.I.R. 1968 Cal. 91: 1968 Cr.L.J. 929; A.I.R. 1968 Goa 72.

Proof of wills—Onus is on propounder: 1968 Ker.L.J. 123.

4. Expert evidence—Whether requires corroboration.—The expert's evidence is only a piece of evidence. A Judge of fact will have to consider that evidence along with the other pieces of evidence. Which is the main evidence and which is the corroborative one depends upon the facts of each case. It is the duty of the trial Court to come to a conclusion on a question of fact on a consideration of the entire evidence including that of the expert: (1954) 2 M.L.J. (Andhra) 39: A.I.R. 1954 Andhra 39; 1958 B.L.J.R. 64: A.I.R. 1958 Pat. 353.

The value of the expert evidence depends largely on the cogency of the reasons on which it is based. In general, it cannot be the basis of conviction unless it is corroborated by other evidence: 1936 All.L.J. 317: A.I.R. 1936 All. 165.

There is no rule of law saying that expert's opinion cannot be accepted unless it is corroborated by other evidence; whether such corroboration is necessary or not is to be decided on the facts and circumstances of each case. [A.I.R. 1980 S.C. 531, Foll.]: (1992) 1 Ker.L.J. 212 (D.B.).

It is going too far to say that the Court must insist upon corroboration of the evidence of a finger-print expert. The Court cannot hold a person guilty merely because an expert comes forward and says that in his opinion the accused must be guilty. The Court must satisfy itself as to the value of the evidence of the expert in the same way as it must satisfy itself of the value of other evidence. The Court has to rely on the expert upon two distinct points, first of all, on the question of similarity between the marks, and secondly, on the point which is one for expert opinion, whether it is possible to find the finger-prints or thumb-impressions of two individuals corresponding in as many points of resemblance as are shown to exist between the impressions found in the case before the Court and those of the accused. When the expert tells the Court that it is impossible to find so many characteristics identical in the finger-prints of two persons as are found in the case, and when that statement entirely agrees with what one has read on the subject in scientific books, the Court need not hesitate in accepting the opinion: I.L.R. 60 Bom. 187: (1936) 38 Bom.L.R. 160: A.I.R. 1936 Bom. 151.

Conviction cannot be based solely on opinion of handwriting expert without any independent corroboration. [1980 Cr.L.J. 396 (S.C.) 1984 Cr.L.J. 1289 (Ori.), Rel. on]: 1985 Cr.L.J. 1401; A.I.R. 1978 Cal. 4 (D.B.); (1990) 2 Ker.L.T. 68 (S.N.); (1992) 1 Ker.L.T. 878.

It may be that normally it is not safe to treat expert evidence as to handwriting as sufficient basis for conviction. It may be, however relied upon along with other various items of external and internal evidence relating to the documents in question: 1957 Cr.L.J. 559: (S. A.I.R. 1957 S.C. 381.

It is well settled that though the opinion of a handwriting expert is relevant on the question of handwriting of a person, it is not conclusive unless corroborated by clear and direct or circumstantial evidence: (1970) 36 Cut.L.T. 1251; (1989) 1 Karn.L.J. 273 (D.B.).

Nothing in the Act justifies the Court to assume that a handwriting expert's opinion is unworthy of credit unless corroborated; under S. 3, a fact is said to be proved if on materials before it, the Court believes it to exist or considers its existence so probable that a prudent man ought under the circumstances to accept its existence; artificial standards of proof are not warranted. Thus, corroboration may not invariably be insisted upon before acting upon the handwriting expert's opinion, though the Court may require it in varying degree in appropriate cases; the Court should proceed cautiously, probe reasons for the expert's opinion, consider all other relevant evidence before finally accepting or rejecting the opinion evidence: A.I.R. 1980 S.C. 531: 1980 Cr.L.J. 396: (1980) 1 S.C.C. 704 (1980) 2 S.C.R. 249: (1980) 1 Karn.L.J. (S.C.) 115.

There is no hard and fast rule laying down that the opinion of a handwriting expert should not be accepted without corroboration. It is only a rule of caution that the Court require

corroboration simply because opinion is after all an opinion. But at the same time, if the opinion is well reasoned, the Court can act upon it even in the absence of any corroboration: 1977 All.Cr.R. 401: 1977 All.W.C. 55.

It is well established that it is unsafe to base a judgment purely on expert opinion without substantial corroboration. In other words, a Court is required to satisfy itself whether the opinion of the handwriting expert can be safely acted upon: 1973 Cr.L.J. 76; 1986 All.W.C. 356.

A decision as to the genuineness of a document cannot be founded solely on the expert opinion; the expert opinion must get support from other evidence so that it may be relied on: A.I.R. 1976 Cal. 224: (1975-76) 80 Cal.W.N. 278 (D.B.).

A conviction cannot be based on an expert's comparison, if it is not supported by corroborative evidence: I.L.R. 36 Mad. 159. It is a rule of law that it is extremely unsafe to base a conviction upon the opinion of handwriting experts without substantial corroboration: A.I.R. 1952 Cal. 422; A.I.R. 1977 S.C. 1091: 1977 Cr.L.J. 711.

Where the charge against the accused is one of forging a writing, as a rule it is imprudent to convict him solely on the basis of the expert testimony.

But it is merely a rule of caution and not an absolute rule of law. There is nothing in law to prevent the Court from recording a conviction on expert evidence alone. The reason is that the identification of handwriting is an imperfect science. There the margin of error is great. Experts often give dogmatic opinions unsupported by reasons. The value of the expert evidence, however, varies with the circumstances of each case and the reasons given by him in support of his opinion. Its value is to be judged with the same yardstick with which the evidence of any other witness is appraised. It is to be seen how far it fits in with the surrounding circumstances and the natural probabilities of the case. If in a given case the evidence of the expert is materially corroborated and confirmed by the other evidence, there is nothing in law to debar the Court from recording a conviction of the accused on the basis of such expert testimony: 1969 Cr.L.J. 932: A.I.R. 1969 Punj. 225.

The expert's evidence as to handwriting is opinion evidence and it can rarely, if ever, take the place of substantive evidence. Before acting on such evidence it is usual to see if it is corroborated either by clear direct evidence or by circumstantial evidence. Where the question is whether the will was executed on the date on which it purports to have been executed and there are no suspicious circumstances attached to the will, the mere opinion of the handwriting expert that it was executed much later cannot override the positive evidence of the attesting witnesses especially when he has not applied any chemical tests which according to his own opinion are essential: A.I.R. 1964 S.C. 529.

There is nothing in the Evidence Act which requires the evidence of an expert in any particular case, *e.g.*, the evidence of a handwriting expert on disputed signatures, to be corroborated before it can be acted upon as sufficient proof of what the expert has stated. The question as to how much reliance a Court may place on the statements of any witness depends on the facts and circumstances of the particular case. The Court must satisfy itself as to the value of the evidence of the expert in the same way as it must satisfy itself of the value of other evidence. The Court should be careful not to delegate its authority to a third party, and should itself be satisfied about the genuineness or otherwise of a disputed signature and not to hold it genuine or forged merely because an expert has given his opinion: I.L.R. (1944) Kar. 305: A.I.R. 1945 Sind 4.

Opinion of handwriting expert or fingerprint expert is not conclusive in absence of other corroborating evidence: (1968) 1 Mys.L.J. 457: 1968 M.L.J. (Cr.) 226.

5. Examination and cross-examination of experts.—Witness produced before Court—Party's right to have him examined. *See* (1957) 2 An.W.R. 242.

It is not satisfactory to examine an expert witness on commission and not in presence of the accused. The evidence of an expert has always to be carefully weighed but when given on commission its value is considerably reduced: 108 I.C. 369: A.I.R. 1928 Lah. 533.

The opinion sent by the expert in writing cannot prove itself. Unless the expert stepped into the witness-box, so as to enable the opponent to cross-examine him in reference to that opinion, the opinion expressed by him in a communication to one of the parties cannot be treated as evidence under the Evidence Act: 1956 Cr.L.J. 1069: A.I.R. 1956 Bom. 617.

The cross-examination of a witness is 'acting' and not 'pleading' and, hence, there is no objection in specific cases for an expert being allowed under special power-of-attorney to be employed for the cross-examination of an expert in the same line of business on the other side: 1942 Nag.L.J. 449.

It is necessary that the expert should be subjected to cross-examination; he is, like any other witness, fallible; the real value of his evidence is his rightful inferences drawn from what he has himself observed and not his mere surmises. Before his testimony becomes admissible, his competence as an expert must be shown either showing that he was possessed of necessary qualification or that he had otherwise acquired special skill by experience: A.I.R. 1989 All. 133 (D.B.).

Where the expert is not examined and the other party had no opportunity of cross-examining him, the report of the expert cannot be admitted in evidence: 141 I.C. 767: A.I.R. 1933 Pat. 159; A.I.R. 1945 All. 142.

But where the lower Court had based its decision on the opinion of the handwriting expert though he had not given sworn testimony in support of the report, *held*, that the objection to the evidence being received could not be taken for the first time in revision: (1933) 35 Punj.L.R. 109: A.I.R. 1934 Lah. 230. *See* also I.L.R. 11 Pat. 782: A.I.R. 1932 Pat. 352.

When the report of the expert is produced and marked as an exhibit, the accused cannot argue that he did not get an opportunity to know the contents of the report at any time. Thus, where the accused even after his examination under S. 313, Cr.P.Code did not ask for an opportunity to cross-examine the expert, *held*, non-furnishing of details contained in the report to the accused was not fatal to the prosecution case: 1994 Cr.L.J. 3562 (Ker.) (D.B.).

Expert evidence—Whether necessary—Examination by handwriting expert is not necessary in every case of disputed writing and no adverse inference can be drawn for not obtaining expert's opinion in such case: 1967 M.L.J. (Cr.) 609: (1967) 1 S.C.R. 595: A.I.R. 1967 S.C. 450; A.I.R. 1967 Mys. 210: (1967) 1 Mys.L.J. 548: 1967 M.L.J. (Cr.) 501.

Where only evidence relied in defence was identity of the handwriting, *held*, in the absence of the handwriting expert's testimony, it is rather too much for the Judge to use his own eyes for comparing the admitted and disputed handwritings: A.I.R. 1988 Del. 39: (1988-2) 94 Punj.L.R. 1.

Though S. 45 as it is makes the mere opinion of an expert as sufficient, taken to its logical end it might as well render unnecessary the underlying reasons for the opinion; stretching the section so far is not proper for the accused is entitled to know and have the copy of the handwriting expert's report in advance if the prosecution relies upon the same; otherwise, he would not be able to cross-examine the expert properly: (1982) 23 Guj.L.R. 116: (1981) 1 Guj.L.H. 373: 1982 Cr.L.J. 763 (D.B.). The accused, however, is not entitled to claim as of right the photographic enlargements of disputed and admitted writings made by the handwritings expert for giving an opinion in respect thereof: (1971) 12 Guj.L.R. 167.

If a finger-print expert has not been cross-examined as to the grounds, of his opinion and as to the test to which he had put a particular finger-print, the weight to be attached to such witness's evidence cannot be diminished by applying to it, considerations to which the witness's attention was never directed: 21 Cr.L.J. 257: 55 I.C. 273 (P.); (1930-31) 35 Cal.W.N. 863: A.I.R. 1931 Cal. 441. *See* also 97 I.C. 335: A.I.R. 1926 Pat. 575; (1925-26) 30 Cal.W.N. 373: A.I.R. 1926 Cal. 531.

There is no rule of law as to whether a conviction can be based on the unsupported testimony of a finger-print expert. It is a matter of caution whether a Court will act on such unsupported evidence or not: 1953 B.L.J.R. 488: A.I.R. 1954 Pat. 131.

Conviction based on the sole testimony of finger-print expert though not safe, yet legal: A.I.R. 1928 Pat. 129: I.L.R. 6 Pat. 305.

Where the report of the finger-print expert was used as evidence without examining him as a witness in the Court and the accused too had not applied to summon the accused—which the Court on such application was bound to do—*held*, the accused's grievance against use of the report as evidence was without any substance: A.I.R. 1975 S.C. 905: (1975) 1 S.C.C. 797: 1975 Cr.L.J. 778.

Report of Government analyst is not admissible unless he is examined: 1968 Cr.L.J. 1561: A.I.R. 1968 Madh. Pra. 238 (F.B.).

Article duly submitted for chemical examination — Chemical Examiner not examined — Report of Chemical Examiner still admissible in evidence: (1965) 1 Cr.L.J. 321: A.I.R. 1965 Ori. 38.

The evidence of experts must be given in the ordinary way. Subject to certain

exceptions—those exceptions being amongst others the certificates of the Imperial Serologist touching the matter of blood-stains and of the Chemical Examiner, which are made admissible in evidence by themselves—The opinion of an expert must be given orally and a report merely or certificate by him cannot possibly be evidence. Unless he goes into the witness-box and gives oral evidence, there can be no cross-examination of the expert at all. The opinion of the Director of Agriculture is certainly the opinion of an expert, but the evidence, being only documentary, is clearly inadmissible: I.L.R. (1937) Mad. 764: A.I.R. 1937 Mad. 407: (1937) 1 M.L.J. 341.

In ordinary circumstances there would be nothing wrong in taking reports of Chemical Examiner and Imperial Serologist on record without examining these persons as witnesses, as permitted by Cr.P.Code. When, however, there is a difference of opinion in the reports so much so that the effect of one report is to nullify the effect of the other, the duty to explain the difference is on the prosecution and the mere production of the report does not under the circumstances, prove anything which can weigh against the accused: A.I.R. 1954 S.C. 1.

What is made relevant under S. 45 of the Evidence Act is the opinion of a medical expert or any other expert and not the document in which he has recorded his opinion. The certificate in itself is not an admissible document. Ss. 65 to 73 relate to the mode of proof of the contents of documents and in such case, if no objection has been taken in the first Court, objection cannot be taken in the first appellate Court or in second appeal. But if the infirmity in the evidence relates to its relevancy or to the manner in which evidence is given, then objection can be taken for the first time even in appeal. Hence, an objection to its admission in evidence of the certificates even when not taken in trial Court, can be taken for the first time in appeal when the objection is based on non-compliance with the provisions of the Evidence Act in Part II relating to proof: (1961) 2 Guj.L.R. 304: A.I.R. 1961 Guj. 196.

The certificate of a Doctor cannot by itself be admissible in evidence unless the Doctor is examined as a witness: I.L.R. (1953) Hyd. 191: A.I.R. 1953 Hyd. 209.

Doctor's medical certificate filed—It does not prove itself—Doctor must be called and cross-examined on it: (1953) 1 M.L.J. 591: A.I.R. 1953 Mad. 858.

Case of grievous hurt—Medical certificate is not substantive evidence—Mere statement of witness on oath, that he issued the certificate is not requisite proof—Opinion must be given orally in witness-box and there should be cross-examination on it—Certificate is only corroborative piece—Absence of oral examination—Injury cannot be said to have been proved—There is no question of prejudice or no prejudice: 1953 Cr.L.J. 104: A.I.R. 1953 Kutch 7.

A medical certificate issued by a registered medical practitioner can be accepted by the Court as evidence of sickness or infirmity of the concerned person without examining the Doctor as a witness; however, if the Court entertains some doubt, it may call and examine the Doctor to ascertain the truth or otherwise of the certificate's contents. Thus, where the medical certificate opined that the party concerned, aged about 76 years, was due to his sickness and infirmity unable to attend the Court to depose as a witness but the Court without examining the Doctor concluded that the character of sickness mentioned in the certificate was not such as to expose the party concerned to any risk, *held*, it was not proper for the Court to brush aside the Doctor's opinion and come to its own conclusion in the absence of expert medical professional knowledge; it was not fair or proper for the Court, in view of the specific provision in O. 26, R. 1 of the C.P.Code, to reject the medical certificate: (1978) 91 Mad.L.W. 486.

Despite common knowledge that medical practitioners often issue untrue medical certificates on mere asking and nominal charges, *held*, it would not be right to say that no medical certificate should be relied upon unless the Doctor himself is examined; there can be no general presumption of all medical certificates being false; however, if the other party challenges the veracity of its contents, the certificate has to be proved by the party relying upon it: A.I.R. 1988 Guj. 34: (1987-2) 28 Guj.L.R. 1134: (1987-2) 7 Guj.L.H. 226.

Where the Doctor, who had examined the injured was not examined as a witness, *held*, his injury report is not admissible in evidence: 1984 Cr.L.J. 217 (Gau.).

Where the medical report was not proved by the Doctor or, if he was not available, by others acquainted with his handwriting, *held*, the accused's conviction cannot be upheld: 1982 Raj.L.W. 429.

The Court has to consider the other evidence which may show injuries but that is no

substitute for the injury or post mortem reports in the absence of the examination of the Doctor; a Doctor alone can prove whether or not the injuries inflicted by the assailant were the result of the victim's death or that the assailant must be presumed to have known that they were likely to cause the victim's death: (1990-1) 38 B.L.J.R. 462 (D.B.).

Where in a case of murder the Doctor who had prepared the post mortem report was not examined as a witness, *held*, the report, not being a piece of substantive evidence, cannot be used to establish the cause of death: 1989 Cr.L.J. (N.O.C.) 193: (1990) 1 Crimes 28 (Pat.); 1975 B.L.J.R. 462: 1975 Cr.L.J. 1405; 1979 Cr.L.J. (N.O.C.) 19 (Madh. Pra.) (D.B.); (1986) 3 Crimes 145 (Cal.). Particularly so when the post mortem report was a carbon copy and not the original report: 1989 Cr.L.J. 107 (N.O.C.) (Pat.) (D.B.).

Where the murder was committed by the accused who had no licensed pistol by, in all probability, using country-made pistols and the pistol and bullets extracted from the victim's body were sent to ballistic expert for his opinion who did not examine them for considerable time and was given up by prosecution as a witness, *held*, non-examination of the ballistic expert is not fatal to the prosecution; as opined in the Text Book of Fire Arms Investigation, the expert could not have found identifying marks on the bullets: A.I.R. 1976 S.C. 2474: (1976) 2 S.C.C. 263: 1976 Cr.L.J. 1891. *See* also 1978 B.L.J. 238.

Where garments supplied for export were rejected as found defective as per report of the Inspector of Textile Committee as an expert but the Inspector was not examined to prove the report, *held*, the report could not be given much weight as the supplier had no opportunity to cross-examine the Inspector: A.I.R. 1981 N.O.C. 151 (Del.).

6. Medical evidence—General.—A medical witness, called in as an expert, is not a witness of fact. His evidence is really of an advisory character, given in the form of an opinion on the facts submitted to him and not to be given by reference to facts collected independently by himself: (1952-53) 57 Cal.W.N. 962: A.I.R. 1954 Cal. 305; (1992) 3 S.C.C. 204: (1993-1) 41 B.L.J.R. 129.

Medical opinion is hardly decisive and often inconclusive because it is primarily an evidence of opinion and not of facts. Such an opinion on non-medical matters need not necessarily be correct: I.L.R. (1963) 1 Ker. 458: (1963) 1 Ker.L.R. 468: (1964) 2 Cr.L.J. 297: A.I.R. 1964 Ker. 222. *See* also 1991 C.Cr.L.R. 61 (Cal.).

The evidence of medical men is of an advisory character given on the data placed before them. Their evidence is primarily an evidence of opinion and not of fact: 1969 Cr.L.J. 1393: A.I.R. 1969 Goa 116.

Doctors are experts in their own right and when they examine the person and give opinion it does not normally mean that their opinion is not correct: 1985 Cr.L.J. 1190: I.L.R. (1984) 2 Del. 376.

Medical evidence has never been considered substantive evidence of the charge; it has only been accepted as corroborative of the charge; though Courts have treated expert medical opinion with respect, they are expected not to surrender their will, independence and judgment to an expert; Courts have rejected such expert evidence as valueless where it was based on insufficient data or reasons: 1987 M.P.L.J. 214.

Expert medical evidence is not conclusive proof, but on a difficult and obscure subject, the observation and inference made by experts with special education and training should be given due weight. It is not the opinion of an expert which will be binding on the Court. The Court has to see other aspects of the case. [A.I.R. 1960 S.C. 706, Rel. on]: 1984 M.P.L.J. 292 (D.B.).

There is no irrebutable presumption that a Doctor is always a witness of truth; his evidence is to be appreciated like that of any other witness: A.I.R. 1983 S.C. 66: (1982) 2 S.C.C. 396: 1982 Cr.L.J. 1972.

The opinion stated by the medical officer is at best an opinion. It cannot be taken as contradicting the positive evidence of the witnesses to the facts such as that the deceased took his last meal at about 4 p.m. and that he was stabbed at 5 p.m.: 1960 M.L.J. (Cr.) 808: (1961) 1 Cr.L.J. 120; A.I.R. 1961 Mys. 21.

Medical evidence cannot override direct evidence if direct evidence is satisfactory and reliable: A.I.R. 1984 S.C. 1233: 1984 Cr.L.J. 921: 1984 S.C.C. (Cr.) 484: (1984) 1 Crimes 859.

Where there are alleged eye witnesses of physical violence which is said to have caused a person's death, the value of medical

evidence adduced by the prosecution in support of its case is only corroborative. It proves that the injuries could have been caused in the manner alleged and death could have been caused by the injuries, so that the prosecution case being consistent with matters verifiable by the medical science, there is no reason why the eye witnesses should not be believed. The medical evidence does not itself prove the prosecution case. The use which the defence can make of medical evidence is to prove by it that the injuries could not possibly have been caused in the manner alleged or death could not possibly have been caused by the injuries and if it can do so, it discredits the eye witnesses. More it is not required to do but less is of no use to it: (1952-53) 57 Cal.W.N. 962: A.I.R. 1954 Cal. 305.

Unless the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eye witnesses, the testimony of the eye witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence: A.I.R. 1983 S.C. 484: 1983 Cr.L.J. 822: (1983) 1 Crimes 625: (1983) 3 Guj.L.H. 576: 1983 M.L.J. (Cr.) 505: (1983) 2 S.C.C. 174; 1990 Cr.L.J. 846: 1989 All.L.J. 463 (D.B.).

It is advisable that Medical Officers while mentioning the assailant should note whether he is a known or unknown person, but not his name: 1993 Cr.L.J. 2173 (Mad.) (D.B.).

The duty of an expert witness such, as a Doctor, is, to state facts without mincing words. He should give the benefit of his expert knowledge without any vestige of partiality: 1958 M.P.L.J. 104:1958 Jab.L.J. 19.

In the professional career, the medical practitioner will have frequently to give evidence as a medical jurist in a Court of law to prove the innocence or guilt of his fellow subjects, or to authenticate or disprove a criminal charge of assault, rape or murder brought against an individual. He must remember that as a medical jurist, his responsibility is very great, for very often he will find that his is the only reliable evidence on which depends the liberty or life of a fellow being. He has, therefore, to acquire the habit of making a careful note of all the facts observed by him, and to learn to draw conclusions correctly and logically after considering in detail the pros and cons of the case, instead of forming hasty judgments: 1979 Cr.L.R. (Guj.) 411 (D.B.).

Where a Doctor examined as a witness did not state that he was a medical graduate but did say that he was Incharge Medical Officer of the Hospital and his deposition was not concerned with any complicated question of medical science pertaining to anatomy, physiology or surgery, *held*, the Doctor's failure to prove his qualifications or speciality would not render his evidence as inadmissible. [A.I.R. 1969 Cal. 321, Not attracted]: 1975 Raj.L.W. 389: I.L.R. (1976) 26 Raj. 34: 1975 W.L.N. 483 (D.B.).

The Doctor who has examined the deceased and conducted the post mortem is the only competent witness to speak about the nature of injuries and the cause of death. Unless there is something inherently defective, the Court cannot substitute its opinion to that of the Doctor: A.I.R. 1992 S.C. 2186: 1992 Cr.L.J. 3710. Where though the Doctor conceded that there would be gapping between both types of punctured wounds whether caused by fire arm or sharp pointed weapon, *held*, when said gapping was not in the post mortem report, no reliance could be placed on the Doctor's opinion: 1986 All.W.C. 932.

Expert medical opinion of a Surgeon who conducted post mortem examination is relevant: 12 I.C. 93: 12 Cr.L.J. 485. *See* also 1972 W.L.N. 633: I.L.R. (1972) 22 Raj. 793.

Where there is a discrepancy between the post mortem report and the inquest report, *held*, post mortem report and testimony of Doctor who conducted post mortem, if otherwise reliable, is preferable to panchnama prepared by Police during inquest: (1983) 1 S.C.C. 379.

Post mortem report and report of Chemical Examiner—Evidentiary value: A.I.R. 1961 Ori. 214.

An expert giving evidence in a matter outside the field of his speciality, *held*, cannot be deemed to have testified as an expert witness; thus, where a Lady Doctor after having found no external injury on the victim's person, opined that it could not be said that the prosecutrix was subjected to forcible sexual intercourse, *held*, it was not expert evidence but the Lady Doctor's personal opinion unrelated to medical science; absence of injury may or may not indicate absence of physical violence; absence of physical violence does not by itself mean that sexual intercourse was not forcible; force need not be actual physical

force; a mere threat of violence may at times prompt submission and at times the victim may not due to her age or physical capacity or otherwise, be in a position to resist or struggle and thereby escape injury; the Lady Doctor's opinion only illustrates the vastness of her ignorance about the true meaning of force: 1987 M.P.L.J. 214.

Doctor's evidence regarding age of injuries cannot be of much reliance if he has failed to mention the age in the report. Besides it is difficult for a Doctor to give the exact age of injuries. Hence, Court cannot fix the time of occurrence on the basis of opinion of the Doctor: 1970 Pat.L.J.R. 376.

Medical jurisprudence not being an exact science, it is indeed difficult for any Doctor to depose with precision as to when a particular injury was caused to and exact time when the accused might have had sexual intercourse with the prosecutrix; the Doctor who examines the victim is in the best position to depose about the medico-legal aspects of the offence; the Court need not effect a detailed research about the exact point of injury: A.I.R. 1977 S.C. 1307: 1977 Cr.L.J. 817: (1977) 3 S.C.C. 41.

The opinion of a Doctor as to the nature of injuries received by and the nature of the incapacity incurred by the plaintiff in a collision between buses is relevant under S. 45 of the Evidence Act. Such opinion, however, must be duly proved, that is, as provided in S. 60 of the Act by the evidence of the person who holds that opinion. Hence, the medical certificates given by the Doctor to the plaintiff cannot, without his examination in Court, be admitted in evidence: (1961) 2 Guj.L.R. 304: A.I.R. 1961 Guj. 196.

Doctor's opinion without examining injury is of no value: 1983 M.P.W.N. 169.

It is very difficult for a Doctor to give opinion about the nature of injury from bare look at photograph: 1988 Cr.L.J. (N.O.C.) 57 (Del.) (D.B.).

Where the trial Court convicted all the accused on the basis of evidence including medical report on the record for the offence of gang-rape and the accused, pleading false implication, relied on the medical report to show that it did not give the number of persons committing the gang-rape, *held*, it is impossible to determine the number of gang-raping persons by medical examination; the evidence of the prosecutrix that all the accused had committed rape on her was not inconsistent with the medical report; conviction upheld: A.I.R. 1987 S.C. 1080: 1987 Cr.L.J. 971: (1987) 2 S.C.C. 27: (1987) 1 U.J. (S.C.) 492: 1987 B.L.J.R. 491: (1987) 1 Crimes 910.

An intact hymen is not a conclusive defence in a prosecution for rape: 1985 All.L.J. 384: (1984) 3 Crimes 251.

Merely because marks of injuries were not found either on the person of the prosecutrix or the accused, *held*, it could not be inferred that there was lack of resistance or there was consent on the part of the prosecutrix to the sexual intercourse: (1984) 3 Crimes 267 (P.&H.).

Where the body of the rape victim was found floating in a well after 18 hours and the Doctor, in his chief-examination, stated that laceration on vagina was due to intercourse, *held*, its veracity is in no way affected by his admission in cross-examination that laceration on the labia mazora was by itself no proof of intercourse because the deceased was a grown-up married lady; there could not have been laceration on the vagina unless it was a violent intercourse: 1992 Cr.L.J. 2236 (Andh. Pra.) (D.B.).

Where in a rape case, the injuries found on the face of the prosecutrix were opined by the Doctor to be simple and could possibly be self-inflicted and regarding her claim of having sustained injury on her thigh, there was no opinion of the Doctor, *held*, in the absence of any medical opinion as to the fact of rape which could have corroborated the sole testimony of the prosecutrix, conviction could not be sustained: 1993 Cr.L.J. 2784 (Ori.).

Where body of the deceased was found at a distance of $18^{1}/_{2}$ metres away from the place of incident and the Doctor had opined that death would have been instantaneous, *held*, the opinion of the Doctor—apart from the fact that it was only an opinion, could not lead to the inference that the deceased would have fallen dead instantaneously on the spot, at the moment he sustained the injury; prosecution's case could not be rejected on that basis: 1992 Cr.L.J. 238 (Ker.) (D.B.).

Where the three Doctors who conducted post mortem could not give the probable time of death because the bodies were highly decomposed, but the High Court fixed the time of death in its judgment, *held*, the High Court usurped the function of an expert; the High Court was not justified in forming its own

opinion when the Doctors failed to give any opinion: A.I.R. 1982 S.C. 1157: (1982) 2 Bom.C.R. 471: 1982 Cr.L.J. 1243: (1982) 2 S.C.C. 351: 1982 U.J. (S.C.) 475.

Where eye witnesses to the murder by fire-arms, otherwise found truthful and trustworthy, had stated that the deceased has taken food at 10-30 and was shot at 12-30 and the post mortem report showed presence of semi digested food in his stomach and it was contended by the defence that the presence of undigested food in the stomach belied the prosecution case, *held*, the Doctor opined that digestion starts in 1 or $1^1/_2$ hours but the process of digestion depends upon each individuals digestive power which varies from man to man; it also depends upon the kind and quantity of food taken; besides, medical evidence is only evidence of opinion and hardly decisive; conviction was proper. [(1985) 2 W.L.N. 98 (Raj.), Affirmed]: A.I.R. 1993 S.C. 2453: 1993 Cr.L.J. 2530: (1993) 1 Crimes 1144: (1993) 2 U.J. (S.C.) 9.

Where the deceased's son, other than the one she was residing with, nursing grievance against her in a property matter, accompanied by other accused came to the farm house and assaulted and killed his mother after she had taken meals, and on post mortem the Doctor noticed that the deceased's stomach contained 150 gms. of semi-digested food, *held*, merely because illiterate witnesses stated that meals were taken immediately before the occurrence could not by itself be a circumstance to discredit their evidence on such medical evidence if otherwise credible; text-books on medical jurisprudence are clear that stomach contents cannot determine precise time of death: A.I.R. 1994 S.C. 672: 1994 Cr.L.J. 626.

Medical evidence regarding an *ante-mortem* burnt injury: (1992) 1 Cal.L.T. (H.C.) 116.

Where the post mortem report definitely stated that the cause of death was 'asphyxia due to throttling' and the Doctor who proved it was not even suggested in cross-examination that death could have been caused by poison nor was the Doctor afforded an opportunity to state whether there would or would not be other visible indications if it was a case of poisoning and the case in the trial Court was argued on the basis of asphyxia due to throttling, *held*, the High Court was not justified, on its own medical knowledge, in the face of circumstantial evidence that it was also possibly a case of death by poisoning: A.I.R. 1972 S.C. 1797: 1972 Cr.L.J. 570.

Doctor giving report that death was due to combined effect of strychnine poison and coal gas poison—Symptoms of coal gas poison found in the internal organs of the deceased—*Held*, the effect of coal gas poison cannot be obliterated and, hence, it cannot be said that the death was caused by the accused administering strychnine to the deceased to cause death: (1973) 3 Sim.L.J. 413 (D.B.).

The best person to give an opinion about the nature and shape of the weapon is the Medical Officer who had conducted the autopsy. Thus, where the Doctor testified that the injuries could have been caused with a *pharsa* or some other sharp-edged weapon, *held*, the High Court was clearly in error in substituting its own opinion based on conjectural premises for that of the Medical expert: A.I.R. 1981 S.C. 897: 1980 (Supp.) S.C.C. 489: 1981 Cr.L.J. 23.

Where the Doctor-defence witness opined that the accused had received gunshot injuries and the Chief Medical Officer examined as an expert by the Court opined that from the nature of injuries on the accused's body, they could not be gunshot injuries as circumference of the exit injury was shorter from that of the bullet shot by the pistol, *held*, the High Court was right in discarding the Doctor giving defence evidence: A.I.R. 1979 S.C. 391.

Where the victim was putting on a turban when he was hit on his head with a *gandasa* but the turban reduced the force of the impact leaving a head injury and the Doctor, on the basis of the X-ray report, testified that it was a deep cut in the whole of the outer table, reaching upto the inner table but without mentioning the depth, *held*, the head fracture within S. 320, clause seventhly was established. [(1978) 80 Punj.L.R. 326, Upheld]: A.I.R. 1986 S.C. 2192: 1986 Cr.L.J. 2061: (1986) 4 S.C.C. 401: 1986 U.J. (S.C.) 620: 1986 Cr.L.R. (S.C.) 468.

Where injuries comprise of stab wounds and the problem is to ascertain whether all or any of them could be caused with one or more weapons, *held*, the opinion of the Medical Officer who had examined the injuries must invariably be obtained; it is the prosecution's, no less of the Court's duty to see that the weapon of the offence, if available, is shown to the medical witness to invite his opinion on the point. Failure to do so may sometimes

deflect the course of justice: A.I.R. 1976 S.C. 76: 1976 Cr.L.J. 13: (1976) 1 S.C.C. 172; A.I.R. 1976 S.C. 2423: (1976) 4 S.C.C. 355: 1976 Cr.L.J. 1883; 1995 Cr.L.J. 3100 (Andh. Pra.) (D.B.). But where the nature of injuries can well, in the normal course, be attributed to the use of a *bhala* (spear), the weapon of offence, *held*, its non-production before the medical witness for seeking his opinion was of no consequence: (1992-1) 40 B.L.J.R. 77 (D.B.).

Where Doctor opined that both the injuries on the person of the deceased were caused by sharp weapon like knife or dagger but the weapon was not produced in the Court, *held*, that would not negative the opinion of the Doctor coupled with the evidence of the eye-witnesses: 1989 Cr.L.J. 226 (Gau.).

Where a knife injury 8 inches deep was testified to by a Doctor as having been caused by a knife of same length with a blade 4 inches long and he was neither cross-examined on the point nor was there anything on record to impeach his testimony, *held*, it could not be contended that the knife could not have caused the injury: 1979 M.L.J. (Cr.) 423.

Where Medical expert deposed that ends of the injury on the injured was elliptical which meant that single edged weapon, *i.e.*, knife, which was alleged to be weapon of offence by prosecution could not cause such an injury but significantly this description did not find a place in wound certificate issued by him and further the ocular evidence of the occurrence witnesses was to the effect that it was with the said knife that the injury was inflicted on injured, *held*, expert evidence could not be relied upon. [1990 Cr.L.J. 1269 (S.C.); (1990) 1 Ker.L.J. 177 and 1983 Cr.L.J. 822 (S.C.), Rel. on]: 1994 Cr.L.J. 1522 (Ker.) (D.B.).

Where the injured immediately removed to the hospital was treated and after death subjected to post-mortem by the Doctor on duty who deposed that the injury was caused by a sharp cutting weapon; though nothing on record showed the Doctor having any reason to be partial or unfair, two Medical Boards were later constituted to opine whether or not the injury could be caused by a sharp weapon; but the Boards due to lapse of time could not give any definite opinion about the nature of the weapon of assault, *held*, the negative evidence of the Medical Boards could not efface the positive evidence of the Doctor on duty. [1978 W.L.N. (U.C.) 103 (Raj.), Affirmed]: A.I.R. 1989 S.C. 705: 1989 Cr.L.J. 845: (1989) 2 Crimes 181.

Under S. 45 the opinion of a medical witness conversant with the disease of insanity, however eminent he may be, must not be read as conclusive of the fact which the Court has to try. Such opinion may be invited in exceptional circumstances where there is no dispute as to facts or their interpretation but it must be considered by the Court as nothing more than relevant. The questing whether in given circumstances a man was sane or insane is for the Court to decide.

An expert can only furnish a Court with data from which insanity can be inferred: I.L.R. (1948) Nag. 711: A.I.R. 1949 Nag. 55: 50 Cr.L.J. 181.

'Sound mind'—Medical evidence of Doctor who treated the testatrix in her last illness on the question of her state of mind, is to be preferred to the medical evidence of a Doctor who did not treat her, but was called to counter the evidence of the attending Doctor: A.I.R. 1962 Andh. Pra. 178.

The opinion of an expert is relevant under S. 45, when a question of science is involved in arriving at a finding as to whether an accused in a criminal case was of unsound mind at the time of the commission of the act or was incapable of knowing the nature of the act or that he was doing what was wrong or contrary to law, the opinion of an expert in mental diseases is relevant and such an expert is generally examined as a witness in cases involving a question of insanity: 47 Cr.L.J. 918: I.L.R. (1946) Nag. 946: 1946 Nag.L.J. 656: A.I.R. 1946 Nag. 321.

Evidence of medical experts—Endorsement of Register under S. 35, Registration Act as to soundness of mind of executant of deed of adoption including opinion of medical expert—Failure to give direct oral evidence under S. 60 though medical expert was alive—Opinion of medical expert cannot be considered: A.I.R. 1970 Raj. 190.

Where medical report regarding soundness of mind was a cryptic report without any data, *held*, no reliance could be placed on it: (1978) 2 M.P.W.N. 144.

Where the Medical Officer at a Mental Hospital merely deposed that the accused was given treatment for schizophrenia for some months and said nothing about the accused's state of health prior to the treatment and the accused himself did not specifically contend that he was of unsound mind on the

day of occurrence, *held*, the Medical Officer's evidence was not that of an expert; and no importance could be given to it: A.I.R. 1971 Goa 3: 1971 Cr.L.J. 36.

No Medical Officer indicates in the certificate, the exact condition of the patient; thus, absence of indication in a medical certificate that its holder was unable to move during the period he was ill and unable to appear in the Court was not fatal to the plea of illness: A.I.R. 1986 Ori. 102.

Doctor's opining on previous condition of patient—Evidentiary value is less as against positive evidence: I.L.R. (1964) 2 Ker. 257: A.I.R. 1965 Ker. 189.

Even where a Doctor has not examined the patient and his evidence as an expert is based on probabilities, still he as an expert is entitled to answer all hypothetical questions put to him, the only safeguard being that the hypotheses are correctly put to the expert: A.I.R. 1956 Bom. 424: (1956) 1 L.L.J. 740: (1956-57) 10 F.J.R. 117. Injury to workmen—Compensation—Loss of earning capacity—Assessment of—Value of medical evidence. *See* A.I.R. 1957 Cal. 660.

Use of medical evidence to determine loss of earning capacity: 1969 Lab.I.C. 971: A.I.R. 1969 Cal. 378.

Though a medical certificate assessing diminution of physical capacity is an important factor in assessment of loss of earning capacity, *held*, in absence of medical evidence by Doctors examining claimant, same cannot be acted upon: 1983 Lab.I.C. 685: 1983 Acc.C.J. 615: (1983) 2 L.L.J. 86 (Cal.). *See* also 1983 Lab.I.C. 1285 (Cal.).

Accident—Loss of expectation of life—Proof—Medical evidence—Admissibility. *See* Motor Vehicles Act (1939), S. 110-B: A.I.R. 1970 Madh. Pra. 172.

When the medical evidence does not at all rule out the eye witness version, there is no reason to disbelieve the version given by the eye witness. [A.I.R. 1983 S.C. 484, Rel. on]: 1990 Cr.L.J. 839: 1989 All.L.J. 454 (D.B.). *See* also (1985) 1 Crimes 655 (Del.); 1983 Jab.L.J. 186; 1983 M.P.W.N. 250; 1983 M.P.W.N. 154; (1981) 1 M.P.W.N. 17; (1980) 1 M.P.W.N. 292.

Where evidence of a witness was consistent with the surrounding circumstances and the probability of the case strikes the Court as true, it can be a good foundation for conviction, more so, if assurance is available from medical evidence. [1976 Cr.L.J. 6 (S.C.), Foll.]: 1993 Cr.L.J. 2954 (All.) (D.B.).

Where though the prosecution case was that the accused fired at complainant party without provocation as a result of which one of them died, the defence version was that complainant party attacked first and each side opened fire and the medical evidence was insufficient to hold with certainty that prosecution version was true and defence version was false, *held*, it would be unsafe to convict accused for murder: A.I.R. 1981 S.C. 1579: 1981 Cr.L.J. 1000: 1981 U.J. (S.C.) 127.

Where though there was no inconsistency between the direct and the medical evidence, there was difference of opinion between the two Doctors, *held*, in such a case where there is a conflict between the opinion of two experts, the Court should normally accept the evidence of the expert whose evidence is corroborated by direct evidence of the case which according to the Court is reliable: A.I.R. 1977 S.C. 2274: 1977 Cr,L.J. 1941: (1977) 4 S.C.C. 452: 1977 U.J. (S.C.) 753; 1989 Cr.L.J. (N.O.C.) 25 (Ori.).

Medical expert's opinion—Judge differing from opinion—Aspersions in judgment against expert when justified: 1966 Cr.L.J. 798: A.I.R. 1966 Raj. 164.

Where annulment of marriage was sought by the husband on the ground that the wife was pregnant by another person at the time of marriage and the wife delivered a full term mature boy and the Lady Doctor deposing as expert witness opined that conception had occurred a little less than two months prior to the marriage, *held*, though the Lady Doctor had not specialised in gynaecology, yet her knowledge of midwifery as obstetrician having been proved to be of high order, her testimony could not be rejected by the High Court. [1968 Cur.L.J. 365 (P.&H.), Reversed]: A.I.R. 1979 S.C. 879.

Effect of withholding of medical evidence by the prosecution. *See* (1979) 1 M.P.W.N. 59.

Evidence of a Medical expert could not be brushed aside as unacceptable merely because the Doctor admittedly did not know the difference between narcotic drugs and psychotropic substances; Medical Officers are not expected to know the differences in legal parlance: A.I.R. 1989 S.C. 1966.

Expert evidence—Death caused by bullet wounds—Exit wound not noticeable—Medical Officer not directing X-ray examination—Conduct of Medical Officer and Investigating Officer criticised: (1965) 2 Cr.L.J. 520: A.I.R. 1965 Ori. 175.

Scope—Offence under S. 326, I.P.Code—Lack of expert medical evidence—Irresponsible investigation—Case of burns by acid—Nature of burns and acid not known—Conviction: 24 Cut.L.T. 241.

Case under S. 376, Penal Code—Evidence of prosecutrix corroborated by direct evidence—Medical evidence also partly supporting it—Evidence of prosecutrix should not be given preference: 31 Cut.L.T. 909.

Medical evidence. *See* Evidence Act (1872), S. 112: A.I.R. 1965 S.C. 364.

Murder case—Medical witness stating that death was caused on account of shock and haemorrhage due to certain injuries—Statement of medical witness cannot be equated to statement that injuries by themselves were in ordinary course of nature likely to cause death—Duties of public prosecutors and Judges while dealing with medical evidence in murder trial: I.L.R. (1965) 15 Raj. 129: A.I.R. 1965 Raj. 32.

Medical opinion—Murder charge—Accused striking deceased twice on his uncovered head with sharp edged weapon (iron picket used for pegging tents)—Extensive subarachnoid haemorrhage, if can result from such injuries: 1964 Cur.L.J. 435 (Punj.).

Trial for murder—Circumstantial evidence—Appreciation of—Opinion of Doctor not conclusive: 29 Cut.L.T. 557. *See* also 1976 Cr.L.R. 661 (Raj.).

Where a piece of evidence against the accused in a case of murder was the dying declaration of the victim spoken to by the Asstt. Sub-Inspector and the Vaidyaraj running the dispensary more than two hours after the injuries inflicted, and the Doctor who conducted the post mortem examination was of opinion and stated that the deceased could not have survived for more than an hour after the infliction of the injuries and he would not have been in a position to speak out after the first few minutes, *held*, that the Doctor's evidence was only an estimate which might have gone wrong; it could not, therefore, be held that the statements of the eye witnesses as to the dying declaration are not true: 1952 Raj.L.W. 318: I.L.R. (1952) Raj. 222.

Medical evidence—Injury report is an admissible piece of evidence in proof or disproof of the theory of accident: 35 Cut.L.T. 362: 1969 Cr.L.J. 1517: A.I.R. 1969 Ori. 289.

Where an alleged period of gestation of 345 days was sought to be proved by the evidence of a Doctor who merely stated that the period may be even 400 days among human beings without reference to any authority and without the examination of the lady in question and he did not find out any causes for such an abnormal period of gestation in the case of the lady in question, his evidence is of no value and the male child in question cannot be accepted to have been proved to have been in the mother's womb within such period to be entitled to a share as on severance in status of the joint Hindu family on that date: (1952) 2 M.L.J. 515: I.L.R. (1953) Mad. 891: A.I.R. 1953 Mad. 146.

Nature and extent of disability—Evidence—Opinion of Commissioner and that of medical man—Value of: A.I.R. 1962 Assam 115.

Appreciation of—Medical evidence. *See* Criminal trial—Evidence: (1962) 2 Cr.L.J. 354: A.I.R. 1962 Cal. 504.

Where it could not be shown by the prosecution that the articles sent to the Serologist were the same as were seized from the accused, *held*, the Serologists' report was not admissible in evidence: (1984) 1 Crimes 646 (Raj.).

Non-filing of Serologist's report in the trial Court by the prosecution—Effect. *See* 1982 M.P.W.N. 94; 1982 M.P.W.N. 55.

Passages from books—Use of to discredit medical witness.—Where the opinions of authors were neither shown to have been given in regard to circumstances exactly similar to those in the particular case before Court nor were they put to the medical witness it is not a satisfactory way of disposing of the evidence of the witness to discredit it on the ground that the Doctor was a comparatively young man and his statements did not accord with the opinions expressed in the books. [A.I.R. 1954 S.C. 28, Rel. on]: A.I.R. 1957 S.C. 589: 1957 M.L.J. (Cr.) 478.

Undoubtedly, a Court is entitled to take judicial notice of matters with which men of

ordinary intelligence are acquainted and to act upon his general knowledge of local affairs. The Court can certainly refer to what is stated in the articles in journals and books by authors though living acquainted with such affairs as mentioned by them in their articles and books: A.I.R. 1978 Pat. 172: 1978 Pat.L.J.R. 96: 1978 B.L.J.R. 32: 1978 B.L.J. 1: 1978 B.B.C.J. (H.C.) 86 (F.B.). S. 57 would become nugatory if it is held otherwise, but treatise on Medical Jurisprudence cannot be looked into for weighing evidence of a Doctor when passages sought to be relied upon were not put to him in the witness box. [A.I.R. 1978 Pat. 172 (F.B.), Foll.]: (1989-2) 37 B.L.J.R. 18: 1989 Cr.L.J. (N.O.C.) 186 (D.B.).

Medical evidence—Text books—Quickening of child in womb—When perceptible to mother—Statements in 'Obstetrics and Gynaecology' by Bugald Baird and 'Manual of Obstetrics' by Eden and Holland, preferred to those in Modi's Medical Jurisprudence: A.I.R. 1965 S.C. 364.

Merely because as per Modi's jurisprudence, common house and blow flies are attracted to dead bodies and lay eggs, especially on open wounds and natural orifices, which hatch into maggots or larvae from 8 to 24 hours during hot weather is no ground to discredit the evidence of the medical expert and eye witnesses as to the time of death unless it is shown that the author had given his opinion on exactly similar circumstances; besides there is vast divergence of opinion between various writers on the subject: 1977 Raj.L.W. 241 (D.B.).

Ss. 45 and 46 read in combination show that where an expert opinion is relevant, facts supporting or opposing the opinion, *held*, are also relevant; however, passages from text books inconsistent with the Doctor's deposition as expert cannot be used to discredit his testimony unless they had been shown to him in cross-examination. [A.I.R. 1957 S.C. 589, Rel. on]: (1993) 1 An.L.T. (Cr.) 73 (D.B.).

7. Medical evidence—Of age.—*See* (1966) 7 Guj.L.R. 378.

Medical evidence as to age of girl—Doctor's opinion based on probability—Definite assertion of father about her birth-date stands proved beyond doubt: 1964 Raj.L.W. 606: (1965) 1 Cr.L.J. 483: I.L.R. (1965) 15 Raj. 6: A.I.R. 1965 Raj. 90.

A Doctor's opinion on the point of a person's age is entitled to greater weight than that of any other person: 10 O.W.N. 1274: A.I.R. 1934 Oudh 32. Though it is not conclusive: 1983 M.P.W.N. 210. The ossification test is no doubt a surer test for determining age. But the opinion of a Doctor as to the age of the girl arrived at without conducting any ossification tests and based on other factors should not be brushed aside merely because he did not conduct such a test, taking into consideration the conditions obtaining in India where such tests are not conducted: 19 Cut.L.T. 14: A.I.R. 1954 Ori. 33.

Though a Doctor is in a better position to form an opinion about the age of a person than a layman, his statement is no more than an opinion and could not amount to legal proof of the age of the person concerned: I.L.R. (1939) All. 871: 1939 All.L.J. 980: A.I.R. 1939 All. 708. *See* also A.I.R. 1957 Him. Pra. 42. But *see infra*. The opinion of a Doctor in regard to the age of a person is a relevant piece of evidence under S. 45 and it is quite a different question as to what weight a particular case ought to be attached to such an opinion: A.I.R. 1939 Pesh. 11.

Opinion of Radiologist as to age cannot be considered as conclusive: (1988) 1 Cal.H.N. 243: (1987-88) 92 Cal.W.N. 688: 1988 C.Cr.L.R. 238 (D.B.); 1989 C.Cr.L.R. 143 (Cal.).

It is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side: A.I.R. 1982 S.C. 1297: 1982 Cr.L.J. 1777: (1982) 2 S.C.C. 538; (1984) 3 Crimes 163 (P.&H.).

Where a qualified Doctor certifies the age of an insured predominantly on the age stated by the insured and his appearance, *held*, that much credence cannot be given to the certificate; even estimation of age based on ossification test, there is ample authority, has an error margin of one to three years: A.I.R. 1981 Madh. Pra. 69: 1981 M.P.L.J. 192 (D.B.).

Medical evidence as to age—Penal Code (1860) Ss. 361, 363—Age of minor—Kidnapping a girl—Evidence of age—Radiologist's evidence about fusion of bones is not conclusive—Documentary evidence found unsatisfactory—Oral evidence found contradictory—Age cannot be held to be below eighteen—Accused charged with S. 363 is entitled to an acquittal—[Evidence Act (1872), S. 45—Medical evidence as to age]: 1968 Cur.L.J. 311. *See* also A.I.R. 1957 Punj. 78.

Medical evidence—Proof of age—Ossification test: I.L.R. (1963) Cut. 917: (1964) 2 Cr.L.J. 102.

Though an ossification test may be a surer basis for age than a medical expert's opinion under S. 45, but that opinion cannot be preferred to the positive evidence of the entry in the Register of Births and Deaths: 1993 Cr.L.J. 549 (Madh. Pra.). However, where such an entry's truthfulness is in doubt, the medical evidence has to be given preference: (1983) 1 Crimes 687 (All.).

Where on the basis of the X-ray plate examination, the Doctor opined that the age of the prosecutrix was 15 years, *held*, the evidence was acceptable: 1989 Cr.L.J. 2435 (All.).

Medical evidence as to age—Age of minor—Medical evidence—Certificate given on examination of height, weight, breast, teeth, etc.—Evidence is worthless: (1962) 1 Cr.L.J. 49: A.I.R. 1962 Manipur 5.

Ss. 45, 61, 64, 60—Question regarding age of girl—Report of doctor who examined her—Report not before Court but reference to it made in affidavit of another person—*Held*, such affidavit was not admissible in proof of contents of the document: I.L.R. (1964) 2 All. 423: (1964) 5 S.C.R. 86: A.I.R. 1964 S.C. 1625.

On the question as to the age of the girl alleged to be taken from custody of the father, a Magistrate is not right in preferring the opinion of the Radiologist to the positive evidence furnished by the Municipal birth register, the School admission register and the evidence of the girl's father, particularly when medico-legal opinion is that owing to the variations in climatic, dietetic, hereditary and other factors affecting the people of the different States of India it cannot be reasonably expected to formulate a uniform standard for the determination of the age by the extent of ossification and the union of epiphysis in bones: 1957 M.L.J. (Cr.) 516: I.L.R. (1957) Ker. 591: A.I.R. 1958 Ker. 121.

Where age of a person kidnapped is in question, *held*, opinion of Doctor based on superficial examination and observation and not on any scientific data cannot take place of legal proof. [(1940) 41 Cr.L.J. 142 (All.) and (1972) 2 Cut.W.R. 1836, Foll.]: 1990 Cr.L.J. (N.O.C.) 110 (Ori.).

Charge of—Kidnapping or abducting a female—Age of girl—Proof—Entry in School certificate not reliable with implicit faith as against medical evidence—Test of epiphyees on basis of fusion being scientific test would be acceptable—If there be conflicting evidence as to age, benefit of uncertainty as to age of the girl should be given to accused: A.I.R. 1970 Punj. 450: 1970 Cr.L.J. 1383: (1970) 72 Punj.L.R. 332.

Where in a trial for the offence of kidnapping a girl, the documentary evidence, including the School leaving certificate, showed her to be more than 18 years of age while medical evidence showed her to be more than 17 years but less than 18 years, *held*, benefit of doubt could be given to the accused as medical evidence is not conclusive proof regarding age of a person: 1994 Cr.L.J. 467 (Ori.).

Where parents of a victim of rape stated that the girl was 13 years of age and there was opinion of Doctor on basis of ossification test that the girl was of 15-16 years, *held*, it could be safely held that the girl was below 16 years when rape was committed on her: 1984 Raj.L.W. 357.

To convict accused of offence under S. 366, Penal Code there should be conclusive proof that the kidnapped woman is below 18 years—When prosecutrix and accused were arrested on suspicion and produced before Magistrate, prosecutrix stating that her age was 20-21 years—She also expressing before witnesses her unwillingness to return to her parents—Oral and documentary evidence as to her minority not reliable—Opinion of medical expert giving her age as 17 years also not reliable as his opinion was formed on a physical examination of the woman and not after radiological examination—*Held*, the age of the woman was not shown beyond doubt to be below 18 years and, hence, accused should be acquitted: 1964 Cur.L.J. 204 (Punj.).

A person seeking bail under S. 18 of the Juvenile Justice Act, 1986 must be apparently juvenile and, thus, where the medical evidence gave the age of the accused as 18 years, *held*, the accused could not be said to be apparently a juvenile, therefore, not entitled to bail. [1982 Cr.L.J. 1777 (S.C.), Disting.]: 1990 Cr.L.J. 2524: 1990 All.Cr.R. 542.

8. Blood group test.—For determining a child's paternity, *held*, expert opinions regarding blood grouping tests are not totally irrelevant; they are admissible in evidence: (1986) 2 Hindu L.R. 219 (Cal.) (D.B.).

Proceedings under S. 488, Cr.P.Code—Question of paternity—Evidence of blood groups test. *See* 1957 M.L.J. (Cr.). 822.

9. Conflict between medical/scientific opinion and oral evidence.—Where there is a conflict between the medical evidence and the oral testimony of witnesses, the evidence can be assessed only in two ways. A Court can either believe the prosecution witnesses unreservedly and explain away the conflict by holding that the witnesses have merely exaggerated the incident or rely upon the medical evidence and approach the oral testimony with caution testing it in the light of the medical evidence. The first method can be applied only in those cases where the oral evidence is above reproach and creates confidence and there is no appreciable reason for the false implication of any accused. Where the evidence is not of that character and the medical evidence is not open to any doubt or suspicion, the only safe and judicial method of assessing evidence is the second method: A.I.R. 1955 All. 189: 1955 Cr.L.J. 473.

Where the expert evidence, including medical evidence, is at variance with ocular evidence, *held*, the conflict can be resolved after proper scrutiny; if after close and careful analysis, the oral evidence is found to be convincing, it has to be preferred; exaggerated picture of the occurrence and minor discrepancies, if any, have to be ignored; otherwise, the safest course is to rely on medical evidence. The Court, however, has to keep in mind that expert evidence is corroborative; one of the methods of appraisal of oral evidence is to test it on touchstone of medical evidence to find out whether the injuries could have been caused in the manner alleged by the prosecution; beyond that, it does not carry much weight: (1988) 36 B.L.J.R. 337 (D.B.); 1989 Cr.L.J. (N.O.C.) 186 (Pat.). *See* also 1983 Cr.L.J. (N.O.C.) 66 (Gau.); (1979) 1 M.P.W.N. 62; (1981) 1 M.P.W.N. 66.

The evidence of a medical expert is merely an opinion lending corroboration to the direct evidence; a glaring inconsistency between direct evidence and the medical evidence would undoubtedly be a manifest defect in the prosecution case. Where two medical expert witnesses both equally competent, contradict each other, the opinion of that expert should be accepted which supports the direct evidence: 1992 Cr.L.J. 474 (Mad.) (D.B.).

True, medical evidence, primarily being evidence of opinion and not of fact, is hardly conclusive or decisive; and equally true, when medical evidence is in conflict with the eye-witnesses' statements, it discredits the eye-witnesses, and all the more where eye-witnesses cannot be unreservedly believed; it is extremely unsafe to act upon the testimony of interested eye-witnesses if contradicted by the medical evidence though the case may be different where the eye-witnesses are totally disinterested and their evidence is cogent and convincing: 1982 Cr.L.J. 1087: 1982 Kash.L.J. 194. *See* also 1989 Cr.L.J. (N.O.C.) 76 (Ker.); A.I.R. 1988 S.C. 2154: (1988) 3 Crimes 195: (1988) 4 S.C.C. 302: 1989 Cr.L.J. 288 (Medical opinion pointing to alternative possibilities).

It is trite that where the eye-witnesses account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. If the evidence of the witness is, however, totally inconsistent with the medical evidence, this is a vital defect and unless reasonably explained, is sufficient to discredit the evidence of the witness: 1993 Cr.L.J. 2812 (Ori.) (D.B.).

The positive evidence in any case is that of the eye-witnesses who had seen and narrated the entire occurrence. The evidence of a medical man or an expert is merely an opinion which lends corroboration to the direct evidence in the case. Where there is a glaring inconsistency between direct evidence and the medical evidence in respect of the entire prosecution story, that is undoubtedly a manifest defect in the prosecution case: A.I.R. 1977 S.C. 2274: 1977 Cr.L.J. 1941: (1977) 4 S.C.C. 452: 1977 U.J. (S.C.) 753.

It is trite that if the eye-witnesses' account is found credible and trustworthy, medical opinion to the contrary is not conclusive. Witnesses, as Bantham said, are the eyes and ears of justice; their account requires careful independent evaluation as to its credibility; it should not be adversely prejudged on the sole touchstone of the medical evidence; the Court must judge its inherent consistency and probability, that is, consistency with the other witnesses' account and undisputed facts; their 'credit' and performance in the witness-box, and their power of observation, etc. It is then that the probative value of such evidence becomes eligible to be weighed in the scales for cumulative evaluation: A.I.R. 1988 S.C. 2154: 1989 Cr.L.J. 288: (1988) 3 Crimes 195: (1988) 4 S.C.C. 302.

True, in case of conflict between the medical evidence and ocular statements, the ocular statements are to be preferred but where the medical evidence completely improbabilised the ocular statement, it is the medical evidence which will take precedence; thus, where medical evidence showed only one injury on the deceased responsible for the death, *held*, the oral evidence that both the accused had dealt blows on the deceased's head could not inspire confidence: 1990 Cr.L.J. (N.O.C.) 39 (Ori.) (D.B.).

Where oral and medical evidence is in conflict, the oral evidence cannot be brushed aside. Doctors are not witnesses of truth; their evidence is to be appreciated like any other evidence; and it is only a corroborative evidence. Thus, where the victim's evidence was reliable and trustworthy about the weapons used, *held*, the Doctor's opinion about the existence of two alternative possibilities could not override the victim's evidence: 1990 Cr.L.J. (N.O.C.) 90: (1990-2) 38 B.L.J.R. (N.O.C.) 28.

Conflict between medical evidence and oral evidence—Oral evidence neither above reproach nor creating confidence but medical evidence not open to suspicion—Only safe method of assessing evidence is to rely upon medical evidence and to test veracity or oral evidence in light of it: (1968) 34 Cut.L.T. 187.

Where medical evidence was totally inconsistent with the belying eye-witnesses' evidence, *held*, accused was entitled to acquittal: 1985 Cr.L.J. 1450: I.L.R. (1985) Him. Pra. 30. *See* also (1979) 1 M.P.W.N. 129.

Where there is a conflict between ocular evidence and medical or scientific opinion, *held*, it is always possible to rely on ocular evidence rather than on medical opinion; but, scientific test being exact and unambiguous, in a trap case, *held*, it is the result of the anthracene powder test, which should prevail over ocular evidence; the presence or absence of the powder on and inside the pocket and on the hands of the accused conclusively established the guilt or innocence of the accused: (1994) 1 Bom.C.R. 238.

Where direct evidence of lay witnesses tallies with medical evidence, especially in the light of alternate possibilities elicited during his cross-examination, *held*, some inconsistency about the distance from which gun shots were fired between their respective versions would be of no significance. [A.I.R. 1971 S.C. 2119, Foll.]: A.I.R. 1978 S.C. 191: 1978 Cr.L.J. 141: (1978) 1 S.C.C. 178.

Where dying declaration was contrary to medical evidence, *held*, no reliance was to be placed on such declaration: (1984) 1 Crimes 661 (P.&H.). *See* also S. 32, Note 24, *supra*.

Where a Doctor, not a ballistic expert, stated that the fire-arm was shot at when the victim was only 1 or 2 feet away but the eye-witnesses, otherwise corroborated by medical and other oral evidence stated the distance to be 8 or 10 feet, *held*, the distance testified to by the Doctor could not be accepted in preference to those of the eye-witnesses: 1991 All.Cr.C. 639: 1991 Cr.L.J. 3076 (D.B.); A.I.R. 1971 S.C. 2119: 1971 Cr.L.J. 1463.

Where the evidence of ballistic expert as well as that of the Medical jurist categorically established that the injuries attributed to the accused were fired from the gun and not from the rifle, *held*, the fact that the sole eye-witness made contradictory statements as to whether those injuries were caused by a gun or by a rifle, was not material as the said witness neither had expertised knowledge nor had ever used any rifle or gun: 1995 Cr.L.J. 1466 (Raj.) (D.B.).

Where there was evidence of autopsy surgeon that deceased received single lathi blow, but witnesses had stated that two persons assaulted the deceased, *held*, there being conflict between expert witness and direct evidence, conviction on such evidence was unsustainable: 1984 Cr.L.J. 360 (Cal.).

Where the Doctor opined that there were three injuries but the eye-witnesses testified that only two blows were given, *held*, in the absence of any data, the Doctor's statement is simply his opinion and cannot prevail over the evidence of eye-witnesses: 1976 Raj.L.W. 643 (D.B.).

Where the complainant's case was that he was assaulted by the accused only with the sharp edge of the axe when only two out of his five injuries were incised wounds and the other three, as per medical evidence, were caused by hard and blunt objects, *held*, the Court could not safely convict the accused on the complainant's sole testimony contradicted by medical evidence and uncorroborated by other reliable evidence: 1979 Bom.C.R. 482.

Where the eye-witnesses' version that the deceased sustained injuries due to two heavy lathi blows on his head and as a result he bled profusely, was contradicted by the medical evidence as no external injuries were found on the head of the deceased, *held*, in view of the peculiar facts of this case, there was no other way than to prefer the medical evidence and reject the ocular version: 1990 Cr.L.J. 1848: (1990) 1 Cut.L.T. 1 (D.B.).

Where, the eye-witnesses had deposed that as many as 7-8 assailants surrounded the deceased and hit him with lathis and caused injuries by knives but the medical evidence did not show even a single contusion having been sustained by the deceased except penetrating wounds caused by knives, *held*, as the medical evidence, *i.e.*, absence of contusions on the body of the deceased, completely ruled out the version given by the eye-witnesses, no reliance could be placed on the evidence of eye-witnesses: 1990 Cr.L.J. 846: 1989 All.L.J. 463: 1989 All.Cr.C. 264 (D.B.).

Where the witnesses had stated that the accused gave a pharsa blow without being asked as to whether it was given from blunt or sharp side, *held*, the opinion of the Doctor that the injury was caused by a blunt object, could not be said to be contradictory of the evidence of witnesses as pharsa can be used from both the sides: 1994 Cr.L.J. 494: 1994 M.P.L.J. 57 (D.B.); 1990 M.P.L.J. 228: 1990 Cr.L.J. (N.O.C.) 125 (D.B.).

Where the accused hacking the deceased with *daos* chased away the three eye-witnesses whom, when they returned to the scene, the injured gave names of the accused and the injured died within an hour or so; the F.I.R. lodged without undue delay also contained the accused's names; and the Doctor opined from the nature of injuries that the deceased might not have been able to talk immediately after the occurrence, *held*, but since the deceased as per the post-mortem report was a 'stout built male' and only one out of the ten injuries was fatal, the Doctor's evidence could not be accepted as conclusive; the dying declaration acted upon: 1991 Cr.L.J. 199 (Gau.) (D.B.).

Where prosecutrix version about the offence of rape was in conflict with the medical evidence. *See* (1984) 3 Crimes 392 (P.&H.).

10. Report of Chemical examiner/Forensic science laboratory.—In almost all criminal cases, the blood-stained earth found from the place of occurrence is invariably sent to the Chemical Examiner and his report alongwith the earth is produced in the Court; where this procedure was departed from for reasons best known to the prosecution, an inference may be drawn that the defence version may be true: A.I.R. 1976 S.C. 2263: 1976 Cr.L.J. 1736: (1976) 4 S.C.C. 394.

Though a Senior Scientific Assistant (Chemistry), Central Forensic Science Laboratory does not fall in categories of the officers enumerated in S. 293 of the Cr.P.Code yet he is an expert in science being Senior Scientist in Chemistry and thus, his opinion would be relevant piece of evidence in view of S. 45 of the Evidence Act: 1995 Cr.L.J. 1623 (Del.) (D.B.).

Expert evidence—Use of report of Chemical Examiner—Admissibility in evidence. *See* 1982 Cr.L.J. 2138: (1982) 84 Punj.L.R. 566.

Where in a prosecution for rape, the report of the Chemical Examiner contra-indicated the story of any sexual-intercourse having taken place with the prosecutrix, *held*, the unexhibited report of the Chemical Examiner did not, in fact, require to be formally proved by any witness; it was a document which proved itself under S. 293, Cr.P.Code and the defence could be legitimately allowed to make use of it: 1993 Cr.L.J. 120 (Madh. Pra.). But where examination of the prosecutrix, a married woman was done after more than three days of the occurrence, *held*, Chemical Analyser's report was of little value: 1982 M.P.W.N. 108.

Report of Chemical Examiner—Evidentiary value—Offence under Prohibition Act: 1967 Ker.L.T. 165.

Where seized sample was kept by the Police Officer in his custody for about three days and he did not note it down anywhere in the records that they were with him and thereafter they were sent to Chemical Analyser, *held*, the certificate of the Chemical Analyser that the seized sample contained heroin could be discarded as there was possibility of tampering with the sample: 1994 Cr.L.J. 1020 (Bom.) (D.B.).

Where although the report of the Chemical Examiner and the Serologist were exhibited, in the record there was no forwarding letter of the Officer who sent these articles to the Chemical Examiner, *held*, unless the forwarding letter was on record, it was not possible to connect the accused with the articles which were examined by the Chemical Examiner and the Serologist: (1973) 39 Cut.L.T. 1211 (D.B.).

Whether a paper containing incriminating material against the accused has been torn out from another copy is an information connected with the forensic science; an expert can examine and say whether the paper came from a particular copy or not; no doubt, the paper's colour, thickness, finish or surface, water mark, wove or laid style, cutting, size, ruling, fluorescence have to be looked into; but it is not necessary that before the identity of the two papers is established, all the aforesaid things must be similar; in a given case

only some of the things may enable the expert to give opinion about the identity of the two papers: 1981 Cr.L.J. 1244: 1981 Raj.L.W. 370 (D.B.).

Where the report of the forensic science laboratory showed that the two items recovered from the accused's house contained human blood, *held*, the expert report and the items belonging to the accused were sufficient to connect the accused with the crime: 1993 Cr.L.J. 2077 (Andh. Pra.) (D.B.).

11. Nautical assessors.—The function of nautical assessors is to advise the Court upon nautical manners and their advice is expert evidence, admissible in Admiralty Courts, on all issues of fact about seamanship. The decision of the case, however, rests entirely with the Court and even in purely nautical matters the Court is not bound to follow the advice of assessors, but on questions of nautical science and skill great attention must obviously be paid to the opinion of the assessors since they are the only source of information on these points and some reason should be given for disregarding them. The assessors in an appeal Court are not substituted for those previously consulted; they are additional to them; and if one adviser or two advisers are to be preferred, it is because in the judgment of the Court the advice given is such as, in itself, is more acceptable. There can be no question of any appeal from one set of assessors to another: A.I.R. 1959 S.C. 597.

12. Handwriting.—The science of handwriting, unlike the science of finger-prints, is not an exact science; even experts tend to commit errors in their opinions on the genuineness of the signatures and handwriting; at times, even in genuine writings the pen hesitates or stops, specially when the writer is under great physical or mental strain; it may sometimes be difficult for an expert to examine even the genuineness of different writings, each with its own individuality, but nevertheless by the same author. It requires intelligent comparison to differentiate a genuine signature from the forged; great care and caution should be exercised, especially when the Court is not assisted by evidence of an expert; and even while calling experts, it is now admitted by all authorities, if a competent one is not available, it is better not to adduce any expert evidence at all: A.I.R. 1994 Andh. Pra. 102 (D.B.).

Comparison of finger-prints and thumb-impressions are highly specialised subjects and high degree of efficiency and qualification is required in giving an opinion about the identity of signatures and thumb-impressions. Only a well trained expert is competent to give his opinion in such matters. In case the trial Court was in doubt about the identity of signatures, the legal and proper course for it is to requisition the services of a handwriting expert *suo motu* at Government expense or call upon the parties to have the identity of signatures established: 1981 All.W.C. 33 (Rev.).

No doubt, there is danger inherent in evidence relating to identity of an accused person from similarities in writings only, but it cannot be said that the evidence as to the identity of an accused person from close resemblance between his admitted handwriting and the disputed handwriting, is even less reliable than evidence as to the identity based upon personal impressions of previously known individuals alleged to have been seen in all kinds of lights in dacoity cases, which Courts in this country do accept and act upon. Of course, there is need for care and caution in judging and utilising the testimony of handwriting experts.

There is no doubt, that the worth of an opinion by an expert can be tested by the reasons given in support of that opinion and not by the bare conclusions of the expert. Nevertheless, the opinion can be stated by the expert both by means of a report and by means of the statement in the witness-box which must be there in addition. Moreover, as the unsoundness of the experts' opinion about some writing can be demonstrated by means of his cross-examination, the brevity of his reports is not sufficient to destroy the value of his evidence.

It is not the apparent qualifications of a handwriting expert which ought to determine the value of the evidence given by him, but the soundness of the reasons advanced by him in support of the particular opinion expressed by him. These reasons are always open to scrutiny by a Court of law, and their soundness can be tested by examining the disputed and the admitted writings in the light of the reasons given. The object of expert evidence is to assist the Court in forming its own opinions. Even if an expert's opinion was not reliable in any particular case, a Court is not absolved from the duty of forming its own opinion about the disputed handwriting. There are certain well-known criteria, such as the examination and comparison of individual characteristics and idiosyncrasies which have to be employed by experts as well as by Courts in arriving at their conclusion.

The Court is bound to form its own opinions with the aid of all the permissible methods, and to arrive at a conclusion where a conclusion can safely be arrived at. Such a conclusion can safely be arrived at where the conclusions of a Court, after comparing the admitted and disputed writings coincide with the opinions of the expert and are further corroborated by other pieces of evidence.

If the opinion of the handwriting expert is found by a Court to be honest and reliable after subjecting it to the recognised test of soundness, it can even be considered better evidence than the evidence of indifferent witnesses whose motives are often mixed and whose powers of observation and recollection are very faulty. The observations of the expert are far more careful and guided by scientific knowledge and skill which, where they exist, must be duly appreciated.

An expert who gives dishonest opinions is quite certain to be exposed by ruthless cross-examination and to be soon found out by astute Courts which do not and should not readily accept expert opinions without rigorously testing what an expert has to say. One of the ways in which the honesty of an expert can be tested is to consider the number of instances in which he has given opinions contrary to the opinions which those who consult may be presumed to desire: 1967 Cr.L.J. 134: A.I.R. 1964 All. 64.

An expert witness is not an accomplice; when it is said on occasions on very high authority that conviction based solely on handwriting expert's opinion is hazardous, it does not mean that experts in general are not reliable; it only indicates that all human judgment being fallible, an expert may go wrong due to some defect of observation or error of premises or honest mistake of conclusion; the more developed and perfect a science, the lessor chance of an incorrect opinion and the *vice versa*. The science of identification of finger-prints has attained near perfection but not the science of identification of handwriting; but that does not justify viewing the handwriting expert's opinion with initial suspicion; it has to be tested on the touchstone of his reasoning; his duty is to furnish necessary scientific criteria for the Judge to formulate his own independent judgment: A.I.R. 1980 S.C. 531: 1980 Cr.L.J. 396: (1980) 1 S.C.C. 704: (1980) 2 S.C.R. 249.

A handwriting expert is a competent witness and his opinion evidence is recognised as relevant; his evidence is not equated to the evidence of an accomplice. It is not fair to approach his opinion evidence with suspicion; the Court should weigh the reasons to assess whether they are sound. But the Court cannot afford to overlook the fact that the science of identification of handwriting is imperfect as compared to the science of identification of finger-prints; Courts are, therefore, wary in placing implicit reliance on such opinion evidence and have looked for corroboration though there is no such rule of prudence to be applied regardless of the circumstances and quality of the expert evidence. There is no hard and fast rule in this behalf but the Court has to decide in each case on its own merits as to what weight should be attached to the expert's opinion. Thus, where, the opinion evidence of handwriting expert was examined by the trial Court in great detail and it came to the conclusion that it was hazardous to rely on his evidence as he had betrayed bias against the accused and in favour of the prosecution as he also belonged to the Police Department and there were doubts as to the genuineness of the specimen writings; after reviewing the matter, the Supreme Court considering that the quality of evidence of the expert was not so high as to commend acceptance, *held*, it could not be accepted without corroboration: A.I.R. 1992 S.C. 2100: 1992 Cr.L.J. 3454: (1992) 3 S.C.C. 700: (1992) 3 Crimes 5. *See* also A.I.R. 1983 All. 54.

The evidence of a handwriting expert, unlike that of a finger-print expert, is generally of a frail character and its fallibilities have been quite often noticed. The Courts should, therefore, be wary to give too much weight to the evidence of handwriting expert: A.I.R. 1973 S.C. 1346: 1973 Cr.L.J. 1143: (1973) 4 S.C.C. 46.

Though the opinion of a handwriting expert given in evidence is no less fallible than any other expert opinion adduced in evidence with the result that such evidence has to be received with great caution, but this opinion evidence, which is relevant, may be worthy of acceptance if there is internal or external evidence relating to the document in question supporting the view expressed by the expert. If after comparison of the disputed and the admitted writings by the Court itself, when the Presiding Officer is familiar with that

language, it is considered safe to accept the opinion of the expert than the conclusion so arrived at cannot be assailed on the mere ground that comparison of handwriting is generally considered as hazardous and inconclusive and that the opinion of the handwriting expert has to be received with considerable caution: A.I.R. 1973 S.C. 2200: 1973 Cr.L.J. 1187: (1973) 2 S.C.C. 86.

The Act, as in English Law, recognises two direct methods of proving a questioned handwriting: (*1*) by admission of its writer, or (2) by evidence of the person who saw it written. Besides, these best methods of proof, there are three other modes of proof by opinion: (*1*) by evidence of a handwriting expert, or (2) by evidence of a witness acquainted with the handwriting of the writer, and (3) by the opinion of the Court by comparison of the admitted and questioned documents. These three cognate modes of proof involve the method of comparison. [1975 Cr.L.J. 1756 (Del.) (D.B.), Reversed]: A.I.R. 1979 S.C. 14: (1978) 2 Karn.L.J. (S.N.) 39.

The report of a handwriting expert is admissible in evidence under O. 26, R. 10 of the C.P.Code; being a mere piece of evidence, it is not conclusive; it is liable to the Court's scrutiny before it can be relied upon: A.I.R. 1987 Ori. 7: (1986) 62 Cut.L.T. 613: (1986) 2 Ori.L.R. 137 (D.B.).

Opinion of a handwriting expert cannot be said to be involving any scientific investigation and, therefore, the words 'scientific investigation' used in O. 26, R. 10-A of the C.P.Code, would not, in the right sense of the expression, apply to opinion evidence made relevant under S. 45, Evidence Act: (1986) 2 An.L.T. 461.

The opinion of handwriting expert is not conclusive evidence. It is, in the nature of opinion evidence. The evidence of the handwriting expert has to be taken with some amount of caution for normally they appear to serve the party at whose instance they have been examined. Therefore, a conclusion cannot be based entirely on the evidence of a handwriting expert. There must be independent evidence or there must be cogent circumstantial evidence: A.I.R. 1978 All. 515; A.I.R. 1978 Cal. 55: 1978 Cal.H.N. 172; 1980 Raj.L.W. 96: 1980 W.L.N. 83 (D.B.).

The opinion of a handwriting expert cannot in law be accepted as conclusive proof. At best it can only be taken as an inconclusive aid in conjunction with other evidence: A.I.R. 1949 Kutch 3: 50 Cr.L.J. 964.

Evidence given by experts of handwriting can never be conclusive, because it is, after all, opinion evidence: (1963) 3 S.C.R. 722: 1963 B.L.J.R. 226: A.I.R. 1963 S.C. 1728.

It is not open to the Court to accept blindly the statement of the handwriting expert. The correct principle of law is that the testimony of the handwriting expert should be taken as a guide and with its assistance the Court should apply its own observation to the disputed writing and reach the conclusion whether the signature which is denied, is or is not the signing of the person: I.L.R. (1952) Nag. 376: 1952 Nag.L.J. 545: A.I.R. 1952 Nag. 289; A.I.R. 1959 Pat. 328: 1959 Cr.L.J. 893.

The law is settled that opinion evidence of handwriting expert is not conclusive; the Court is competent to compare the disputed and admitted writings, even without examining an expert, to satisfy itself from its own observations for arriving at its own conclusions; but it is always better as a matter of prudence and caution, to have expert opinion to facilitate its scrutiny by the Court's eye. [A.I.R. 1967 S.C. 1325; A.I.R. 1957 S.C. 589; A.I.R. 1954 S.C. 28; A.I.R. 1963 S.C. 1728, Foll.]. The expert's opinion is to some extent helpful, where the findings against the accused were not solely based on the expert's evidence: 1991 Cr.L.J. 1563 (Mad.). *See* also 1973 Mah.L.J. 855: I.L.R. (1974) Bom. 337 (D.B.).

An opinion of an handwriting expert is not to be given preference simply because he is better qualified than the other expert. In such cases the opinion has to be valued on the basis of the reasons given by the experts than on their qualifications: 1962 M.P.L.J. (Notes) 127.

It is an accepted principle of law that the science of handwriting is not accurate; there is a likelihood of errors creeping in the handwriting expert's evidence; his evidence should, therefore, be received with caution; its evidentiary value is to be determined by the trial Judge: (1993) 3 An.L.T. 446.

It is open to the Court to hold that the evidence of the handwriting expert is not reliable or does not carry conviction but the Court cannot misread his statement: 1959 M.P.L.J. 869. A comparison of handwriting is to be used with great care and caution and especially in a criminal case when a large

quantity of apparently different handwriting is under comparison: I.L.R. 39 Cal. 606: (1911-12) 16 Cal.W.N. 812; A.I.R. 1926 Pat. 575 (thumb-impression); I.L.R. 29 Cal. 1; A.I.R. 1925 Oudh 413. *See* also I.L.R. 45 Cal. 60: (1916-17) 21 Cal.W.N. 1076: 42 I.C. 484.

The opinion of handwriting expert is not conclusive. Still it cannot be brushed aside as useless. The opinion of an expert is entitled to some consideration and weight when it is corroborated by other evidence: 1956 Cr.L.J. 253: I.L.R. (1955) Mys. 585: A.I.R. 1956 Mys. 9.

It may be that normally it is not safe to treat expert evidence as to handwriting as sufficient basis for conviction. It may be, however, relied upon alongwith other various items of external and internal evidence relating to the documents in question: 1957 Cr.L.J. 559: A.I.R. 1957 S.C. 381; A.I.R. 1959 Pat. 328.

The comparison of the signature is nothing but opinion evidence and the dispute as to the genuineness of the document could not have been decided solely on the opinion evidence: A.I.R. 1979 Cal. 256: (1977-78) 82 Cal.W.N. 1119.

Though expert evidence to prove or disprove the genuineness of a handwriting or signature is relevant under S. 45, other evidence supporting or detracting from expert evidence is also relevant under S. 46. Expert evidence, like other opinion evidence under S. 47, is based on opinion; the science of identifying handwritings is imperfect, not exact and an opinion thereunder may not be conclusive; it may not be safe for the Court to base its finding solely on opinion evidence though it is only a rule of caution; the Court may act upon it if the opinion evidence finds support from internal or external evidence, direct or circumstantial. But the Court has to satisfy itself in each case: 1983 Ker.L.T. 281 (D.B.).

Only a handwriting expert or some other person having the opportunity of seeing and being familiar with the writing can be said to be competent to give evidence about its authenticity: (1990-2) 10 Guj.L.H. 438: (1990-2) 31 Guj.L.R. 1296.

It is well settled that evidence of handwriting experts under S. 45 is not conclusive and cannot be used as substantive evidence; the Court must always look for corroboration from other evidence; the Court has to take into account various factors that surround the transaction in dispute; it should judge the case on the basis of both external and internal evidence; evidence of the expert *per se* is not binding on the Court: (1971) 2 Mys.L.J. 407 (D.B.).

Handwriting expert—Evidence is not conclusive—Overwhelming evidence in proof of handwriting—Opinion of expert to the contrary held was of no value: I.L.R. (1954) 1 All. 76: A.I.R. 1953 All. 318.

Ss. 45, 47 and 73 provide for three methods of arriving at decision whether the disputed writings or signatures are of the same person: (*1*) comparison of disputed and admitted writings on the opinion of expert witness or (2) of the persons acquainted with the handwriting or (3) comparison by the Court itself: A.I.R. 1970 Mad. 85: 1969 M.L.J. (Cr.) 117: 1970 Cr.L.J. 254.

The writing may be proved to be in the handwriting of a particular individual by the evidence of a person familiar with the handwriting of that individual or by the testimony of an expert competent to the comparison of handwritings on a scientific basis. A third method is comparison by the Court with the writing made in the presence of the Court or admitted or proved to by the writing of the person. Both under Ss. 45 and 47 the evidence is an opinion, in the former by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experience. In either case the Court must satisfy itself by such means as are open that the opinion may be acted upon. Where an expert's opinion is given, the Court must see for itself and with the assistance of the expert come to its own conclusion whether it can safely be held that the two writings are by the same person. This is not to say that the Court must play the role of an expert but to say that the Court may accept the fact proved only when it has satisfied itself on its observation that it is safe to accept the opinion whether of the expert or other witness: A.I.R. 1967 S.C. 1326: (1967) 2 S.C.A. 135: 1967 M.L.J. (Cr.) 925.

One such means open to the Court is to apply its own observation to the admitted or proved writings and to compare them with the disputed one, not to become an handwriting expert but to verify the premises of the expert in the one case and to appraise the value of the opinion in the other case. This comparison depends on an analysis of the characteristics in the admitted or proved

writings and the findings of the same characteristics in large measure in the disputed writing. In this way the opinion of the deponent whether expert or other is subject to scrutiny and although relevant to start with becomes probative: 12 Law. Rep. 92 (Mys.).

When there is a dispute over signatures or writings, *held*, it is for the Court to determine whether the decision may be made with or without expert assistance: 1976 Rev.L.R. 648 (P.&H.) (D.B.).

To make the evidence of a handwriting expert admissible, it is not necessary that the handwriting should be actually compared in Court. It is enough if the documents admittedly in the accused's handwriting are shown to him in open Court and he expresses his opinions thereon: 16 Cr.L.J. 703: 30 I.C. 751 (M.); (1911-12) 16 Cal.W.N. 812: I.L.R. 39 Cal. 606. *See* also 2 All.L.J. 444; I.L.R. 39 Cal. 245; 2 Weir 759. (Sub-Registrar not expert: 2 Weir 760).

No doubt, a comparison of the signatures without the help of an expert may not afford a conclusive test in the case of expert forgers. But, where the disputed signature appears to belong to a class different from the group of admitted signatures, it is certainly one of those cases where expert evidence would be of great use: I.L.R. (1957) Andh. Pra. 399.

In the case of a disputed handwriting or signature a Court is not incompetent to use its own eyes for the purpose of deciding whether certain handwritings or signatures placed before it are similar or not. A Court should not be deprived of the function for which it exists, namely, of deciding disputed facts placed before it. The opinion of experts is only a piece of evidence, but the opinion of the judge is the decision in the case. A judge has to be satisfied that he is entitled to take such assistance upon evidence as is available in the circumstances of the case: A.I.R. 1937 Pat. 328. Where an acknowledgment by judgment-debtors saving limitation is attacked as a forgery, the fact that the handwriting expert himself does not claim infallibility for his opinion that the admitted signature is different from the questioned one is immaterial. That consideration would be of great importance in a prosecution for forgery, in which the onus would be on the prosecution to satisfy the Court positively that the handwriting is not the handwriting of the person concerned. In the civil suit, however, it is the contrary proposition which has to be proved, namely, that the handwriting is the handwriting of the judgment-debtors and the onus is on the decree-holders. Where the evidence on behalf of the decree-holders is not sufficient to prove that the handwriting expert's opinion is incorrect, the decree-holder must fail as he has not discharged the burden on him: 225 I.C. 528: A.I.R. 1947 Pat. 139.

Although it is permissible for a Court to compare the handwriting, it is generally recognised to be a hazardous test and should not be resorted to except in clearest cases without the aid of experts: A.I.R. 1955 Madh. Bh. 103 (F.B.); 1983 All.W.C. 398: 1983 All.L.R. 467.

There is no legal bar to the Judge using his own eyes to compare the disputed writing with the admitted writing, even without the aid of the evidence of any handwriting expert: 1983 B.L.J.R. 649: 1983 Pat.L.J.R. 541.

The Supreme Court in an appeal also is entitled to call for the writings for making a comparison thereof: (1967) 2 S.C.A. 135: 1967 M.L.J. (Cr.) 925: A.I.R. 1967 S.C. 1326; A.I.R. 1973 Pat. 215: 1973 Pat.L.J.R. 393 (D.B.).

Ss. 45, 73—Genuineness of document in question—Court itself can compare unaided by expert evidence, handwritings in disputed document and admitted document and hold disputed document to be genuine—Comparison should, however, be before and without assistance of lawyers appearing in the cases: A.I.R. 1965 Pat. 332.

Comparison of signatures by Court itself—Permissibility—Court not to base its conclusion solely on such comparison: A.I.R. 1957 All. 119. A comparison of handwriting is at all times, as a mode of proof, hazardous and inconclusive and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of Counsel and the evidence of experts. A comparison of writings has consequently been deemed a mode of ascertaining the truth which ought to be used with very great caution: I.L.R. 49 Cal. 235: (1921-22) 26 Cal.W.N. 113: 65 I.C. 774: A.I.R. 1922 Cal. 12.

Comparison of disputed signature with the admitted signature without the aid of expert evidence is hazardous: 1963 M.P.L.J. (Notes) 253.

Before accepting the evidence of an expert or other witness familiar with the handwriting and signature of a person, *held*, the Court has to use its own observation in comparing admitted or proved and disputed writings not as a handwriting expert but to verify the expert's premises in one case and appraise the value of opinion evidence in the other case. [A.I.R. 1967 S.C. 1326; A.I.R. 1925 Cal. 485; A.I.R. 1946 All. 67 and A.I.R. 1947 All. 411, Rel. on]: A.I.R. 1971 Assam 168: 1971 Assam L.R. 267.

Even where there is opinion of handwriting expert, the Court must itself compare the two handwritings and with the assistance of the expert must come to its own conclusion whether the two handwritings are of same person. [A.I.R. 1967 S.C. 1326, Applied]: A.I.R. 1984 N.O.C. 77 (All.).

Comparison of handwritings by an handwriting expert, unlike the comparison of finger-prints, *held*, is at best only a tentative method of judging their authorship; the safer course is to judge the comparison in the light of surrounding circumstances: A.I.R. 1982 N.O.C. 113 (Gau.).

When the experts differ, ultimately the Court has to form its own opinion on the basis of the entire evidence brought on record. The Court also would be competent to compare the signatures and the writings under S. 73: (1983) 2 Karn.L.J. 135.

There may be cases where both sides call experts and the voices of science are heard. There may be cases where neither side calls an expert, being ill able to afford him. In all such cases, it becomes the plain duty of the Court to compare the writings and come to its own conclusion where there are expert opinions, they will aid the Court. Where there is none, the Court will have to seek guidance from some authoritative textbook and the Court's own experience and knowledge. But discharge it must, its plain duty, with or without expert, with or without other evidence: A.I.R. 1980 S.C. 531: 1980 Cr.L.J. 396: (1980) 1 S.C.C. 704: (1980) 2 S.C.R. 249.

It cannot be laid down as a general rule that on the defendant choosing to deny his signatures, the plaintiff must examine a handwriting expert; nor is the Court bound to accept the evidence of a handwriting expert as true; the Court has to apply its own mind to the evidence of expert and either to believe or disbelieve it. [A.I.R. 1957 All. 119, Dissent. from]: A.I.R. 1973 Raj. 12: 1973 Raj.L.W. 182: 1972 W.L.N. 658.

Where an expert witness was not definite in his opinion about the authorship of the disputed signatures and the request made for obtaining the opinion of another expert possessing 'greater and better authority' was declined, *held*, it is not necessary for the Court to wait until a definite opinion is received from one expert or other; the Court could decide about the authenticity of the signature on the basis of oral evidence in accordance with law empowering the Judge to compare the two signatures himself. Justice is older than experts; it does not rely solely upon expert opinion; even if experts are unable to give a definite opinion, justice must come to its own conclusion to give a definite finding: A.I.R. 1984 Cal. 316.

Where specimen signatures sent to Government expert who reported that the signatures on the original document do not admit of comparison with specimen signatures, *held*, it will be needless and futile exercise to keep on sending that signature to one expert and another: 1983 All.W.C. 1002: 1983 All.Cr.C. 533.

Both under O. 26 of the C.P.Code or under S. 45 of the Evidence Act, a second reference to a handwriting expert without setting aside the first report is not prohibited; it lies in the Court's discretion to be used with due circumspection to allow the examination of the second expert if circumstances so justify: A.I.R. 1982 Ker. 49: 1981 Ker.L.T. 360: I.L.R. (1981) 2 Ker. 32; (1990-2) 106 Mad.L.W. 420.

Where a handwriting expert, appointed at the instance of a party, gave his report which was adverse to the party and during arguments the party applied for appointment of a second expert, *held*, the request could not be granted straightaway; if it is found on objections already filed by the party that the first expert's opinion is erroneous, it would be open to the party to examine another expert as its witness: (1990-2) 106 Mad.L.W. 420.

It is not right to say that when there is difference between the two handwriting experts, the Court ought to have sent the matter to some other independent handwriting expert having no concern with either party, instead of himself acting as an expert and coming to a conclusion. Where an expert's

opinion is given, the Court must come to its own conclusion, whether it can safely be held that the two writings are by the same person. This is not to say that trial Court must play the role of an expert but to say that the Court may accept the fact proved only when it has satisfied itself on its observation that it is safe to accept the opinion whether of the expert or other witness: A.I.R. 1973 Pat. 215: 1973 Pat.L.J.R. 393 (D.B.).

It would be going too far to say that an expert who has generally a certain amount of unconscious bias in favour of the party examining him is more reliable than the witnesses of fact. The expert evidence moreover is open to considerable danger when it relates to the state of a writing or regarding bare initials: A.I.R. 1951 Pepsu 101.

Though experts generally depose in favour of the party producing them but where their opinions themselves differ on disputed signatures, *held*, evidence of one expert may not be discarded if the Court after comparing the disputed and the genuine signatures also comes to the same conclusion; his opinion thereby stands accepted with re-inforced reasoning; the Court, however, cannot be said in such a case to be acting as an expert. [A.I.R. 1967 S.C. 1326, Foll.]: A.I.R. 1991 P.&H. 254: (1991-2) 100 Punj.L.R. 112: (1991) 2 Rev.L.R. 254.

Where accused persons were alleged to have conspired in order to eliminate deceased and in its support prosecution relied upon certain letters allegedly written by accused and as opined by Government examiner they were in accused's handwriting whereas expert opinion cited on behalf of the accused regarding impugned documents was contrary to that of Government examiner, *held*, there is natural tendency on the part of the expert to support the view of the person who had called him. As evidence of Government examiner was more reasonable, dependable and convincing, it could be relied upon: 1995 Cr.L.J. 810 (Him. Pra.) (D.B.).

Where a handwriting expert was privately consulted by a party before he was produced in Court and he was produced as his opinion was favourable to that party, much importance cannot be attached to his evidence: 39 P.L.R. (J.&K.) 54; A.I.R. 1959 Pat. 328.

When the defendant in a civil suit applies to the Court for obtaining the opinion of a named handwriting expert to prove the genuineness of certain disputed documents to support his case, the Court cannot compel him to choose or accept a handwriting expert of the choice of the plaintiff for this purpose. The handwriting expert is after all a witness of a particular party that party cannot be compelled to choose its witnesses according to the dictate of the opposite party: (1968) 2 M.L.J. 48: I.L.R. (1968) 1 Mad. 805.

Where each of the parties had called an expert of questioned documents who operating on private basis appear as witnesses with understanding to support their respective paymasters and would not, but for such understanding, be led into witness-box, and their experts gave conflicting opinion, *held*, no great reliance could be placed on their evidence; all the attending circumstances have to be kept in mind before the testimony of either of them is accepted: A.I.R. 1974 P.&H. 302.

Evidence of handwriting expert—Appreciation of—No direct proof—Expert's opinion is of no use in the absence of direct evidence: (1962) 1 Cr.L.J. 812 (Cal.).

Mere assertion, without mentioning the data or basis is not evidence, even if it comes from an expert; expert opinion is admissible only when accompanied by the data and basis and the reasoning tending to that inference: A.I.R. 1953 Vindh. Pra. 21.

Necessity for giving reasons in support of handwriting expert's report. *See* 1992 Cr.L.R. 435 (Raj.).

Where the reasons in support of the opinion of the handwriting expert were introduced for the first time in Court at the stage of evidence but it was not the case of the accused that they were not afforded opportunity for cross-examination in that regard, *held*, no prejudice could be said to have been caused to them; if they were prejudiced in any manner due to non-supply of the reasons, they could have asked for respite from the Court to more effectively prepare themselves for the purpose of cross-examination: 1992 Cr.L.J. 243 (Ori.).

Where the statement of a person does not show that he is an 'expert' in the art of handwriting, his evidence can be ruled out as being inadmissible: (1929) 31 Punj.L.R. 109: A.I.R. 1930 Lah. 336.

Where the evidence does not, in any special manner, refer to the expert knowledge with regard to the handwriting, the sworn testimony of the other witnesses should be given preference to the opinion of the expert when those witnesses swear on oath that the signatures were written in their presence by the signatories: I.L.R. (1953) Hyd. 140: A.I.R. 1953 Hyd. 181.

Where the expert who had examined the documents supported his opinion with detailed reasons and the defence had not been able to establish that he lacked either the qualifications or the skill that are expected of such an expert, *held*, his evidence could certainly be relied on: (1994) 1 Bom.C.R. 84 (D.B.).

The opinion of a well trained educated person formally trained in the science of handwriting at the Institute of Forensic Science and Technology at Calcutta for 2 years and practically trained in the United Kingdom, being a Fellow Member of the Royal Microscopical Society of London supported by good reasons, *held*, should be preferred to that of another expert, a mere Matriculate, having received no training at any recognised institution and offering unconvincing reasons in support of his opinion: (1986) 34 B.L.J.R. 725.

The proof of the signature of a person to a document is not necessarily a proof of its contents; normally, the contents of a document should be proved by calling the person who is the author of the document or by the presence of other internal circumstantial evidence. [A.I.R. 1957 S.C. 857, Foll.]: A.I.R. 1984 N.O.C. 306 (Del.).

It is well-known that handwriting experts need plenty of comparative material before they can reach a conclusion.

It is common knowledge that signature have to be magnified to an equal extent, superimposed, and lines drawn to find out the angles, to measure the lengths of the various strokes, to find out their taperings and so on: 1958 M.P.L.J. 833: 1958 Jab.L.J. 674: 1958 M.P.C. 689: A.I.R. 1959 Madh. Pra. 84.

In obtaining a specimen handwriting, the same type of paper, the same colour of ink and the same kind of medium as were used in the disputed handwriting should be used as far as possible: A.I.R. 1960 Raj. 77: I.L.R. (1960) 10 Raj. 152: 1960 Raj.L.W. 152.

There are experts who pretend to determine the age of a writing by merely examining it with a hand magnifier or a microscope; it always exhibits their ignorance or dishonest presumption. [A.I.R. 1964 S.C. 529, Rel. on]: A.I.R. 1994 Andh. Pra. 90: (1993) 3 An.L.T. 446.

Chemical tests to determine age of a writing, as a rule, are a mere excuse to make a guess; they furnish no reliable data to arrive at a definite opinion; thus, a mere opinion of the handwriting expert cannot override the positive evidence of the attesting witnesses in the suspicious circumstances. [A.I.R. 1964 S.C. 529, Rel. on]: A.I.R. 1994 Andh. Pra. 90: (1993) 3 An.L.T. 446.

Where though the defendant had admitted the execution of the document in question, he asserted that attestation of said document was done subsequent to execution and thus, moved an application to take the opinion of the handwriting expert for the purpose of ascertaining the age of the ink used by the attestor and the scribe, *held*, the Court below was right in allowing said application: A.I.R. 1994 Andh. Pra. 90: (1993) 3 An.L.T. 446.

Where, expert did not compare signatures in the open Court before the parties, had not taken or developed the photographs in the Court, had not sent the report to the Court in a sealed cover and had sent the photographs, not alongwith the report, but had tendered them in the Court, *held*, that the lower Court had rightly rejected the expert's opinion. [A.I.R. 1973 S.C. 2200, Rel. on]: A.I.R. 1976 Cal. 224: (1975-76) 80 Cal.W.N. 278 (D.B.).

The practice of sending original documents in the custody of Court to handwriting experts is a highly objectionable and a very bad procedure. Under no circumstances should a Court permit or allow the documents to go out of its custody, as such a civil practice is attendant with various risks. The proper procedure in such cases would be only to permit the handwriting expert to inspect the document in the Court premises itself in the presence of some responsible officer of the Court and also if necessary permit the expert to have photographic copies of documents in the presence of the responsible officer of the Court. Any lapse in taking the necessary safeguards in this direction may result in miscarriage of justice, besides creating complications: (1968) 2 M.L.J. 48: I.L.R. (1968) 1 Mad. 805, approved in (1994-2) 114 Mad.L.W. 287 (D.B.); (1984) 97 Mad.L.W. 222 (S.N.).

It is unsafe to hand over questioned documents during the trial to experts, whether private or Government; the purpose obviously is to ensure the documents' safety and to prevent their being tampered with: A.I.R. 1976 Mad. 66: (1976) 1 M.L.J. 11: (1976) 89 Mad.L.W. 77.

The request of a party for sending original account books for ascertaining the age of ink used at certain pages of the account books to the Director, Government Finger-print and Handwriting Bureau or the State Forensic Science Laboratory, *held*, cannot always be declined on the ground that they should not go out of the Court's custody which involves grave risk of losing them; (1968) 2 M.L.J. 48 is not attracted as it is confined to private

experts, not Government experts: (1975) 88 Mad.L.W. 71.

The usual practice in Orissa is to send documents to the expert for his opinion; it is only when it is necessary to examine him in Court that one of the parties may summon him which involves heavy expenses; it cannot be laid down as a rule that in no circumstances can the documents be sent to him and he must always be summoned to examine the documents in the Court. [(1968) 2 M.L.J. 48, Dissent. from]: A.I.R. 1975 Ori. 125: 41 Cut.L.T. 255: (1975) 1 Cut.W.R. 110.

General features cannot constitute sufficient material for establishing identity of handwriting. What is requisite is the peculiar writing habits or idiosyncrasies and the presence or absence of the same in the two sets of writings is a feature which is of decisive importance. A single dissimilarity can outweigh a large number of similarities. 1973 Mah.L.J. 855: I.L.R. (1974) Bom. 337 (D.B.).

It is common knowledge that handwritings of persons are never uniform, especially when they are old: 1958 M.P.L.J. 198: 1958 Jab.L.J. 289: 1958 M.P.C. 317: A.I.R. 1958 Madh. Pra. 246.

A fine or stub pen, haste or deliberation, good or bad health, sitting or standing, drunk or sober may radically change the appearance and quality of writing. At the most, expert opinion on handwriting can raise a suspicion as to the genuineness of a document but it is of no moment unless confirmed by other evidence: I.L.R. (1953) Hyd. 140: A.I.R. 1953 Hyd. 181.

After a severe attack of malaria or some virulent disease the patient may recover within a week, and there may be tremor in his hand as compared to the signature which he may have made a week or 10 days prior to the illness. Such facts also should be taken into consideration by the handwriting experts before expressing their final opinion: I.L.R. (1953) Hyd. 140: A.I.R. 1953 Hyd. 181.

Where the borrower was undergoing treatment when he signed the promissory notes in question and was in a serious condition, *held*, marginal dissimilarity in signatures was inevitable: A.I.R. 1987 Mad. 17: (1986) 99 Mad.L.W. 633: (1986) 2 M.L.J. 442 (D.B.).

It is an established principle that a handwriting expert's opinion based on glaring similarities is not of much value; in any serious attempt, the forgers do achieve some similarities, even glaring similarities; an expert should rather find out dis-similarities on points normal in the writings of a man: (1983) 2 Kam.L.J. 135.

In examining a disputed document, the true test is not the extent of the similarities observed when compared with genuine documents, as forged documents usually are good imitations of genuine documents, but the nature and extent of the dissimilarities noticed. It is these differences which expose the true character of the document in question: I.L.R. (1960) Mys. 1206: (1962) 1 Cr.L.J. 441: A.I.R. 1962 Mys. 53.

It is not safe to hold the document to be forged or genuine solely on the evidence of an expert. [A.I.R. 1973 S.C. 1346, Foll.]. While comparing disputed and admitted signatures, it is always proper to see that admitted signatures are of the same period as the disputed signatures: 1980 Rev.L.R. 346 (P.&H.).

It has been held in a number of cases that a handwriting expert's opinion in forgery cases is very weak evidence and the Court should seek other evidence in corroboration. But where the prosecution's handwriting experts had no special qualification to be claimed to be so and the books of account alleged to be forged or falsified were not before the Court, *held*, it is highly unsafe to sustain a conviction founded on such evidence: 1976 Cr.L.J. 145 (Goa).

It is not safe to rely upon the similarity of the signatures or on a layman's opinion as to whether they are similar or not: A.I.R. 1955 Mad. 88. The rejection even *in toto* of an expert's opinion would not exonerate the Court from the duty of coming to an independent finding on the question of an authorship of handwriting; the Court has to examine the opinion and come to its own decision. The most important things are to examine the general characteristics, formation of letters, fixed pen habits and mannerisms, and discern the identity of the writer. The identity or resemblance in handwriting has to be found out on the value of the effect of various considerations arising from individual characteristics and idiosyncrasies which have been embodied in technical language of experts: 38 Cr.L.J. 818: A.I.R. 1937 Cal. 99 (S.B.).

It is true that a clever forger will try to give the forged signature as much resemblance as

possible of a genuine signature. But the personal characteristics of the writings or signatures of a particular individual are often an unfailing guide in determining the question of genuineness of the writing, and it is often a difficult work for a stranger or a forger to reproduce faithfully all such characteristics in the writings forged by him: (1959-60) 64 Cal.W.N. 1067: A.I.R. 1961 Cal. 300.

A mere statement, therefore, by a witness that it is in the handwriting of the accused is no evidence if he is not able to say how long ago they were written: I.L.R. 36 Mad. 159. In arriving at a conclusion of the authorship of the forged document, the expert should show marked peculiarities in the handwriting of the accused, which are re-produced in the forged document and when the writing has no such peculiarities and comparison is of no consequence and cannot be relied on. Also the fact that the disputed samples are put separately from the started ones for the examination lessens its usefulness: I.L.R. 36 Mad. 159.

Accused charged with forgery—Conviction can be based solely on expert testimony, though as a measure of precaution the evidence should be corroborated by other evidence: 1969 Cr.L.J. 932: A.I.R. 1969 Punj. 225.

Ss. 47, 45—Handwriting proof of—Forgery—Opinion of handwriting expert—Not sufficient by itself to prove genuineness of handwriting—Substantial corroboration—Necessary—Penal Code (1860), S. 463: (1962) 1 An.L.T. 57: (1963) 2 Cr.L.J. 546.

Where the suit for recovery of money was based on a document which was denied by the defendant as a forgery but it was testified to by a witness acquainted with writing of the defendant as having been written and signed by the defendant, *held*, for identifying a particular writing, there is provision for examining an expert under S. 45 and any other person acquainted with the handwriting under S. 47: A.I.R. 1983 Pat. 321: 1983 B.B.C.J. 494: 1983 Pat.L.J.R. 541 (D.B.).

Where two rent receipts produced to prove the plaintiff's claim were challenged by the defendant as forgeries and were sent, together with the defendant's admitted signatures for opinion to an expert outside the State without disclosing, as agreed to by the parties, the name of the expert, and the expert opined the disputed signatures to have been forged, and the plaintiff impeaching the report to be a nullity contended that it could not be admitted in evidence under O. 26, R. 10 of the C.P.Code, *held*, examination and comparison of handwritings by an expert is a scientific investigation which together with the handwriting expert's opinion is governed by O. 26, R. 10 of the C.P.Code; it shall be read as evidence in the suit and form part of the record: A.I.R. 1987 Ori. 7: (1986) 62 Cut.L.T. 613: (1986) 2 Ori.L.R. 137 (D.B.).

Where there was no substantive evidence against the accused of forgery except that of the handwriting expert, *held*, no conviction could be based on such expert evidence: 1981 Mad.L.W. (Cr.) 134.

Where conviction in a corruption case rested on the uncorroborated testimony of a handwriting expert who had characterised even writings of such witnesses who had admitted on oath to be theirs as forged, clearly a most extraordinary situation, *held*, the conviction could not be upheld: A.I.R. 1979 S.C. 1011.

Where the Courts trying a summary suit, took upon itself the impermissible exercise of itself comparing the disputed and undisputed signatures, *held*, the result of such comparison is a mere personal belief or opinion of the Judge; the issue of forgery cannot be determined without its trial: (1990-2) 10 Guj.L.H. 438.

The conviction for forgery merely on the evidence of a handwriting expert, unsupported by any independent evidence, is unsafe. *Held*, that the opinion of the witness which was not based on any scientific examination of the documents but merely on a comparison of shape and design of the various writings, could hardly be considered reliable and sufficient: 1957 All.W.R. (H.C.) 558: 1957 Cr.L.J. 276; A.I.R. 1954 Pepsu 81: 1954 Cr.L.J. 739.

In a case of forgery the only chief evidence being an expert's examination of the forged documents as compared with the other documents alleged to be in the handwriting of the accused, the other documents must be strictly proved to be in his handwriting: I.L.R. 36 Mad. 159: 22 M.L.J. 270.

Where the parties examined handwriting experts in a suit based on promissory note impeached by the defendant as a forgery and the lower appellate Court accepted the evidence of the plaintiff's expert on the assumption that the defendant would have surely

tried to disguise his specimen signatures to make it very difficult for an expert to give an opinion or that his handwriting when he signed the pronote might have been more steady than four years after when he gave the specimen signatures, *held*, these mere conjectures were not sufficient when it is apparent from the record that the defendant possessed no skill in writing: A.I.R. 1981 All. 62.

It is well settled that the science of handwriting is not perfect; evidence of a handwriting expert is, thus, received with great caution; where expert admitted that there were variations in the admitted and disputed signatures and opined that the hand of the writer was not set, *held*, his evidence could not be of much assistance to the Court: A.I.R. 1987 P.&H. 93: (1986) 90 Punj.L.R. 478: 1986 Rev.L.R. 504: I.L.R.(1987) 2 P.&H. 96.

The opinion of a handwriting expert should not be rejected because it is based solely on a photograph of the impugned document as the photograph must be taken to represent the condition of the original correctly. The fact that the expert was handicapped to some extent by the absence of the original and that he could not study the pen pressure with any degree of accuracy, is not sufficient to reject the photograph and his testimony. Pen pressure is only one of the several items to be considered in deciding the genuineness or otherwise of a document: I.L.R. (1951) Nag. 104: A.I.R. 1951 Nag. 226.

Where opinion of handwriting expert in respect of signature on the impugned voucher was not free from doubt, *held*, his opinion could not be relied upon to hold that the disputed signatures on the voucher were in the handwriting of the accused alone. [1977 Cr.L.J. 711, Rel. on]: 1992 Cr.L.J. 3987: 1992 All.L.J. 1187.

The opinion of a handwriting expert cannot prevail over direct evidence, if found reliable, of the attesting witnesses of the will: 1981 Jab.L.J. 203: 1981 M.P.L.J. 448: 1981 Hindu L.R. 763.

Though a handwriting expert's opinion is admissible under S. 45 to prove execution of a will, there must be other evidence to corroborate it: (1990) 2 Ker.L.J. 539.

Proof of the signature of the testator in a will is a vital matter which requires to be proved. It is true that the evidence insisted by law is that of the attestors. But that is not to say that other kinds of evidence is shut out by law. If there is anything suspicious in the signature, evidence of an attestor who attests the signature can certainly be corroborated or contradicted by expert opinion. Thus, it cannot be said that evidence of an expert on signature or handwriting in a will is not relevant. [A.I.R. 1989 Ker. 228: (1988) 2 Ker.L.J. 512: (1988) 2 Ker.L.T. 736: (1988) 2 Hindu L.R. 724, Overruled]: A.I.R. 1991 Ker. 259: (1991) 1 Ker.L.J. 154: (1992) 1 Hindu L.R. 606 (D.B.).

Where ink used for making two signatures of the testator in two pages of will were different and there was marked variance in the writing of the two signatures which were visible even to the naked eye but the expert failed to notice said peculiar features, *held*, expert opinion was unreliable: A.I.R. 1991 Ori. 289.

Where the plaintiff's expert witness positively asserted that the signature on the will was that of the testator but the defendant's expert witness merely cast doubts on the signature's authenticity, *held*, it could not be ruled with confidence that the signature was not of the testator; the will bore the testator's signature: A.I.R. 1989 All. 17: (1989) 14 All.L.R. 814.

Where the handwriting expert could not give any opinion on the authorship of the questioned signature but the persons acquainted with the accued's handwriting deposed that the signatures were that of the accused, *held*, it was not safe to convict the accused in such circumstances. [A.I.R. 1959 S.C. 93; A.I.R. 1963 S.C. 1728; 1973 Cr.L.J. 1187 (S.C.) and 1973 Cr.L.J. 1143 (S.C.), Rel. on]: 1989 Cr.L.J (N.O.C.) 146 (Gau.).

A request made in passing during arguments before the Court that the document should be referred to an expert, *held*, cannot be treated with the same regard as a proper application setting out the facts and grounds upon which the prayer is made: A.I.R. 1973 Him. Pra. 62: 1972 Sim.L.J. 297.

Where the plaintiff had denied his signatures not only on the disputed sale deed as an attesting witness but also on the plaint and the *wakalatnama* and the defendant's application to send them for expert opinion of the handwriting, was dismissed by the trial Court on the ground that the Court could itself decide about the disputed signatures, *held*, in revision, though the Court can itself compare the

disputed and admitted signatures to arrive at its own finding, but the defendants could not be denied benefits of the handwriting expert's opinion to prove their case unless their attempt is very much belated or otherwise springs from ulterior motive: A.I.R. 1991 Mad. 399: (1991) 1 M.L.J. 383: (1992) 1 Hindu L.R. 269.

The Court also deprecated the practice of making belated and repeated applications for examination of documents by handwriting experts, in order to protract and delay the trial: (1968) 2 M.L.J. 48: I.L.R. (1968) 1 Mad. 805.

The Court's refusal to send documents to the Government Handwriting Expert but allowing the party to get them examined by the expert of his own choice, *held*, is liable to be interfered in revision; the Court below directed to send documents to the Government expert at the party's expense: A.I.R. 1983 N.O.C. 210 (Pat.).

Where an application for sending the documents in question to a handwriting expert was made about 11 years after the filing of appeal in the High Court, *held*, in absence of any explanation for not filing such an application in the trial Court or in the appellate Court within reasonable time, application was to be rejected: (1994-2) 114 Mad.L.W. 287 (D.B.).

Where the charge of adultery was founded upon the wife having aborted her allegedly illicit pregnancy in the civil hospital, her signature on the admission form, and the handwriting expert's opinion on its authenticity and none of the witnesses testified that the wife had signed the form and the expert examined by the wife also contradicted the testimony of the husband's expert who had also admitted that he had taken photographs of the signatures without the Court's permission and without verifying the disputed and admitted signatures from the Court, *held*, evidence of the husband's handwriting expert deserved no credence and must indeed be adversely commented upon: A.I.R. 1984 P.&H. 9: 1983 Hindu L.R. 513.

Where the genuineness of two letters purported to have been written by the wife to her paramour was in doubt and the husband adduced no direct or circumstantial evidence to prove their authorship and they appeared to the Court on comparison not to tally with the admitted signatures, *held*, the Court need not in appeal send them for expert opinion; the Court is not bound to accept the expert opinion which may, in turn, require further scrutiny by the Court: (1972) 85 Mad.L.W. 484.

Proof writing—Opinion of handwriting expert—Evidentiary value: 1967 Cr.L.J. 1197: A.I.R. 1967 S.C. 1326.

Where the disputed signature is shown to be exactly alike to the admitted one, the disputed signature is suspicious, for a man cannot write his signature twice exactly alike: 1959 Jab.L.J. 673: 1960 M.P.C. 154: 1960 M.P.L.J. 746.

It is a dangerous method to find in favour of a will or against it by a mere comparison of the signatures of the testator with the other signatures of his and especially so when the dissimilarity relied upon is not that of a general character but merely of particular letters. Where the variation is due to the fact that the signature of the deceased is found to be shaky but not uncharacteristic, this is a point in favour of the will being genuine. The superficial dissimilarities in particular letters would be due to the pens used, the space available, the position in which the signature was made, etc. The proper way to decide is to base the finding on the evidence of attestors and the scribe if they are available and if not on other cogent direct and circumstantial evidence which throws light upon the execution of the will. Therefore, when the opinion of the Judge is based upon the difference in particular letters and nothing more and in the case of a will in Canarese when he himself is not a Canarese knowing gentleman and little acquainted with Canarese signatures, the opinion is of little value: A.I.R. 1956 Mad. 566.

Report of calligraphic expert called on application of plaintiff—Court can call for opinion of another expert on application of defendant without finding that first report is unacceptable—Handwriting expert cannot be treated as Commissioner deputed by Court—Hence, principle applying to report of Commissioner for local inspection cannot be applied to report of handwriting expert—No rule of law or practice requires Court to adjudicate the merit of the testimony of a witness before allowing a witness for opposite party to speak on the same fact: 1961 Ker.L.T. 960: I.L.R. (1961) 2 Ker. 716.

Handwriting. *See* (1959-60) 64 Cal.W.N. 1067: A.I.R. 1961 Cal. 300.

Though opinion of handwriting expert is relevant in view of S. 45, on question of handwriting of person, it is not conclusive—Handwriting of a person can be proved by other means also—*Held*, complainant's evidence about handwriting of accused was sufficient to establish offence against accused and it was not necessary to examine handwriting expert in support of complainant's evidence: 1967 M.L.J. (Cr.) 442: (1967) 1 S.C.R. 249: A.I.R. 1967 S.C. 778.

Handwriting expert's opinion—Use of—Suit for eviction—Application for stay of suit under S. 8 of Kerala Prevention of Eviction Act (XII of 1966)—Expert's opinion should be considered for ascertaining whether *prima facie* case of tenancy is made out: 1969 Ker.L.T. 664.

Handwriting expert—Evidentiary value of his—opinion—Expert unable to give definite opinion about disputed handwriting in document, being in the pen of accused—Fact insufficient to justify rejection of positive evidence of witnesses who were familiar with handwriting of accused and who were therefore, competent to prove document to be in writing of accused: (1963) 2 Cr.L.J. 36: A.I.R. 1963 Pat. 262.

Participation in conspiracy—Proof—Photograph of disputed writing—Admissibility in evidence—Expert testimony: 1968 Cr.L.J. 1124: A.I.R. 1958 S.C. 938.

Where the specimen writings and specimen signatures of the accused charged under Ss. 120, 420, 468 of the Indian Penal Code and S. 5(1)(*d*) of the Prevention of Corruption Act were taken by a Magistrate who neither knew the accused personally nor got them identified, *held*, the specimen writings and signatures could not be said to be of the accused; their comparison with the disputed writings by the handwriting expert could not connect the accused with the crime: 1982 Raj.L.W. 203: 1983 Cr.L.J. 858.

13. Section 45 *vis-a-vis* section 47.—Ss. 45 and 47 of Evidence Act prescribe the method in which signature can be proved. Under S. 45 the opinion of the handwriting experts is relevant while under S. 47 the opinion of any person acquainted with the handwriting of the person who is alleged to have signed the document is admissible. This is, therefore, the manner in which the alleged signature of a person could and should have been proved; but even assuming that the signature of the person could be legally held to be proved on circumstantial evidence, the principle which governs the appreciation of such circumstantial evidence in cases of this kind cannot be ignored. It is only if the Court is satisfied that the circumstantial evidence irresistibly leads to the inference that the person must have signed the document in question that the Court can legitimately reach a conclusion: A.I.R. 1959 S.C. 93.

It is not correct to say that when a handwriting expert is not examined, the Court is not justified in relying upon the evidence as to handwriting coming from a person who was not only competent but who appeared to be correct in saying that the handwriting was in the handwriting of a particular person: 1960 Cr.L.J. 579: A.I.R. 1960 Cal. 318.

The opinion of a handwriting expert is no doubt admissible under S. 45. There certainly may be, and perhaps are, cases where the handwriting expert's opinion may be of assistance to the Court in coming to a conclusion as to the genuineness of disputed handwriting. But the art of forming opinion by comparison of handwriting is essentially empirical in character, and error is seldom inseparable from such opinion. Where, however, there is direct and trustworthy evidence of persons who had actually seen the signing of the document by the testatrix, it is not necessary to refer to or rely on the expert opinion: A.I.R. 1962 Andh. Pra. 178.

Where a document is written by the accused in the presence of a witness who also knew his handwriting even though there is no handwriting expert's opinion regarding the writing in the document, it is admissible in evidence: 1975 Cr.L.J. 354 (Gau.) (D.B.).

The opinion of experts and other persons acquainted with the handwriting of the persons concerned are relevant under S. 45 and S. 47, respectively; it is opinion evidence based in the former case by a scientific comparison and in the latter case by familiarity resulting from frequent observation and experience. However, the opinion of handwriting experts is not conclusive; it is fallible or liable to error like in case of any other witness but cannot be brushed aside as useless: A.I.R. 1989 Gau. 42 (1987) 2 Gau.L.R. 299.

14. When handwriting expert is not acquainted with language of writing—Effect.—The fact that an expert is not acquainted with

the characters of the language and can neither read nor write them will not make him incompetent as an expert in handwriting: 1936 All.L.J. 317: A.I.R. 1936 All. 165. But *see contra* A.I.R. 1983 All. 54: Where the handwriting expert was not acquainted with the language of the disputed signatures and of the handwriting on a document with which he compared the signatures, *held*, no reliance could be placed on his evidence.

Value of expert opinion as to the signature in language which expert cannot read or write. *See* A.I.R. 1933 Pat. 559.

When the expert's opinion is corroborated by the direct evidence of witnesses, the fact that the expert was not acquainted with the language in which the admitted as well as the disputed signatures were, would not make him incompetent as an expert; his evidence can be relied on: A.I.R. 1977 Ori. 139: (1977) 1 Cut.W.R. 206: I.L.R. (1977) Cut. 679.

15. Tape-recorded voice.—Nothing in the Evidence Act even remotely suggests that the Court has power to call upon a prosecution witness to get his sample voice recorded for comparison with his disputed tape recorded voice; neither S. 73 nor S. 45 provides for recording of voice for comparison by Court or the expert witness. Even S. 146 which deals with the scope of questions which can be put in cross-examination does not provide for giving any such direction by a Court to the witnesses: (1981) 19 Del.L.T. 390: 1981 Cr.L.J. 927. But *see* (1985-2) 88 Punj.L.R. 41, cited in S. 73, Note 12, *infra*.

16. Finger-print expert.—Although the evidence of a handwriting expert is frequently found to be faulty, the evidence of a thumb-impression expert is more reliable, because with regard to finger-prints it has never been found that two finger-prints are identical in all respects. The Court, however, cannot delegate its authority to the expert but has to satisfy itself as to the value of the evidence of the expert in the same way as it must satisfy itself as to the value of any other evidence: (1930-31) 35 Cal.W.N. 863, Expl. and Appr.]: 33 Cal.L.J. 397: A.I.R. 1950 Cal. 66.

A Court is not bound to accept the evidence of an expert, such as a finger-print expert, even though there are no special reasons for not accepting it. The expert, however, must be given an opportunity of explaining to the Court the reasons for his opinion, as it is only after hearing the expert's reasons and elucidation that the Court would be in a position to express a sound opinion whether or not the expert's opinion is satisfactory: A.I.R. 1941 Mad. 551: (1941) 1 M.L.J. 475.

When a conviction rests entirely upon the evidence of a finger-print expert, it is the duty of the trial Court to direct its mind to such evidence with a view to satisfying itself that the thumb-impression in question is in fact the thumb-impression of the person charged, taking such assistance as it can from the evidence of the finger-print expert. A trial Court is not absolved from the duty of forming its own conclusions in respect of a questioned finger-print merely because a finger-print expert says that the questioned print is the print of an accused person's finger or thumb: A.I.R. 1947 Sind 177.

The science of comparison of finger-prints has developed to a stage of exactitude. It is quite possible to compare the impressions taken from finger-prints of individuals with the disputed impressions, provided they are sufficiently clear and enlarged photographs are available. The identification of finger impressions with the aid of a good magnifying glass is not difficult particularly when the photographs of latent and patent impressions are pasted side by side: 1958 M.L.J. (Cr.) 341: I.L.R. (1957) Mys. 177: A.I.R. 1958 Mys. 150: 1958 Cr.L.J. 1489.

Simply because there is the opinion of the finger-print expert, the Court is not bound to accept it and base the conviction of the accused on it. It is a very weighty piece of evidence but nevertheless the Court is to consider its weight and is free either to accept or reject it giving sufficient reasons. The Court cannot delegate its own function to find a person guilty or not guilty to the expert. It cannot convict simply because the expert says that the man is guilty. The Court, in a case of this sort, has to rely on the expert upon two distinct points, first of all, on the question of similarity between the marks, which is a question of fact on which the Court can, and should, with the assistance of the expert satisfy itself and secondly, on the point which is one for expert opinion whether it is possible to find the finger-prints or thumb-impressions of two individuals corresponding in as many points of resemblance as are shown to exist between the impressions found in the case before the Court and those of the accused. The Court

should examine the expert as to how much experience he had in the way of comparison of finger-prints and as to how much literature on the subject he had studied. The Court cannot refuse to convict a person on the evidence of a finger-print expert, merely on the ground that it is unsafe to base a conviction upon such evidence. If the finger-prints are clear enough the Court must verify the evidence of the expert by examining them with a magnifying glass, if necessary, and applying its own mind to the similarities and dissimilarities afforded by the finger-prints, before coming to a conclusion one way or the other. The science has developed to a stage of exactitude. But the main thing to be scrutinised is whether the expert's examination is thorough, complete and scientific: A.I.R. 1957 Ori. 172: I.L.R. (1957) Cut. 200.

It is the duty of the finger-print expert, who has been examined to explain how he came to the conclusion. It is the duty of the Court to scrutinise the evidence or make a comparison of the impressions personally. The *ipse dixit* of the expert should not be accepted and acted upon: 1960 Cr.L.J. 315: A.I.R. 1960 Andh. Pra. 164.

If in a case of denial of the execution of a document, the direct evidence of the witnesses is of a very unsatisfactory nature, the Court can rightly rely on the opinion of a finger-print expert: 42 P.L.R. (J.&K.) 343.

There is no rule of law making it unsafe to convict on uncorroborated testimony of a finger print expert; the true rule seems to be one of caution. The Court cannot delegate its authority to the expert; it must satisfy itself as to the value to be given to the expert evidence. The reasons given by the expert are ultimately to be weighed by the Court which should satisfy itself about the correctness of the expert's conclusion by comparison of the prints. If enlarged photo prints are kept side by side and their markings compared, it becomes much easier to follow the reasonings of the finger print expert about points of similarities or dissimilarities and to judge the conclusion. Thus, where the finger print expert had failed to take enlarged photographs of all the disputed prints but had taken photo enlargements of only 12 disputed prints, and had also admitted that most of the disputed finger prints were quite legible but he had not marked two fixed points nor drawn a line between the two points on the photograph, nor had he counted the number of ridges between, and had only marked out six points of similarities in each of the enlargements of the disputed finger prints and based his opinion mainly on ridge characteristics which agree in nature and relative position; he did not opine that any of these prints had unusual peculiarities nor had he stated that at least four points of similarities were in sequence; he had further contradicted his report in the cross-examination in respect of several items; had also differed in opinion on the points of similarities between disputed and specimen prints; *held*, the prosecution had failed to prove beyond doubt that the thumb-impression on the muster-rolls were forged: 1978 Cr.L.J. 1220: 1978 M.P.L.J. 197 (D.B.).

It is unsafe to draw adverse inference against the accused on the basis of finger-print expert when other corroborative evidence was absent and doubtful: (1988) 3 Crimes 114 (Gau.) (D.B.).

A majority of finger-prints found at crime scenes or crime articles are partially smudged, and it is for the experienced and skilled finger-print expert to say whether a mark is usable as finger-print evidence. Similarly, it is for a competent technician to examine and give his opinion whether the identity can be established, and if so whether that can be done on eight or even less identical characteristics in an appropriate case: A.I.R. 1978 S.C. 1183: 1978 Cr.L.J. 1107: (1978) 3 S.C.C. 279.

Where the defendant is illiterate and the genuineness of a paper said to have been executed by him is disputed and the decision of the question depends upon the genuineness of the finger-print, the parties should be allowed if they want to examine experts: 141 I.C. 767: A.I.R. 1933 Pat. 159.

Opinion of expert on finger-prints—Evidentiary value—Finger-prints found to be smudged—Court can discard the opinion: (1962) 4 Ori.J.D. 4.

Where circumstantial evidence was even otherwise incapable of leading only to the guilt of the accused in a murder case, the report of the Police Inspector that the *gandasa* had the accused's finger-prints on it, *held* carried no weight as he had neither given any reasons in support of his opinion nor shown having acquired any special skill, knowledge

and experience in the science of identifying finger-prints: A.I.R. 1976 S.C. 69: 1976 Cr.L.J. 10: (1976) 1 S.C.C. 542: 1975 U.J. (S.C.) 875.

17. Thumb-impression.—Evidence of a thumb-impression expert has an important bearing and is bound to be of great value in determining the issue regarding the validity of a document which purports to bear thumb-impression of an executant when those thumb-impressions are denied. It is a matter of common knowledge that science of finger-print is more exact than that relating to handwriting. In cases of comparison of finger-prints, the points of similarity and difference are easily discernible and the Courts must apply their mind properly to the evidence of experts in such cases. The Judge commits a gross error of law in not even considering the evidence of such expert: (1969) 71 Punj.L.R. 908.

The science of identifying thumb impression is an exact science and does not admit of any mistake or doubt: A.I.R. 1979 S.C. 1708. Thus, where the finger-prints of the accused were found by the finger-print expert to be identical with the finger-prints that were found on the stolen articles, *held*, there is no infirmity in the conviction of the accused by the lower Courts: 1985 M.L.J. (Cr.) 384. *See* also 1992 Cr.L.R. 435 (Raj.).

The comparison of the ridge characteristics, if they are large in number, are sufficient for identification of thumb-impression: 1975 Cr.L.J. 1277: 1975 Raj.L.W. 27. No definite rule for fixing number of points of similarity for identity of thumb-impressions can be laid down: 1978 M.P.L.J. 197: 1978 Cr.L.J. 1220 (D.B.).

Science of identification by thumb impression has advanced by a great leap; the Supreme Court regards it as an exact science and does not admit of any mistake or doubt; once at least 12 identical characteristics between the questioned and standard finger impressions were required to conclude that both belonged to the same finger but later on 6 such identical characteristics were considered sufficient to arrive at such conclusion. [A.I.R. 1979 S.C. 1708; A.I.R. 1978 S.C. 1183, Foll.]: (1994) 1 Ker.L.J. 871 (D.B.).

The question of identity of thumb-mark is a question of fact and the evidence of the expert is only a guide to the discretion of the Court: 9 Mys.L.J. 44. If a Court wishes to admit in evidence a report of a thumb-impression expert, then the Court should insist on the production of the expert, as a witness in the case. Else, the report does not by itself become evidence: 1935 All.W.R. 76: A.I.R. 1935 All. 142. Taking thumb-impression of accused in Court for purpose of comparison is legal: I.L.R. 50 Mad. 462: 53 M.L.J. 597. But *see* case law given under S. 73, Note 13, *infra*.

It is for the experienced and skilled expert to say whether a particular thumb-impression is usable for comparison; but it is undoubtedly for the Court to decide whether the extent of smudgeness is such that the expert could not have used. [A.I.R. 1979 S.C. 1708; A.I.R. 1978 S.C. 1183, Foll.]: (1994) 1 Ker.L.J. 871 (D.B.).

Whoever is the witness for giving a report on comparison of the thumb-impressions, has to prove that the photographs of the genuine and contested thumb-impressions were prepared in his presence and knowledge and that he proved them; if any other person was involved, these persons together must have proved the enlargements to be related to the original thumb-impression without this conclusive report which runs into a few lines could not be connected to the original thumb-impression and the trial Court was right in observing that such report remain doubtful: 1983 All.W.C. 43 (Rev.).

The evidence of an expert, *held*, on facts, brought out clearly helped the Court to appreciate the inescapable significance of what is there on the record in the form of thumb-impressions on the wills and the proved thumb-impressions in the record maintained at the District Registration Office: A.I.R. 1971 All. 304.

Where no expert was examined as to whether the party had made his thumb-impression on the summons, *held*, the Court's conclusion after observing the mode of writings, ink used and intensity of ink could not be faulted: 1982 All.W.C. (Rev.) 113.

18. Palm impressions.—Palm impressions are akin to finger impressions and expert evidence relating thereto should on the whole be admitted rather than excluded: I.L.R. 52 Bom. 233: (1928) 30 Bom.L.R. 321: A.I.R. 1928 Bom. 158.

19. Foot-print expert.—Experts in foot-prints are not recognised by the Evidence Act, but a Magistrate is undoubtedly entitled to take into consideration the evidence of a

person who has seen a foot-print and taken the foot-print of the accused and found that they are very similar. Such evidence is not, however, sufficient to bring home the offence to the accused in the absence of further knowledge regarding the differences between one foot and another: (1942) 55 Mad.L.W. 231 (1): A.I.R. 1942 Mad. 452 (2).

S. 45 does not include foot-prints within its ambit as it does the finger impressions. Notwithstanding this omission, the evidence of foot-prints expert has been admitted with the qualification that there should be other evidence to bring home the charge to the accused. The rule on the point is that the opinion of the foot-print expert would not by itself suffice to base conviction on and the rule has been applied to testimony of other experts including experts on finger-prints: 1955 Cr.L.J. 437: A.I.R. 1955 Assam 51.

The opinion of a foot-print expert is not admissible as evidence. If the Court is to make any use at all of foot-print impressions, it must be satisfied from a comparison of the various foot-prints that they are those of the persons whose the expert says they are. The value of evidence with regard to foot-prints is obviously very much less trustworthy than evidence with regard to finger-prints. In examining a finger-print, one not merely compares the general configuration of the finger and all the lines on it, but one is able to study such minute details as the bifurcations and junctions of the ridges and the relative positions on those ridges of the sweat pores. With regard to foot-prints, one can only compare the general shape of foot-prints found with the shape of impressions taken from the feet of the person suspected. Even in this limited comparison, one has not the same certainty as one would have in comparing finger-prints because foot impressions vary considerably according to the circumstances under which they are made. Foot-prints made when a person is walking slowly or fast or running slowly or fast or jumping, all create differences which are material. Moreover, a foot-print taken after a person has walked a considerable distance is larger than a foot-print taken when a person has been at rest: 1949 Mad.W.N. 634: (1949) 2 M.L.J. 544.

The science of foot-prints is not exact. Where no ridges were found at all, it is impossible to identify a person with any degree of certainty by the bare outline of his foot-print: I.L.R. (1951) 1 Cal. 539.

The science of identification of foot-prints is no doubt a rudimentary science and much reliance cannot be placed on the result of such identification. The track evidence, however, can be relied upon as a circumstance which, alongwith other circumstances, would point to the identity of the culprit though by itself it would not be enough to carry conviction in the mind of the Court: 1956 Cr.L.J. 805: A.I.R. 1956 S.C. 415.

It is quite clear that the science, if it could be so called, of foot-prints has not yet progressed very far. But there is no doubt whatever that evidence of similarity of the impressions of the foot, shod or unshod, given by a foot-print expert is admitted by the Courts. Such evidence comes under the head of circumstantial evidence. It is not the opinion of the expert that is of any importance but the facts that the expert has noticed. A person who has made a study of the prints made by the human foot is better qualified to notice points of similarity or dissimilarity than one who has made no much study. He is able to lay these points before the Court, and from his evidence the Court draws its own conclusion: I.L.R. (1938) Mad. 262: A.I.R. 1937 Mad. 951.

If the finger-prints are clear enough to sustain an argument, there is no reason why an argument, by way of deduction should not be as sure a foundation for a conclusion and it may be a better one than any based on direct evidence. There is nothing in the so-called science of finger-print or the qualifications of an expert in it which need deter a Court from applying its own eyes and its own mind to the evidence and verifying the results submitted to it by the witness: I.L.R. 46 Mad. 715: A.I.R. 1923 Mad. 173; 9 P.R. (Cr.) 1914: 27 I.C. 203.

The opinion of a foot-print expert should not be taken as conclusive. The Judge must form his own opinion with regard to the identity of the foot-print. The expert's opinion is valuable but it must be supported by statements of facts, the accuracy or otherwise of which can be verified by the Judge: 1940 Mad.W.N. 761: (1939) 52 Mad.L.W. 198: A.I.R. 1941 Mad. 88. *See* also A.I.R. 1942 Sind 11.

Identification from foot-prints when they show ridge characteristics is as accurate as the science of finger-prints; but identification from foot-prints with special characteristics apart from ridge, etc., is another class which is usually but erroneously understood as identification from foot-prints though it is only one of the three classes. Identification from foot-prints is a science and the expert's opinion is a relevant fact under S. 45. Thus, where the points of similarity between the foot-prints of the accused and those in blood found near the

place of murder were 9 in respect of the right and 10 in respect of the left foot while the points of dissimilarity were only three which could be explained to be due to different densities of printing ink and blood, *held*, there is a high degree of probability that the foot-prints in blood were those of the accused, a strong incriminating circumstance against him: 1972 M.P.L.J. 1029: 1972 Jab.L.J. 1008: 1972 Cr.L.J. 1668 (D.B.). *See* also 1989 Raj.Cr.C. 125.

In a murder case before relying on the opinion of the expert as to foot-prints found near the corpse of the deceased as conclusive evidence against the accused, the Judge should form his opinion with regard to the identity of the foot-prints found near the corpse with the foot-prints of the accused: A.I.R. 1953 Madh. Bh. 119: 1955 Cr.L.J. 1073 (F.B.).

In a criminal trial if the Court is to attach importance to evidence of foot-marks alleged to be those of the shoes of the accused, it is not enough to show that the foot-marks tally with the accused's shoes. The evidence must go further and show that the marks have some peculiarity which is found in the shoes of the accused and which would not be found in most other shoes; unless this is shown, the evidence is inadequate. Further, unless the circumstances in which the foot-marks were discovered are known are disclosed, evidence of the marks must be held to be unreliable: I.L.R. (1944) Bom. 25: (1943) 45 Bom.L.R. 884: A.I.R. 1943 Bom. 458.

Evidence of foot-print expert—Evidentiary value—Unsafe to convict accused solely on his opinion—Science of identification of foot-print impression is not exact science: (1968-69) 73 Cal.W.N. 467: 1970 Cr.L.J. 403; (1991) 1 Cal.H.N. 331: 1991 C.Cr.L.R. 121.

20. Identification of hair.—Science of identification of hair has not reached the stage of certainty and in other words it is not at all a positive science. All that the observer is enabled by this science to do is to diagnose the origin of a hair of at least the group of animals from which a hair has been derived. Corroboration of the statement of the prosecutrix is necessary apart from such evidence, in a trial on a charge of rape: 1959 M.P.L.J. (Notes) 23.

The prosecution can be granted permission to obtain head hair sample of the accused for the purpose of comparison during investigation: (1993) 52 Del.L.T. 586.

An order requiring the accused to give specimen of hair for the purpose of identification is not violative of Art. 20(3) or Art. 21 of the Constitution: 1971 Cr.L.J. 1405 (Raj.).

21. Dog tracking evidence—Admissibility.—(*Obiter*). The tracker dog's evidence cannot be likened to the type of evidence accepted from scientific experts describing chemical reactions, blood tests and the actions of bacilli, because the behaviour of chemicals, blood corpuscles and bacilli contains no element of conscious volition or deliberate choice. Dogs are intelligent animals with many thought processes similar to the thought processes of human beings and wherever there are thought processes there is always the risk of error, deception and even self-deception. In the present state of scientific knowledge evidence of dog tracking, even if admissible, is not ordinarily of much weight.

(Their Lordships, however, did not express any concluded opinion or lay down any general rule with regard to tracker dog evidence or its significance or its admissibility as against the accused): 1969 M.L.J. (Cr.) 862: A.I.R. 1970 S.C. 283: 1970 Cr.L.J. 373: (1970) 1 S.C.R. 551.

In present state of scientific knowledge evidence of dog tracking, even if admissible, is not ordinarily of much weight. A.I.R. 1970 S.C. 283, Rel. on]: (1988) 3 Crimes 114 (Gau.) (D.B.).

Judicial notice must be taken of the fact that the training skills and the special qualities that are found in the Police Dogs are now universally being recognised as being of such a high calibre that in cases such as detection of explosives, drugs, etc., they are found superior and more effective than the most sophisticated instruments. In this background, one needs to take cognizance of the fact that for the purpose of tracking down a criminal, that special faculties, qualities and skills of the dog are aspects of which serious note must be taken. Where the Police rely on such evidence, the Courts would be more than fully justified in accepting it provided that it passes the test of complete scrutiny: 1993 Cr.L.J. 3883 (Bom.) (D.B.).

It is scientifically accepted that dogs are extremely intelligent and some of their sensibilities are very highly developed and extremely reliable; some breeds and strains of dogs are specially utilised for hunting and tracking because of their abnormally high talents. If such a dog is shown to the Court to be specially trained for detection, the evidence of dog tracking will be not only admissible but of a very high calibre. Such evidence as any other evidence must pass the test of scrutiny and reliability as per the following guidelines: (*a*) there must be reliable and

complete record of the exact manner in which the tracking was done; the *panchnama* evidence therefor will have to be clear and complete and properly proved and supported by the evidence of the handler; (*b*) there should be no discrepancies between the version in the *panchnama* and the handler's deposition in the Court; (*c*) the handler's evidence will have to independently pass the test of cross-examination and (*d*) the handler must place before the Court materials like the type of training imparted to the dog, its past performance, achievements, reliability, etc., supported, if possible and available, by documents: 1993 Cr.L.J. 2808: 1993 Mah.L.J. 1118.

Evidence relating to movements of tracker dogs cannot be rejected as inadmissible and in appropriate cases it is open to the Court to consider it. Its reliability, of course, depends upon the acceptability of the testimony of persons who manned the dog and those who witnessed the movements and conduct of the animal. [1993 Cr.L.J. 2808 (Bom.), Rel. on]: 1995 Cr.L.J. 676 (Ker.) (D.B.).

The genuiness of the evidence of dog tracking need not necessarily be tested in the restricted terms of the availability or non-availability of a drawn panchanama supported by the testimony of the dog handler. With regard to the dog tracking evidence the testimony of the dog handler should inspire confidence of the Court so as to be accepted as a genuine and valid evidence given by the prosecution. The Courts should be satisfied and free to accept any test of scrutiny of such evidence so as to enable them to reach to the conclusion that such evidence is reliable and far from any doubt as corroborative evidence of the various other circumstances placed or made available by the prosecution in support of their case. [1970 Cr.L.J. 373 (S.C.), Disting]: 1995 Cr.L.J. 943 (Bom.) (D.B.).

Track evidence can be relied upon as a circumstance, which would point to the identity of the culprit, though by itself it would not be enough to carry conviction in the mind of the Court. Thus, where the evidence in regard to foot prints was believed by the trial Court as a corroborative circumstance to establish the identity of the accused as a culprit, *held*, the High Court would not dissent from the appreciation of the evidence made by the trial Court: 1970 Raj.L.W. 1.

Where the chappals and knife found at the scene of occurrence was wrapped by the Investigating Officer in a paper to preserve the original scent and within 24 hours, the accused were apprehended and for the purpose of identification they were mixed up with dummies and thereafter services of the Dog-squad were requisitioned and the Police dog after getting smell from those articles, picked out the accused, *held*, the dog tracking evidence clearly linked those articles with the accused persons: 1993 Cr.L.J. 3883 (Bom.) (D.B.).

Where there were discrepancies in the evidence of prosecution witnesses as to whether the Police-dog scented the chappals, bahi (part of a cot) or chaukhat of the window, *held*, the pointing out of the accused by the dog became meaningless: 1988 Cr.L.J. 39 (P.&H.) (D.B.).

22. Ballistic expert.—It is not necessary to examine a ballistic expert in each and every case, particularly when the direct evidence is of an unimpeachable character and the nature of the injury disclosed by the post-mortem report is clearly consistent with the direct evidence: A.I.R. 1963 S.C. 340: (1963) 1 Cr.L.J. 323; 1995 Cr.L.J. 2019 (Ori.) (D.B.).

It cannot be laid down as an invariable proposition of law that in every case where a firearm is alleged to have been used by an accused person, the prosecution must, in addition to the direct evidence, lead the evidence of a ballistic expert. [A.I.R. 1953 S.C. 415, Disting. and Expl.; A.I.R. 1963 S.C. 340, Rel. on]: 1971 Cr.L.J. 1656 (Raj.) (D.B.).

A comparison microscope is the most important and most widely used scientific instrument in comparing the crime cartridge with the test cartridge. Though there has been considerable difference of opinion amongst investigators regarding the use of photographs in a Court for the purpose of illustrating the matching of the markings, and while it may be that microscope photographs, when taken with the due care and in the best of conditions, may enable the evidence to be placed on the record in a visible form, it cannot be denied that a Court would not be justified in rejecting the opinion of an expert who has examined the markings under the comparison microscope and categorically stated that he had compared the land and groove markings on the bullets under a comparison microscope, simply because he did not think it necessary to take the photographs. [(1971) 3 S.C.C. 208, Disting.]: A.I.R. 1978 S.C. 1204: (1978) 3 S.C.C. 86: 1978 Cr.L.J. 1137.

As to the probative value of the conclusions reached by medical and ballistic experts it must be remembered that though they may ensure high degree of probability, it is after all opinion evidence and unless the Court is satisfied after considering the data and be

convinced of the correctness of the expert's opinion, it cannot be acted upon.

The evidence of ballistic expert even based on the conclusions reached by him on experiments made by him may not be conclusive in nature. It is nevertheless an important piece of evidence and as opinion evidence must be acted upon if the Court is satisfied about it: (1968) 1 An.W.R. 178: 1968 M.L.J. (Cr.) 131.

In cases where injuries are caused by fire-arms, the opinion of the ballistic expert is of a considerable importance where both the fire-arm and the crime cartridge are recovered during the investigation to connect an accused with the crime. Failure to produce the expert opinion before the trial Court in such cases affects the creditworthiness of the prosecution case to a great extent: A.I.R. 1995 S.C. 1601.

Till the guns recovered at the instance of the accused are sent for ballastic examination and a report is obtained that they are in working order, mere recovery of guns cannot connect the accused with the crime. [1984 W.L.N. (U.C.) 15 (Raj.), Foll.]: 1994 Cr.L.J. 2952 (Raj.) (D.B.).

Fire-arms injuries resulting in death—Injuries caused by pellets—Question as to range of shot and spread of pellets—Opinion of ballistic expert important, particularly when gun firing the fatal shot has not been recovered: (1968) 1 An.W.R. 178: 1968 M.L.J. (Cr.) 131.

Expert opinion—Ballistic expert—Opinion as to distance at which weapon was discharged: I.L.R. (1964) Cut. 623.

A greater degree of probability can be ensured with regard to rifle shot injuries than the shot gun injuries, for the shot gun injuries cannot impart by reason of its smooth barrel those additional characteristics which a rifle can impart. The features peculiar to shot gun injuries are determined by the fact that the charge is composed of several small missiles. At close range they make a single wound of a large size by travelling in a compact mass. As the range increases individual pellets continue at their own speed and direction. The penetrating power of each pellet decreases with the distance. Eventually the penetration may be limited to the clothing and skin of the victim. Hence, range and velocity are the important factors when looking to the varying degree of penetration of the missiles: (1968) 1 An.W.R. 178: 1968 M.L.J. (Cr.) 131.

Medical evidence—Appreciation of—Gunshot injury—Evidence of medical witness—Duty of Court. *See* A.I.R. 1958 All. 255. When the victims wore several clothes, no scorching of wounds is possible even if firing was from very close range. (Taylor on Medical Jurisprudence relied on): 1953 All.L.J. 720: A.I.R. 1953 All. 652.

Unless the data collected by the fire arms expert with respect to the fire arms whereby an offence is committed be supplied or the enlarged photos he has taken be produced so that the opinion of the expert may be verified by the Court, the Court ought not to accept the opinion of the expert without satisfying itself of the correctness of the same: (1957) 2 An.W.R. 156: 1957 M.L.J. (Cr.) 421: A.I.R. 1957 Andh. Pra. 758.

Murder by shooting with pistol—Fire-arms expert—Evidence and opinion of fire-arms expert—Value of: A.I.R. 1958 S.C. 180: 1958 Cr.L.J. 300.

Where it had been clearly mentioned by the ballistic expert that he had fired six live cartridges from the rifle recovered before recording his opinion that the empty cartridge recovered from the spot was fired from the said rifle and that opinion was not at all challenged in the trial Court as well as in the statement of the accused under S. 313, Cr.P.Code, *held*, it could not be argued in the appellate Court that the said opinion of the expert could not be believed and accepted: 1995 Cr.L.J. 3189 (Del.) (D.B.).

Where the ballistic expert's opinion that certain cartridges could not have been fired except from the fire arms recovered from the accused was based on his having found individual characteristic of the firing pin, firing pin scrape and breach face mark; corroborating the testimony of eye-witnesses, the expert's opinion, *held*, was reliable: A.I.R. 1977 S.C. 349: (1976) 3 S.C.C. 478: 1977 Cr.L.J. 214.

Fire-arm injuries—Respective fields of Doctor and ballistic expert stated—Opinion of Doctor who has no elementary knowledge of ballistic and fire-arms, not likely to be helpful in distinguishing and interpreting fire-arms injuries: (1968) 1 An.W.R. 178: 1968 M.L.J. (Cr.) 131.

Where the prosecution's case that the accused had fired their guns was amply corroborated by the report of the ballistic expert that all the cartridges recovered from the deceased's house had been fired from the guns of the accused, *held*, conviction was justified when there were other evidence also pointing towards the guilt of the accused: A.I.R. 1994 S.C. 137: 1993 Cr.L.J. 3904.

Where the Doctor conducting post-mortem deposed that the injuries on the deceased must have been caused by fire arms and pellets were removed from the deceased's head, one of them six inch deep, and other two head injuries were also caused by close range fire and eye-witnesses had also testified that country-made pistols were used in murder, *held*, merely because the ballistic expert had opined that some of the weapons recovered could not have been used in the offence is not a serious infirmity; conviction upheld: A.I.R. 1994 S.C. 1029: 1994 Cr.L.J. 1374.

Where the ballistic expert initially opined that the two gun-shot injuries could emanate from a single shot but then vacillated, stating that the possibility of the injuries having been caused by two different shots could not be ruled out in such nebulous state of the expert's evidence, the High Court went wholly wrong in doubting the direct evidence of the eye-witnesses unless it suffered from glaring infirmities: A.I.R. 1990 S.C. 1242: 1990 Cr.L.J. 1269: 1990 All.L.J. 281.

Where though the ballistic expert opined that the empty cartridge was fired from the gun which was alleged to be recovered at the accused's instance, he gave no reasons for his opinion and further the gun before being sent to the ballistic expert, was kept in Police custody for a long period for two months and 10 days, *held*, the evidence of the expert was unreliable: 1988 Cr.L.J. 1583 (Madh. Pra.) (D.B.).

Where the ballistic expert had not seen the injuries but he opined on the basis of dimension of injuries shown in the medical report that probably the injuries were caused by one gun shot only, *held*, not only that his opinion was not categorical but it would also require superhuman ability to come to such a conclusion from the dimensions of injuries recorded, or even their photograph taken, by the Doctors; no implicit faith could be reposed in such testimony: A.I.R. 1975 S.C. 2161: 1975 Cr.L.J. 1865: (1975) 4 S.C.C. 254.

Where in a case for attempt to murder, the ballistic expert fired two shots on the injured's trousers and comparing them with the hole made in his trousers by the pellet recovered from his calf and opined that the earlier hole was caused by the pellet recovered, *held*, it was highly unsatisfactory and not an expert's opinion; he should have given fact, and not uncheckable opinion; he should have placed before the Court all materials which induced him to come to his conclusion to help the Court form its own judgment: 1991 Cr.L.J. 1235: 1991 All.L.J. 374. *See* also 1982 Jab.L.J. (Notes) 11.

Where rifle and cartridges were recovered from accused and firing capability of said rifle was examined by an armourer, *held*, it was not necessary to make a test firing for the purpose of ascertaining firing capability of rifle: A.I.R. 1995 S.C. 578.

23. Type script.—The opinion of an expert that one document has been typewritten on the same machine as another document, is not admissible. The Court may ask the witness points in favour of the view whether the two documents have or have not been typewritten on the same machine but must come to its own conclusion and not treat such assistance as an expert opinion a relevant fact in itself: A.I.R. 1935 All. 162. But evidence as to the fact that the typewriters used in the typing of the various exhibits have certain defects which are clear from the typing of these exhibits can be competently given by an expert who has had an opportunity of examining the documents, though the Court is entitled to draw its own conclusion at the source and authorship of the documents from the whole evidence in the case: A.I.R. 1933 All. 498. *See* also I.L.R. 55 All. 1040: A.I.R. 1933 All. 690.

The opinion of expert that a particular letter was typed on a particular machine does not fall within the ambit of S. 45 and is inadmissible. [1953 Cr.L.J. 129 (S.C.), Foll.]: (1993) 2 Ker.L.J. 583.

The Law Commission in its 6th Report (Vol. IV) in Chapter 17 captioned "Opinion of Expert" referred to A.I.R. 1952 S.C. 343 and recommended that S. 45 should be amended so as to include 'identity of typewriting': A.I.R. 1990 S.C. 1050: 1990 Cr.L.J. 1112: (1990) 41 Del.L.T. 309.

Admissibility of expert opinion on type script under S. 45 needs to be examined in detail and decided; there is rapid development with the march of times in the field of Forensic Science; it has, therefore, become imperative for the law to match with the march of modern vistas of scientific knowledge; whether the expert opinion about type script would fall within S. 45 requires to be decided by a larger Bench: A.I.R. 1990 S.C. 1050: 1990 Cr.L.J. 1112: (1990) 41 Del.L.T. 309.

24. Photographs.—Where the question of legitimacy arises, photographs of the putative father and son to prove resemblance are admissible: 13 I.C. 678: 15 Cal.L.J. 621, on appeal, 47 I.C. 513: I.L.R. 45 Cal. 878. As to admissibility of photographs in evidence, *see* 113 I.C. 771: A.I.R. 1931 P.C. 189 (P.C.).

25. Technical work.—Technical works cannot be used to refuse an expert witness's opinion unless the passages to be used are put in

cross-examination to the witness and it is then for him to explain them if he can. [I.L.R. 23 Cal. 1 (P.C.), Ref.]: (1917-18) 22 Cal.W.N. 745: 46 I.C. 593.

26. Trade mark/Copyright.—Similarity of trade mark is a matter for the Court: I.L.R. 49 All. 92: 99 I.C. 353: A.I.R. 1927 All. 81.

Registration of trade mark—Similarity with existing trade mark—Registrar's opinion that there was no deceptive similarity between two marks—Having expert knowledge in the matter his opinion should not be disturbed lightly—Concurrent finding to the contrary of Courts below is, however, binding in appeal under Art. 136 of Constitution: A.I.R. 1970 S.C. 146: (1970) 1 S.C.R. 290.

Where in a complaint for infringement of copyright in books, the accused was acquitted for absence of expert opinion to prove that offending books were reproduction of the book printed and published by *de facto* complainant, *held*, as the Court could have on its own motion examined experts for ends of justice, acquittal was unjustified: 1985 Cr.L.J. 202 (Cal.).

27. Foreign law.—Expert opinion on matters of foreign law. *See* 92 I.C. 112: A.I.R. 1926 Mad. 218. Under this section expert evidence is admissible in respect of the Jewish Law: I.L.R. (1944) 2 Cal. 201: A.I.R. 1946 Cal. 90. Expert opinion on foreign law, where it is elaborately laid down in a Code, need not be called for—Court should itself interpret such law: 123 I.C. 600: A.I.R. 1930 Mad. 146. The evidence of translators or interpreters of Hindu Law texts is not admissible: I.L.R. 12 Pat. 359: A.I.R. 1933 Pat. 306.

28. Expert opinion regarding value of land.—Expert opinion—Acquisition of land—Determination of market value—Expert opinion when necessary: A.I.R. 1969 Ker. 265.

While an expert's evidence about the extent of depreciation in the land value where its major chunk has been acquired may assist the Court in reaching a conclusion where technical assistance is called for, *held*, it cannot be laid down as a rule of law that if no such expert is available, the Court is barred from making its own guess on the basis of available materials on record: A.I.R. 1981 Guj. 219: (1981) 22 Guj.L.R. 590 (D.B.).

The architects may be experts for the purpose of designing and building house, but they are not experts for the purpose of giving opinion as to what would be the cost of construction in a particular year without any data about the prices of materials and wages prevalent in that particular year: A.I.R. 1972 Del. 41: I.L.R. (1971) 2 Del. 437.

Where the Commissioner and Administrator of the Municipal Corporation appears as an expert witness having gained knowledge about the value of land and houses situated in different parts of the city, *held*, that knowledge entitles him to be considered as an expert; his opinion founded on such knowledge is admissible in evidence: A.I.R. 1971 Madh. Pra. 32: 1970 M.P.W.R. 349: 1970 M.P.L.J. 465: 1970 Jab.L.J. 466 (D.B.).

29. Report of public analyst.—A public analyst is supposed to be specially skilled in the science of dietetics; as an expert in the science, he is competent to opine and testify about this fact. Thus, the opinion of the public analyst who examines and analyses the sample, as to the fitness or otherwise of the sample for human consumption, would constitute legal evidence: A.I.R. 1976 S.C. 394: (1976) 1 S.C.C. 412: 1976 Cr.L.J. 336: (1976) 2 S.C.R. 1.

Food adulteration case—Public analyst, report of—Special rule of evidence: (1969) 1 An.W.R. 541: 1969 M.L.J. (Cr.) 438: 1970 Cr.L.J. 275.

Report of public analyst giving full factual data and no opinion—Conviction can be based upon it—Public analyst need not be examined—But record must show that Rr. 7 and 18 were duly complied with: (1964) 5 Guj.L.R. 578: (1964) 2 Cr.L.J. 32: A.I.R. 1964 Guj. 136. *See* also 1980 Jab.L.J. 491.

In a prosecution under the Prevention of Food Adulteration Act, 1954, report of unqualified public analyst is not admissible as report of public analyst, however, it is admissible only as report of an expert under S. 45: 1994 Cr.L.J. (N.O.C.) 242 (Ori.).

Adulterated tea—Report of public analyst and certificate of director—Value of and binding nature on Courts: 1969 Cr.L.J. 615: A.I.R. 1969 Ker. 146.

Where an expert had testified that the insect infected *maida*, when its sample was lifted, could possibly contain only eggs, *held*, the Court could not discard his opinion on the basis of some passages in a book without putting them to the expert: 1985 Cr.L.J. 285: 1984 F.A.J. 407 (Del.).

30. Miscellaneous.—Where a deaf and dumb person had made a registered Will in favour of his sister's son but on his death, collaterals of the deceased sued his nephew for possession of the property left behind by the deceased and challenged the deceased's competence to make the Will, *held*, there was no legal bar to a deaf and dumb person making the Will on the basis of questions put to, and answers received from him by the

46. Facts bearing upon opinions of experts.—Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

Illustrations

(*a*) The question is, whether *A* was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be symptoms of that poison, is relevant.

(*b*) The question is, whether an obstruction to a harbour is caused by a certain sea-wall.

The fact that other harbours similarly situated in other respects, but where there were no such sea-walls, began to be obstructed at about the same time, is relevant.

Principal of the School for the Deaf and Dumb and reduced in writing; the Will also carried a certificate by the Principal that it had been explained by signs and gestures to the testator who thumb-marked it in token of its correctness. The expert evidence of the Principal, himself a deaf and dumb, *held*, is admissible under S. 45: A.I.R. 1983 P.&H. 373: 1983 Rev.L.R. 341.

Though the reports of the Local Commissioner and expert appointed by the Court under O. 26, R. 10 of the Code of Civil Procedure is to be read as evidence but where the assessment of the crop value of the standing sugarcane was based on their respective estimates of the crop being 5 and 7, months old, *held*, their reports in the absence of corroboration, reasons for their views and their cross-examination, had little evidentiary value: A.I.R. 1971 Mad. 198: (1970) 83 Mad.L.W. 783. *See* also 1986 All.W.C. 9.

The Gazette of the Bombay Presidency, Vol. III published in 1879, is admissible under S. 35 read with S. 81 of the Evidence Act, 1872. The Gazette is admissible being official record evidencing public affairs and the Court may presume their contents as genuine. The statement contained therein can be taken into account to discover the historical material contained therein and the facts stated therein is evidence under S. 45 and the Court may in conjunction with other evidence and circumstances take into consideration in adjudging the dispute in question, namely, whether Kalika Mataji temple was a public trust, though it may not be treated as conclusive evidence: A.I.R. 1995 S.C. 167.

In order to exhibit a document under S. 67, *held*, it must have been proved; thus, where the witness admitted in cross-examination that he did not know who prepared it, the decree based on the document could not be sustained: A.I.R. 1991 N.O.C. 108 (Gau.).

Where in a suit for recovery of handling and transportation charges, the plaintiff relied on the challans to establish delivery at the destination which were claimed by the defendant to be forged but the plaintiff sought permission to adduce expert evidence though belatedly to prove them, *held*, rejection of the application on the ground of delay was proper: A.I.R. 1992 Gau. 42.

Where an expert undoubtedly qualified to compare or identify printed matters, though he had published no paper on the subject, had given his opinion which did not necessarily mean that the number of the lottery ticket was a forgery and he had been sent only 3 tickets for comparison on the narrow point whether they were printed with the same machine but comparison was made *qua* one printing machine when there were eight machines in the press, *held*, though admissible, the expert evidence was not sufficient to clinch the issue of forgery: A.I.R. 1979 S.C. 1890: 1979 Cr.L.J. 1411: (1980) 1 S.C.C. 460.

Section 46—Notes.

Though expert evidence to prove or disprove the genuineness of a handwriting or signature is relevant under S. 45, other evidence supporting or detracting from expert evidence is also relevant under S. 46: 1983 Ker.L.T. 281 (D.B.).

Ss. 45 and 46 read in combination show that where an expert opinion is relevant, facts supporting or opposing the opinion, *held*, are also relevant; however, passages from text books inconsistent with the Doctor's deposition as expert cannot be used to discredit his testimony unless they had been shown to him in cross-examination: [A.I.R. 1957 S.C. 589, Rel. on]: (1993) 1 An.L.T. (Cr.) 73 (D.B.).

Normally, in order that a certificate from medical expert could be received in evidence, the person, who has issued the certificate must be called and examined as a witness before the Court. The certificate of the Principal of a Medical College giving opinion as to the contents of a liquid seized in a prohibition case under the Bombay Prohibition Act, without more, not being evidence and S. 510 of the

47. Opinion as to handwriting, when relevant.—When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is relevant fact.

Explanation—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

Illustration

The question is, whether a given letter is in the handwriting of *A*, a merchant in London.

B is a merchant in Calcutta, who has written letters addressed to *A* and received letters purporting to be written by him. *C* is *B*'s clerk, whose duty it was to examine and file *B*'s correspondence. *D* is *B*'s broker, to whom *B* habitually submitted the letters purporting to be written by *A* for the purpose of advising with him thereon.

The opinions of *B*, *C*, and *D* on the question whether the letter is in the handwriting of *A* are relevant, though neither *B*, *C*, nor *D* ever saw *A* write.

Cr.P.Code or S. 129-B of the Bombay Prohibition Act, which contain special rules of evidence being inapplicable to such a certificate, no reliance can be placed by the prosecution thereon: I.L.R. (1962) Bom. 472: 1962 Nag.L.J. 616: (1962) 64 Bom.L.R. 303: A.I.R. 1962 Bom. 229.

Certificate of Chemical Examiner relating to nature of preparation claimed to be medicinal—Not covered by S. 129-B: I.L.R. (1962) Bom. 472 : A.I.R. 1962 Bom. 229.

Certificate of Chemical Examiner—Probative value—Negative opinion expressed—Failure of accused to summon and examine Chemical Examiner as a witness—Effect: I.L.R. (1962) Bom. 472: A.I.R. 1962 Bom. 229.

A Court can take judicial notice of the fact that theft of copper wire from telegraph lines had become very rampant, especially in Bengal, Bihar, Orissa and Mysore and Parliament found it necessary to amend the Telegraph Wire (Unlawful Possession) Act, 1950, by the Amending Act of 1953: 28 Cut.L.T. 185.

Ss. 47, 67 and 74 (1)(*ii*)—Proof of sanction—Order authorising Senior Superintendent of Police to make complaint under S. 153-A, Penal Code—Such order signed by Deputy Secretary to Government—Assistant who was acquainted with Deputy Secretary's signature could prove it: 1965 B.L.J.R. 613: (1965) 2 Cr.L.J. 410: A.I.R. 1965 Pat. 393.

Section 47—Notes.

See also Notes under Ss. 45 and 46. The proof of a document's genuineness is the proof of its authorship; its evidence, like proof of any other fact, may be direct or circumstantial. The direct evidence would be of a person who had seen the document being written or signed; the proof by circumstantial evidence may be by one of the modes provided in Ss. 45 and 47; it may as well be proved by the internal evidence afforded by the document's contents which would be of considerable value if the document purports to be a link in correspondence when some of its other links have been proved; in such a situation, the recipient of the document would be in a reasonably good position to prove it both as acquainted with the author's knowledge of the writer's handwriting and signatures and his knowledge about the subject-matter of the correspondence; the Court may as well be in a position to judge whether the document fits in the correspondence: A.I.R. 1957 S.C. 857.

The opinion of experts and other persons acquainted with the handwriting of the persons concerned are relevant under S. 45 and S. 47, respectively; it is opinion evidence based in the former case by a scientific comparison and in the latter case by familiarity resulting from frequent observation and experience. However, the opinion of handwriting experts is not conclusive; it is fallible or liable to error like in case of any other witness but cannot be brushed aside as useless: A.I.R. 1989 Gau. 42: (1987) 2 Gau.L.R. 299.

The Act, as in English Law, recognizes two direct methods of proving a questioned handwriting: (*1*) by admission of its writer or (2) by evidence of the person who saw it written.

Besides, these best methods of proof, there are three other modes of proof by opinion: (*1*) by evidence of a handwriting expert or (2) by evidence of a witness acquainted with the handwriting of the writer and (3) by the opinion of the Court by comparison of the admitted and questioned documents; these three cognate modes of proof involve the method of comparison. [1975 Cr.L.J. 1756 (Del.) (D.B.), Reversed]: A.I.R. 1979 S.C. 14: (1978) 2 Karn.L.J. (S.N.) 39.

The evidence of a person acquainted with the handwriting of a person by whom the document is said to be written is admissible even though they are not experts: 18 P.R. 1915 (Cr.): 28 I.C. 722: 16 Cr.L.J. 338: I.L.R. 18 Bom. 66. *See* also 147 P.L.R. 1912: 15 I.C. 979; I.L.R. 4 Pat. 394; 7 Pat.L.T. 507: A.I.R. 1925 Pat. 787; I.L.R. 22 Cal. 313; (1911-12) 16 Cal.W.N. 812; A.I.R. 1925 Oudh 413.

Opinion evidence is hearsay and becomes relevant only if the condition laid down in S. 47 is first proved. Thus, where there was oral evidence identifying the signature but the witness did not depose that he was familiar with the handwriting of the person whose signatures were to be identified, *held*, no reliance could be placed on evidence of such witness alone: A.I.R. 1975 S.C. 290: (1974) 2 S.C.C. 660.

The main part of S. 47 is intended to apply to those cases where the disputed signatures or writings are not written in presence of any person, but are sought to be proved by those, who although have not seen the person writing the disputed signatures, are otherwise competent to recognise the writing on account of their familiarity and acquaintance with the character of the writing of the person concerned: A.I.R. 1977 Pat. 241: 1977 B.B.C.J. 449; (1989) 1 Karn.L.J. 52 (D.B.).

As to sufficiency of evidence, *see* A.I.R. 1934 Nag. 204.

Where the question is whether a certain handwriting is that of the accused, due weight should be attached to the evidence of a person who is accustomed to see the handwriting of the accused: 1959 M.L.J. (Cr.) 337: A.I.R. 1959 Mys. 185; A.I.R. 1960 Cal. 318.

Where a witness deposes that a certain document is in the handwriting of that accused, the degree of his acquaintance with the handwriting will affect the value, though not the admissibility of his evidence: 1936 All.L.J. 317: A.I.R. 1936 All. 165.

The importance of direct evidence of witness on the question of the genuineness of documents cannot be over emphasised. Under S. 47 any writing may be proved by the opinion of any person who is acquainted with the handwriting of the man alleged to have written the document. It has long been recognised in England as well as in this country that this kind of opinion was for various reasons better than expert evidence. One of the ways in which the knowledge of a person's handwriting may be acquired is by the witness having seen in the ordinary course of business, documents which on evidence, direct or circumstantial are proved to have been written by such person: A.I.R. 1965 Pat. 332.

The technical requirements of proof of handwriting are satisfied if a person alleges that he had seen another writing and that, in his opinion, the writing to be proved is of that other person. S. 47 of the Evidence Act deals only with the admissibility of a variety of opinion evidence and not with its value. In a case covered by this provision, the value of the opinion, unlike that of the expert, depends upon the familiarity which a witness has acquired with the writing of another about which the opinion is expressed, and not upon the reasons which he can advance in support of the opinion. It would be quite legitimate to discard the evidence given, by a witness who is shown to have insufficient familiarity with the handwriting of a person about which he states his opinion. If a witness is not sufficiently familiar with the writings of another person a cross-examiner can easily test the value of the opinion expressed by the witness provided other admitted writings of the alleged writer are available: 1967 Cr.L.J. 134: A.I.R. 1967 All. 64.

The evidence of the content contained in the document is hearsay evidence unless the writer thereof is examined before the Court. An attempt to prove the contents of the document by providing the signature or the handwriting of the author thereof is to set at naught the well-recognised rule that hearsay evidence cannot be admitted. [A.I.R. 1954 Bom. 305, Rel. on; A.I.R. 1957 S.C. 857, Ref.].

Even if the entire document is held formally proved, that does not amount to a proof of the truth of the contents of the document. The only person competent to give evidence on the truthfulness of the contents of the document is the writer thereof: (1966) 68 Bom.L.R. 228: I.L.R. (1966) Bom. 420: 1967 Mah. L.J. 65: A.I.R. 1968 Bom. 112.

A document can be proved by internal evidence afforded by the contents of the documents: (1987-1) 35 B.L.J.R. 127 (D.B.).

Ss. 47 and 67 deal only with the admissibility of a variety of opinion evidence on handwriting and the mode of its proof; they do not

deal with the value of such evidence. [A.I.R. 1963 Raj. 84; A.I.R. 1934 All. 990, Foll.; A.I.R. 1943 P.C. 83; A.I.R. 1925 Cal. 452; A.I.R. 1921 Cal. 71, Rel. on; A.I.R. 1957 All. 119, Disting.]: A.I.R. 1977 Gau. 27.

It is well settled that the proof of a document's genuineness is the proof of its authorship; it has to be proved like any other fact. In India, therefore, the proof of a document's genuineness can be direct or circumstantial. Direct evidence would be of a person who had seen the document being written or signed or by proof of the handwriting or contents or signature by one of the modes under Ss. 5 and 47; it may also be internal evidence, afforded by the document's contents. The language used in S. 67 indicates that the proof of the signatures on a document cannot extend to its contents' genuineness when the document is written in someone else's handwriting. Signatures on a document are proved by examining that person; handwriting on a document, written wholly or partly by a person, is proved by examining that person; where the signatures, have been proved but the contents' genuineness is in dispute, it is all the more necessary that the author or the scribe be examined to afford an opportunity to the person disputing the genuineness of the contents to cross-examine him: (1993-2) 112 Mad.L.W. 587 (D.B.).

Explanation—Even the opinion evidence of a non-expert, becomes good evidence to go by, if the acquaintance of such of witness with the signature of the executor is well proved within the meaning of S. 47, *Explanation*: (1968-69) 73 Cal.W.N. 877: A.I.R. 1970 Cal. 292.

The proof of the signature of a person to a document is not necessarily a proof of its contents; normally, the contents of a document should be proved by calling the person who is the author of the document or by the presence of other internal circumstantial evidence. [A.I.R. 1957 S.C. 857, Foll.]: A.I.R. 1984 N.O.C. 306 (Del.).

Although it is true under the Evidence Act comparison of handwriting is legitimate enough and the view of persons competent to express opinions may be in many cases of considerable value, the opinions of those who have not carefully studied the art of calligraphy is not as a rule of very great utility. The mere fact that there is a resemblance between the signature alleged to be false and a signature admitted to be genuine does not carry great weight. If a signature is denied, the onus of proving it is on the party relying on its genuineness: 64 I.C. 234 (P.).

A person having the custody of family records can obtain familiarity with the handwriting of persons who are dead and gone: 1952 Raj.L.W. 79: A.I.R. 1952 Raj. 102: I.L.R. (1951) Raj. 764.

It is not impossible for a person unable to read and write certain characters to know and to recognise and prove the handwriting of another in those particular characters, if he had the occasion to see the latter write: 4 All.W.R. 676: A.I.R. 1934 All. 990.

A person having seen another signing or writing a document, *held*, can be said to be acquainted with his handwriting; he is competent to prove the handwriting and signature even if it is in English which the witness cannot read. [A.I.R. 1963 Raj. 84; A.I.R. 1934 All. 990, Foll.]: A.I.R. 1977 Gau. 27.

When a question has to be decided as to the person by whom any document was signed or written, then, according to S. 47, the opinion or any person acquainted with the handwriting of the person by whom it is supposed to be written or signed is a relevant fact. But the section contemplates only the production of the original document and not a copy of it: 1939 R.D. 105: 1939 All.W.R. (B.R.) 167.

When a witness says that a particular document is in the handwriting of a certain person whom he knows, it is evidence of a fact. The fact that the witness does not also say that he knows and is acquainted with the handwriting of the person concerned does not render that evidence inadmissible. That is legal evidence of the handwriting of that person. The witness need not say in the first instance that he knows the handwriting. It is the duty of the opposite party to explore in cross-examination the sources of his knowledge, if he is not satisfied with the testimony of the witness as it stands. Nor would the fact that the document is not before the Court render such evidence inadmissible: 178 I.C. 324: 1938 Pat.W.N. 403: A.I.R. 1938 Pat. 497; 198 I.C. 711: A.I.R. 1942 Pat. 449.

A witness need not state in the first instance how he knows the handwriting. It is enough if he states in examination-in-chief that he is acquainted with the handwriting, and it is then for the cross-examining Counsel to bring out the circumstances challenging that statement, and discredit the witness: A.I.R. 1955 Raj. 186; A.I.R. 1984 Karn. 112 (D.B.).

It is sufficient for the witness appearing to depose under S. 47 to say in examination-in-chief that he is acquainted with the handwriting; if the other party desires to challenge the statement, it has to cross-examine the witness to show that the witness could not have been

acquainted with the handwriting: (1992-2) 110 Mad.L.W. 523: (1993) 1 Hindu L.R. 406.

Explanation—Opinion as to handwriting expert witness—Admissibility of evidence of—Duty of cross-examiner—Party relying on evidence of witness to prove document—Failure to prove acquaintance of witness with handwriting of executant of document—Evidence of such witness is inadmissible—Cross-examiner not obliged to prove absence of acquaintance with handwriting: 1968 All.L.J. 466: 1969 Cr.L.J. 1089: A.I.R. 1969 All. 423.

Handwriting—Proof—Nature and extent of dissimilarities notice imported: (1962) 1 Cr.L.J. 441: A.I.R. 1962 Mys. 53.

Secondary evidence of existence or contents of lost document—Proof of execution by primary evidence—Examination of person acquainted with handwriting of executant: A.I.R. 1958 Ori. 207.

Before accepting the evidence of an expert or other witness familiar with the handwriting and signature of a person, *held*, the Court has to use its own observation in comparing admitted or proved and disputed writings not as a handwriting expert but to verify the expert's premises in one case and appraise the value of opinion evidence in the other case. [A.I.R. 1967 S.C. 1326; A.I.R. 1925 Cal. 485; A.I.R. 1946 All. 67 and A.I.R. 1947 All. 411, Rel. on]: A.I.R. 1971 Assam 168: 1971 Assam L.R. 267.

In order to exhibit a document under S. 67, *held*, it must have been proved; thus, where the witness admitted in cross-examination that he did not know who prepared it, the decree based on the document could not be sustained: A.I.R. 1991 N.O.C. 108 (Gau.).

Where a witness called to identify the handwriting of the defendant did not say straight off that the signatures on the document in dispute were those of the defendant but proceeded to compare them with those entered in his own bahi, *held*, that although the evidence of persons acquainted with the handwriting of the executant of a document is relevant and admissible the witness did not express any opinion as if by a person acquainted with the handwriting of the executant, but attempted to play the role of an expert, and as such his evidence must be rejected: A.I.R. 1958 Raj. 6.

Where the witness proves that the letter was in the handwriting of the sender with whom he had been corresponding, *held*, it sufficiently proves that the letter was written and the statements contained therein were those of the sender; in the absence of examination of the sender, the correctness of those statements cannot be said to have been proved; the letter's contents but not, their truth stands proved; to that extent, the letter is relevant and admissible: A.I.R. 1971 S.C. 1949: 1971 U.J. (S.C.) 726.

Where neither the vakalatnama was signed in the presence of the Counsel nor was he acquainted with the signatures, *held*, vakalatnama could not be said to have been proved: (1981) 2 M.P.W.N. 89.

Much reliance cannot be placed on the evidence of a non-expert witness about the identification of the executant's signature, who had only seen the executant writing only once or twice, more so when there is the question of the identification of the signature which are alleged to have been subscribed before the witness was born: A.I.R. 1972 Raj. 9: 1971 Raj.L.W. 103.

Where in a suit for recovery of money, the Court compared the admitted signature with the disputed one on the bond, *held*, the Court's finding based thereon cannot be discarded on the ground that the Court was not handwriting expert: A.I.R. 1982 N.O.C. 267 (All.).

Where the suit for recovery of money was based on a document which was denied by the defendant as a forgery but it was testified to by a witness acquainted with writing of the defendant as having been written and signed by the defendant, *held*, for identiting a particular writing, there is provision for examining an expert under S. 45 and any other person acquainted with the handwriting under S. 47: A.I.R. 1983 Pat. 321: 1983 B.B.C.J. 494: 1983 Pat.L.J.R. 541 (D.B.).

Where the creditor had himself seen the debtor writing the disputed signatures on the credit memos as they were signed in his presence, *held*, he could certainly be said to be a person 'acquainted' with the debtor's handwriting within the meaning of S. 47: A.I.R. 1977 Pat. 241: 1977 B.B.C.J. (H.C.) 449.

Where accused was charged for offences of cheating and forgery and the bank manager and accountant of the bank as well as the persons who introduced the accused to the Bank categorically deposed that the accused had put down his signatures in their presence and that the signatures were of accused and none-else, *held*, it was not necessary for the prosecution to have got compared the signatures of accused from handwriting expert: 1995 Cr.L.J. 969 (P.&H.).

An entry in an account book kept by the predecessors-in-interest of the plaintiffs was sought to be proved by the statement of one of the plaintiffs who stated that the entry was in

48. Opinion as to existence of right or custom, when relevant.—When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

---

he handwriting of a Munim in the employment of the plaintiffs' predecessors-in-interest, and that he was acquainted with the handwriting of the said Munim. In cross-examination it was brought out that the witness was born 19 years after the death of the writer, and that the account book in question, from which the entry was sought to be proved, was found accidentally in a Bukhari about four years before the witness gave this statement. *Held*, that under the circumstances it could not be said that the witness was acquainted with the handwriting of the writer by the third mode provided by the section, namely, the documents purporting to be written by the Munim being habitually submitted to the witness in the ordinary course of business: A.I.R. 1955 Raj. 186.

Where the handwriting expert could not give any opinion on the authorship of the questioned signature but the persons acquainted with the accused's handwriting deposed that the signatures were that of the accused, *held*, it was not safe to convict the accused in such circumstances. [A.I.R. 1959 S.C. 93; A.I.R. 1963 S.C. 1728; 1973 Cr.L.J. 1187 S.C.) and 1973 Cr.L.J. 1143 (S.C.), Rel. on]: 1989 Cr.L.J. (N.O.C.) 146 (Gau.).

Witness deposing that he being immediate superior of accused knew handwriting and signature of accused very well and identifying a particular handwriting and signature on disputed document as that of accused—Evidence of witness remaining unchallenged in cross-examination—*Held*, evidence must receive due weight: (1967) 1 Mys.L.J. 548: 1967 M.L.J. (Cr.) 501: 1967 Cr.L.J. 1536: A.I.R 1967 Mys. 210.

Proof of wills—Onus is on propounder: 1968 Ker.L.J. 123.

Where there is evidence that the attestors signed in the presence of the person who deposed such attestation, *held*, handwriting of the attestor was proved: (1988) 1 An.L.T. 19 (N.R.C.).

Where the witness in whose presence the rent notes were executed by the tenants had been examined to prove the rent notes, *held*, non-examination of the tenant or the scribe of the rent deeds was of no effect: A.I.R. 1973 Del. 280 (D.B.).

A document alleged to be in the handwriting of *A* cannot be proved to have been in the handwriting of *A* under S. 47 by a person, who has not seen *A* write nor has received any communication from *A*, in answer to letters written by him or in ordinary course of business. But although contents of the document are not proved, the fact of its receipt purporting to come from *A* in reply to a letter written to *A* would be relevant under Ss. 7 and 11, Evidence Act: 1955 Cr.L.J. 1208: A.I.R. 1955 Sau. 68.

Section 48—Notes.

See A.I.R. 1937 Pat. 463. Ss. 48 and 51 do not undoubtedly make it necessary for the person giving opinion evidence, to have personal knowledge about the facts testified to by him. However, he should possess sufficient experience to indicate that he is 'likely to know' of the existence of the custom sought to be proved by him; but if he has no such experiential qualification, he should show the grounds on which his opinion is based like his having studied some ancient documents or having made personal inquiry from persons contemporaneous to the exercise of the custom or some other basis which would make him a reliable witness to prove the existence of the custom; otherwise, his mere repetition of hearsay would not lend any weight to his testimony; a mere *ipse dixit* of such witnesses is not admissible or relevant and carry no evidentiary value: A.I.R. 1971 Guj. 188 (D.B.).

Generally speaking, opinion evidence, unless it is the opinion of an expert, is not admissible, but S. 48 provides an exception to this general rule: A.I.R. 1971 Guj. 188 (D.B.).

Ss. 48 and 49 do not deal with the statements of dead persons or persons who cannot be found. Such cases are dealt with by S. 32: I.L.R. 22 Luck. 522: A.I.R. 1948 Oudh 307.

General evidence as to the existence of tribal or family custom is admissible under S. 48, but it must be evidence of opinion of persons who would be likely to know of its existence if it existed: A.I.R. 1953 Him. Pra. 66.

Explanation.—The expression "general custom or right" includes customs or rights common to any considerable class of persons.

Illustration

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.

As to proof of right or custom, opinions of persons likely to know of its existence are admissible: I.L.R. 6 Luck. 519: A.I.R. 1931 Oudh 89.

And the weight of their evidence would depend on their position and character and of the persons on whose statements they have formed their opinion: A.I.R. 1933 Oudh 246. *See* also A.I.R. 1933 Sind 213.

Mere expression of opinion in regard to a custom is of no value unless, the persons expressing the opinion are persons who would be likely to know of its existence if it existed. Where nothing is pointed out in the statement of the witnesses which might show that they satisfied this condition, such as for instance of the exercise of the right of pre-emption, it is patent on the face of it that they are not likely to know of the existence of any custom of pre-emption. Their opinion on the existence of custom of pre-emption in such a case is worthless: A.I.R. 1954 Him. Pra. 20.

A living witness may state his opinion on the existence of a family custom and may state as grounds thereof information derived from deceased persons but it must be the expression of independent opinion based on hearsay and no repetition of hearsay: I.L.R. 8 Luck. 445: A.I.R. 1933 Oudh 246. S. 48 read with S. 60 requires that the person who holds the opinion should be called as a witness. Statements made by deceased persons after the controversy had arisen and therefore inadmissible under S. 32 are not admissible under S. 48 or under S. 32(7). Statements cannot be called instances: A.I.R. 1933 Oudh 246.

A customary right is not a mere personal right *vis-a-vis* a particular person; it is the right of the community or recognized by the community as a whole. Normally, a custom has got to be immemorial, its origin not being traceable, or of very long duration, and very remote and distant origin. Though Courts might come across witnesses sufficiently old to remember that in their childhood, such a custom did not prevail; but nevertheless the long, uninterrupted practice recognized by the community as a whole has to be established. A custom may also have its origin in some lost grant; it will not be, strictly speaking, a customary right but a right flowing from the lost grant. In all such cases members of the community must be examined to prove the existence of such a longstanding custom, the community's custom. By and large the custom has got to be recognized by the community as a whole though its beneficiary may be an individual. Thus, where the plaintiff had examined two witnesses and himself to depose that he had been taking water from the pond for the last thirty years and not one word was uttered by anyone about the custom, *held*, no customary right in favour of the plaintiff was proved: A.I.R. 1991 Bom. 119.

Opinion of elderly members or the executive body of the Samaj regarding custom of adoption of a boy over 15 years of age. *See* 1976 Mah.L.J. 125.

Where the witnesses, who hailed from same village and were members of the same brotherhood, had given specific instances of their close relatives to prove the custom of divorce out of Court, *held*, it was not at all necessary to examine the persons whose instances were given, to prove such a custom; as the testimony of the witnesses actually examined was based on personal knowledge, their evidence could not be discarded as mere hearsay: A.I.R. 1985 Del. 14: 1984 Rajdhani L.R. 653: (1985) 1 D.M.C. 35: (1985) 1 Hindu L.R. 369: (1985) 1 Hindu L.R. 442.

Where the evidence of the plaintiff's solitary witness in support of his claim to Mahantship of an institution according to custom, and who claimed to be present when the plaintiff was initiated as a chela of former Mahant, was found to be neither trustworthy nor sufficient to prove such initiation, *held*, one of the factors of substratum of the custom to claim Mahantship having become absent, his claim was to be rejected: A.I.R. 1977 S.C. 2002: 1977 U.J. (S.C.) 555: (1977) 4 S.C.C. 65.

When a witness testifies as to the information having been given by him to another and the latter is not examined, the testimony of the witness is not admissible being hearsay. [A.I.R.

49. Opinion as to usages, tenets, etc., when relevant.—When the Court has to form an opinion as to—

the usages and tenets of any body of men or family,

the constitution and government of any religious or charitable foundation, or

the meaning of words or terms used in particular districts or by particular classes of people,

the opinions of persons having special means of knowledge thereon, are relevant facts.

1983 S.C. 906, Foll.]: (1984) 58 Cut.L.T. 127.

The answers to the questions given in Wilson's Manual are clearly admissible under S. 48, being the opinion, as to the existence of a general custom or right, of persons who would be likely to know of its existence, if it existed. They are also admissible under S. 35 as entries relating to a relevant fact contained in what may be regarded as a public record made by a public servant in the discharge of his official duty: 68 I.A. 1: I.L.R. (1941) Lah. 154: A.I.R. 1941 P.C. 21 (P.C.). Rattigan's Digest of Customary Law in Punjab—Authority of, *see* A.I.R. 1955 S.C. 266. *See* also A.I.R. 1987 P.&H. 138: (1987) 91 Punj.L.R. 247: 1987 Rev.L.R. 35; A.I.R. 1982 N.O.C. 306 (P.&H.), cited under Ss. 56 and 57, Note 10, *infra*.

Section 49—Notes.

A custom cannot be created by purchase. It must be such as has obtained the force of law by long usage; it must be ancient, certain and reasonable and must be construed strictly. The evidence of custom must not only be clear and unambiguous, but should also establish that those who were following it were compelled to follow it as it was in accordance with law, and the burden of proof as to its existence rests on the person who set up the custom. When the Court has to form an opinion as to the existence of an usage, S. 49, Evidence Act, makes such evidence admissible if the persons giving their opinion have special means of knowledge regarding the usages and tenets of any body of men or their family. The weight of such evidence would depend upon the position and character of the witness and his evidence must be expression of an independent opinion formed on what he has known or heard. Repetition of hearsay is still hearsay evidence: A.I.R. 1956 Ori. 41: I.L.R. (1955) Cut. 653.

Where all that the Court has to ascertain is the rate of interest chargeable on hundies as is fixed by usage, the evidence of three persons familiar with that usage is sufficient particularly when it stands uncontradicted on the record: I.L.R. 13 Lah. 800: A.I.R. 1923 Lah. 582. *See* also (1937) 39 Bom.L.R. 613: I.L.R. (1937) Bom. 670: A.I.R. 1937 Bom. 385.

The words 'usages of any body of men' in S. 49 do not cover inferences or conclusions that may be drawn on the basis of past experience: 13 P.R. 1914 (Cr.): 20 I.C. 625. On this section, *see* also 7 I.A. 63: I.L.R. 5 Cal. 744 (P.C.); I.L.R. 23 Cal. 427; I.L.R. 26 Cal. 148; 49 I.C. 743; A.I.R. 1937 Bom. 385: (1937) 39 Bom.L.R. 613.

Where a deed of gift contains an agreement transferring one ghumaon of land to the donee and also relinquishment of reversionary rights by a reversioner, the deed, although it is inadmissible in evidence, for want of registration so far as the gift is concerned, can be admitted in evidence under S. 49 for the collateral purpose of proving the relinquishment of reversionary rights: A.I.R. 1939 Lah. 414.

When the author of a book, a passage from which is relied on as to the usages and tenets of any body of men and family as of a person having special means of knowledge, is still alive, *held*, his opinion in aforesaid passage is not admissible in evidence because of the provisions of S. 60: A.I.R. 1973 Pat. 206: 1973 Pat.L.J.R. 153 (D.B.).

Prosecution relying on words used by accused for proof of its case—Section applies as the case is one where the Court has to form an opinion as to the meaning of those words in order to decide whether the prosecution has proved its case: (1963) 2 Cr.L.J. 87: (1963) 4 Guj.L.R. 733.

A Police Officer can give evidence under S. 49 of the Evidence Act, provided he has

50. Opinion on relationship, when relevant.—When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact:

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, 1869 (4 of 1869), or in prosecutions under sections 494, 495, 497 or 498 of the Indian Penal Code (45 of 1860).

---

special means of knowledge as to the meaning of words of terms used in a particular district or by a particular class of people. And for the purpose of S. 49 of the Evidence Act, gambler would be a class of people.

The expression "special means of knowledge" does not necessarily mean that the person giving evidence should himself engage in a particular business or that he himself should be a member of a particular class of people. It is sufficient that he has special means of knowledge regarding the meaning of words or terms used in a particular district or by a particular class of people. The very fact that the witness is a Police Sub-Inspector of Prohibition and Gambling qualifies him under S. 49 and in such case it is open to the accused to show in cross-examination that the evidence given by him is of no value or of little value. The fact that he himself had not said in the chief-examination that he has special means of knowledge or how he acquired special means of knowledge does not go against the admissibility of his evidence under the section.

It is true that a Police Officer must in chief-examination give the instances and give details of his experience in cross-examination if he is asked to do so, and the value to be attached to his evidence would depend on answers to such questions and other questions. But it would also be reasonable for the Court to presume that the Police Sub-Inspector in charge of gambling in a particular area has special means of knowledge regarding the words used by the gamblers as reference can be made by it to S. 114 to make certain evidence relevant: (1963) 2 Cr.L.J. 87: (1963) 4 Guj.L.R. 733.

Code words used by a class of people—Section applies where the meaning of these words is the matter on which the Court has to form an opinion: (1963) 2 Cr.L.J. 87: (1963) 4 Guj.L.R. 733.

Ss. 49, 13—Family custom of primogeniture—Proof of—Three branches of same family—Custom prevailing in two branches—Members of third branch cannot rely on custom unless proved by cogent evidence: A.I.R. 1964 Pat. 150.

Inference drawn by prosecution witnesses—Inadmissible—Prosecution under Ss. 12(*a*), 4 of Bombay Prevention of Gambling Act—Not admissible evidence of the bet—Conviction of accused set aside: (1963) 4 Guj.L.R. 304: (1963) 1 Cr.L.J. 666.

Bombay Prevention of Gambling Act (IV of 1887), S. 12(*a*)—Offence under—Question whether words used could be treated as a bet—Words can be explained by resort to S. 49, Evidence Act, by giving opinion evidence—Prosecution has to prove that the person has special means of knowledge before it adduces opinion evidence and in order to make opinion evidence relevant under S. 49—Opinion does not become relevant if special knowledge has not been proved—It is not for the defence to put question to show that witness had no special means of knowledge: I.L.R. (1965) Guj. 901: 1966 Cr.L.J. 830 (1).

Section 50—Synopsis.

1. Scope and applicability.
2. "Opinion expressed by conduct".
3. Person whose evidence is admissible.
4. Marriage.
5. Adoption.
6. Paternity.
7. Proviso.
8. Miscellaneous.

---

1. Scope and applicability.—Difference between English and Indian Law: 91 I.C. 462: A.I.R. 1926 Mad. 475.

S. 50 is limited to opinion as expressed by conduct and there is provision in the Act making general reputation receivable in evidence as in English Law: A.I.R. 1926 Mad. 475: 91 I.C. 462.

Illustrations

(*a*) The question is, whether *A* and *B* were married.

The fact that they were usually received and treated by their friends as husband and wife, is relevant.

(*b*) The question is, whether *A* was the legitimate son of *B*. The fact that *A* was always treated as such by members of the family, is relevant.

As the Indian law of evidence is based on the English Common Law, the Courts in India may seek guidance upon the precedents of the Courts in England to construe S. 50 where it is found to be ambiguously worded: A.I.R. 1973 P.&H. 213: (1972) 74 Punj.L.R. 625: I.L.R. (1972) 2 Punj. 424 (F.B.).

S. 50 makes relevant the evidence admissible in English law as 'family conduct' but evidence of general reputation, which is admissible according to English law to prove relationship, is not admissible under this section. The scope of the section, therefore, appears to be more restricted: A.I.R. 1956 Pat. 49: 1955 B.L.J.R. 705.

S. 50 is an exception to the general rule that hearsay evidence is inadmissible as also opinion based upon such evidence. The section lays down that when the Court has to form an opinion as to the relationship of one person with another, it may rely upon the opinion of a particular witness expressed by conduct. [33 Cut.L.T. 740, Rel. on]: (1973) 1 Cut.W.R. 152.

Opinion evidence of relationship is not admissible: (1972) 1 Cut.W.R. 527: 38 Cut.L.T. 577.

Two things are necessary to make the evidence of a witness relevant under S. 50: (*i*) The witness must have special means of knowledge with regard to existence of disputed relationship either as a member of family or otherwise and (*ii*) the witness must depose to his own conduct towards person whose relationship is in dispute: 1979 Hindu L.R. 189 (Punj.).

The essential requirements of the section are: (*1*) there must be a case where the Court has to form an opinion as to the relationship of one person to another, (2) in such a case the opinion, expressed by conduct as to the existence of such relationship is a relevant fact, (3) and the person whose opinion expressed by conduct is relevant must be a person who as a member of the family or otherwise has special means of knowledge on the particular subject of relationship: (1988-2) 94 Punj.L.R. 680: (1988) 2 Rev.L.R. 245; A.I.R. 1972 Ori. 141: 38 Cut.L.T. 44.

On an analysis of S. 50, following considerations emerge: (*1*) the fact in issue is one person's relationship with another on which the Court has (*2*) to form its opinion and determine existence of the relationship but (*3*) third persons' bare opinion on the issue is not relevant as its genesis and trustworthiness cannot be easily tested; (*4*) such opinion is relevant only when it is expressed by conduct of the person like neighbourers or frequently visiting close friends but not casual visitors or invitees, having special means of knowing, whether as a family member or otherwise, about such relationship; and (*5*) 'conduct' means external behaviour—'opinion' means judgment or conviction; thus, the third person giving his opinion about the relationship must have an independent conviction of his own; his external behaviour must show that he was convinced of the existence of such relationship; there must be interaction between his conviction and his conduct. [(1967) 33 Cut.L.T. 749; Rel. on]: A.I.R. 1973 Ori. 1: (1972) 2 Cut.W.R. 1078 (D.B.).

Under S. 50 the opinion of a person is relevant only when the following requirements are fulfilled:—(*1*) The person whose opinion is sought to be given in evidence must be proved to have special means of knowledge on the subject; (2) (*a*) The opinion alone is evidence, (*b*) the opinion as expressed by conduct alone is evidence, or, in other words (*i*) conduct only can be given in evidence, (*ii*) from the conduct given in evidence the Court is to see whether it is the result of any opinion held by the person; (3) The opinion which is relevant must be the one as to the existence of the relationship. The negative opinion, or the opinion as to the non-existence of the relationship may not be relevant. Under the section, the opinion of a person is only a relevant piece of evidence. It still remains for the Court to weigh such evidence and come to its own opinion as the '*factum provandum*'—as to the

relationship in question: I.L.R. (1942) Cal. 299: (1941-42) 46 Cal.W.N. 729: A.I.R. 1943 Cal. 76; A.I.R. 1956 Pat. 49: 1955 B.L.J.R. 705. (The opinion may be of a member of the family, or an outsider; it is enough if he has special means of knowledge on the subject).

The essential requirements of the section are: (*1*) there must be a case where the Court has to form an opinion as to the relationship of one person to another; (2) in such a case, the opinion expressed by conduct as to the existence of such relationship is a relevant fact; (3) but the person whose opinion expressed by conduct is relevant must be a person who as a member of the family or otherwise has special means of knowledge on the particular subject of relationship, in other words, the person must fulfil the condition laid down in the latter part of the section. If the person fulfils that condition, then what is relevant is his opinion expressed by conduct. Opinion means something more than mere retailing of gossip or of hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question. The 'belief' or conviction may manifest itself in conduct or behaviour which indicates the existence of the belief or opinion. What the section says is that such conduct or outward behaviour as evidence of the opinion held is relevant and may, therefore, be proved.

S. 50 does not make evidence of mere general reputation (without conduct) admissible as proof of relationship.

The conduct or outward behaviour must be proved in the manner laid down in S. 60; if the conduct relates to something which can be seen, it must be proved by the person who saw it; if it is something which can be heard of, it must be proved by the person who heard it; and so on. The conduct must be of the person who fulfils the essential conditions of S. 50, and it must be proved in the manner laid down in the provisions relating to proof. That portion of S. 60 which provides that the person who holds an opinion must be called to prove his opinion does not necessarily delimit the scope of S. 50 in the sense that opinion expressed by conduct must be proved only by the person whose conduct expresses the opinion. Conduct, as an external perceptible fact, may be proved either by the testimony of the person himself whose opinion, is evidence under S. 50 or by some other person acquainted with the facts which express such opinion, and as the testimony must relate to external facts which constitute conduct and is given by persons personally acquainted with such facts, the testimony is in each case direct within the meaning of S. 60. This is the true inter-relation between S. 50 and S. 60 of the Evidence Act. But while S. 50 affords an exceptional way of proving a relationship and by no means prevents any person from stating a fact of which he or she has special means of knowledge the section does not imply that the person whose opinion is a relevant fact cannot be called to state his own opinion as expressed by his conduct and that his conduct may be proved by others only when he is dead or cannot be called. S. 50 does not put any such limitation: A.I.R. 1959 S.C. 914.

The necessary requisites of S. 50 are (*1*) that the Court has to form an opinion as to the relationship of one person to another; (2) there must be expression of opinion by conduct as to the existence of the relationship; (3) it must relate to a member of the family or a person who otherwise has special means of knowledge on the subject. When these three requisites are present then what is relevant is the opinion as emerging from the conduct. What has to be offered as evidence is the conduct of such persons, whereafter it has to be found out whether the conduct proved, can be accepted as evidence of the opinion of a person who fulfils the requirements given in the section.

The offered item of evidence thus only moves the Court to see if the conduct established any opinion of the person, whose conduct is in evidence. In order to enable the Court to infer 'the opinion' the conduct must be of a tenor which cannot well be supposed to have been made without the inner existence of the opinion: A.I.R. 1968 All. 58.

In order to enable the Court to infer 'the opinion' the conduct must be of a tenor which cannot well be supposed to have been willed without the inner existence of the 'opinion'. When the conduct is of such a tenor, the Court only gets to a relevant piece of evidence, namely, the opinion of a person. It still remains for the Court to weigh such evidence and come to its own opinion as to the *'factum probandum'*—as to the relationship in question: A.I.R. 1960 Pat. 480.

Question of relationship—Nature of evidence receivable: 1962 M.P.L.J. (Notes) 147.

Ss. 50 *and* 60—S. 50 deals only with the relevancy of facts and the manner in which these relevant facts have to be proved is given in S. 60: (1968) 70 Punj.L.R. 83: 1968 Cur.L.J. 162, overruled on another point in A.I.R. 1973 Punj. 213: (1972) 74 Punj.L.R. 625 (F.B.).

The proof required for marriage or relationship of husband and wife stands on a different footing from the ordinary standard of proof in respect of other facts. In fact, the rule of exclusion of hearsay evidence has been in a way relaxed in cases where marriage or relationship of one person to another has to be proved. It is not essential that the factum of marriage must be established by eye witnesses or proof of the performance of ceremonies.

S. 50 makes relevant the opinion expressed by conduct, *i.e.*, external facts. It may be proved by the evidence of the person holding the opinion or by other persons acquainted with such facts evidencing conduct. Evidence as to the conduct of other members of the family made admissible under the section may be given either by the person whose conduct is in question or by a stranger who has special means of knowledge. In either case, the witness is to state facts observed by him and the opinion he has formed thereon. The opinion may be of member of the family or an outsider; it is enough if he has special means of knowledge on the subject: 1969 All.W.R. (H.C.) 579.

To know the relationship of a particular person, an entry in Kutumb register has to be given greater weight than the one in voters' list: 1977 R.D. 362: 1977 All.W.C. 53 (Rev.).

Where in a suit for pre-emption, the vendor's son-in-law deposed that he treated the pre-emptor as his real brother-in-law, that the pre-emptor treated the vendor as his father and that the vendor treated the pre-emptor as his son and that conduct was grounded on the belief or conviction in the truth of such relationship, *held*, that the evidence satisfied the requirements of S. 50; the relationships stood proved. [A.I.R. 1959 S.C. 914; A.I.R. 1943 Cal. 76, Foll.]: A.I.R. 1971 P.&H. 362.

2. "Opinion expressed by conduct".—The opinion made relevant under S. 50 is 'opinion, expressed by conduct' which is the expression in outward behaviour of the opinion entertained as to relationship: A.I.R. 1956 Pat. 49: 1955 B.L.J.R. 705.

S. 50 does not make evidence of mere general reputation admissible as proof of relationship; it is the conduct or outward behaviour which must be proved in the manner laid down in S. 60: A.I.R. 1985 Ori. 171 (D.B.).

S. 50 does not make evidence of mere general reputation (without conduct) admissible as proof of relationship, and the conduct must be of the person who fulfils the essential conditions of S. 50: (1982) 2 Karn.L.J. 485.

Only 'opinion expressed by conduct' as to the relationship of one person to another, somewhat akin to 'reputation evidence' is made relevant. But the conduct must be proved in accordance with the law relating to proof. Conduct, as an external perceptible fact, may be proved either by the testimony of the person himself if his opinion is admissible under S. 50 or by some other person acquainted with the facts which express such opinion: A.I.R. 1976 Ker. 34: 1978 Ker.L.T. 823.

When oral evidence is led to establish relationship, that evidence must be of an opinion and such opinion may be given by any person who has any special means of knowledge on the subject either being member of the family or otherwise, but such opinion must be expressed by conduct and such conduct can only be proved under S. 60 by a person who has actually seen or experienced the conduct which means an overt act. The opinion, which means coming to a conscious judgment or conviction, must emanate from the conduct exhibited showing that the person concerned has formed such a judgment or conviction: A.I.R. 1987 Ori. 187.

Ss. 50 and 60—Opinion on relationship expressed by conduct person whose opinion is relevant must be person who has special means of knowledge of relationship—S. 50 does not make evidence of mere general reputation (without conduct) admissible as proof of relationship—Devolution of family property is often very valuable evidence of conduct within meaning of S. 50: 1969 B.L.J.R. 932; A.I.R. 1963 Pat. 450.

The language of S. 50 leaves no room for doubt that the opinion expressed by conduct of any person who, as a member of the family or otherwise, has a special means of knowledge as to the relationship of one person to another about which the Court has to form an

opinion is relevant irrespective of the fact whether that person is himself called as a witness or not. The offered item of evidence is the conduct but what is made admissible in evidence is the opinion. The portion of S. 60 which provides that the person who holds an opinion must be called to prove his opinion does not necessarily delimit the scope of S. 50 in the sense that opinion expressed by conduct must be proved only by the person whose conduct expresses the opinion. Conduct as an external perceptible fact, may be proved either by the testimony of the person himself whose opinion is evidence under S. 50 or by some other person acquainted with the facts which express such opinion, and as the testimony must relate to external facts which constitute conduct and is given by persons personally acquainted with such facts, the testimony is in each case direct within the meaning of S. 60. It is, thus, clear that the evidence of mere general reputation (without conduct) is not relevant as proof of relationship and evidence of witnesses who do not speak of conduct of their own or of some other person in support of their opinion which is sought to be proved is not admissible: I.L.R. 47 Pat. 636: A.I.R. 1968 Pat. 481; A.I.R. 1968 All. 58.

It cannot be said that in no case evidence can be given with regard to the relationship by a person who is not a member of the family. S. 50 has to be read alongwith S. 60. There may be evidence of persons having special means of knowledge with regard to the conduct of a member of the family in relation to the persons whose relationship is in issue before the Court. If a man belongs to a certain village, who comes in frequent contact with the members of the family and has occasion to watch the conduct of one member towards another, he must be taken to be a person with special means of knowledge and if he has watched this, then his evidence must be admissible under S. 60 as evidence of a person who has heard how one member is treated by another member of the family and as such he must be a person of special means of knowledge: A.I.R. 1969 Pat. 82.

Traditional evidence, as media of proof of pedigree, recognises 'conduct' as one of the forms of declarations or statements relating to them by persons deceased and having had special opportunity or interest to know, or to inquire, ascertain and know contemporaneously. While there is no doubt that a mere opinion about relationship based on general repute and not supported by conduct will not be admissible under S. 50 of the Evidence Act, it is not necessary that in every instance where a witness proves relationship he must also prove exhaustively all the instances of family conduct in support of that relationship. The quantum of evidence must necessarily vary with the facts of each case: A.I.R. 1952 Ori. 75.

Where the statement of witness giving the pedigree is found to be inadmissible under S. 32(5) but he deposes to facts which establish such treatment as is contemplated by S. 50, it should be admitted to that extent: 151 I.C. 338: A.I.R. 1934 All. 117.

Conduct, as an external perceptible fact may be proved either by the person himself whose opinion is evidence or by some other person acquainted with the facts which express such opinion: A.I.R. 1981 Pat. 103: 1981 B.L.J.R. 255 (D.B.). It is not necessary that in every instance where a witness proves relationship, he must also prove exhaustively all the instances of family conduct in support of that relationship. The quantum of evidence must necessarily vary with the facts of each case.

Held, on facts that the evidence given by the witnesses satisfied the requirements of S. 53, Evidence Act and as such was admissible to prove the parentage of the plaintiff: A.I.R. 1963 Pat. 450.

A member of the family can speak in the witness box of what he has been told and what he has learned about his own ancestors, provided what he says is an expression of his own independent opinion (even though it is based on hearsay derived from deceased not living persons) and is not merely repetition of the hearsay opinion of others and provided the opinion is expressed by conduct. His sources of information and the time at which he acquired the knowledge (for example, whether before the dispute, or not) would affect its weight but not its admissibility: A.I.R. 1954 S.C. 601.

A person who, although not a member of the family, has special means of knowledge about the relationship of the parties, can speak in the witness-box of what he has been told, and what he has learned about the relationship of the parties provided what he says is an expression of his own independent opinion. The words 'or otherwise' in S. 50 clearly contemplate such a case: A.I.R. 1956 Pat. 49: 1955 B.L.J.R. 705.

Oral evidence of witnesses who have no special means of knowledge, and whose

evidence is of the nature of hearsay, about the name of the grandfather of the deceased, is not admissible in evidence under S. 50 because that is not the opinion expressed by conduct as to the existence of relationship between the deceased and his grandfather: A.I.R. 1963 Pat. 390.

Opinion of relationship expressed by conduct—Belief or conviction must manifest itself in conduct or outward behaviour which indicates existence of belief or opinion—Opinion as to legitimacy based on hearsay and not any belief or conviction—Not admissible: A.I.R. 1965 Him. Pra. 32.

When the Court has to form an opinion regarding relationship between persons, the opinion expressed by conduct as to existence of relationship, is relevant: (1992) 2 Hindu L.R. 478: (1992) 2 Ker.L.J. 303.

Where a person's relationship with another is to be proved by conduct of a person having special means of knowledge, it is not necessary that it should be proved by that person himself by his own conduct expressing his own opinion and conviction; he may do so by reference to the conduct and opinion of another person though it would not be opinion evidence under S. 50. [(1968) 70 Punj.L.R. 83, Overruled]: A.I.R. 1973 Punj. 213: (1972) 74 Punj.L.R. 625 (F.B.).

The opinion of the witness as to the relationship must be expressed by conduct. The person who deposes must also testify that he had special means of knowledge about the relationship either as a member of the family or otherwise. Where the witnesses are co-villagers and they might have otherwise special means of knowledge about the relationship, these facts must be clarified by them in their evidence and also must say as to how they knew of the relationship as being expressed by conduct: I.L.R. (1966) Cut. 193.

When a Court is to judge the relationship of a person to another it is only permitted to take into consideration the belief of a person provided it is expressed by conduct in case the witness has special means of knowledge. S. 50 requires that opinion expressed by conduct alone or in other words, conduct based on opinion is admissible in evidence. Therefore, mere statement of a witness that a person was son of someone born after $1^1/_2$ years of marriage without stating as to where the birth had taken place, *held*, is not admissible under S. 50: A.I.R. 1982 Sikkim 26 (D.B.).

Documentary pieces of evidence indicating devolution or treatment of family property is evidence of conduct and, thus, relevant under S. 50. [A.I.R. 1963 Pat. 450, Rel. on]: (1973) 1 Cut.W.R. 402.

3. Person whose evidence is admissible.—S. 50 does not make inadmissible the evidence of any person merely because he does not happen to be related to the party claiming to prove that relationship. All that S. 50 requires is that the person appearing as a witness has special means of knowledge on the subject and that knowledge may arise from being a member of the family or otherwise: 1995 Punj.L.J. 145.

When a witness gives evidence of opinion by conduct contemplated by S. 50, *held*, it is not required that he must himself be having special means of knowledge about the relationship between the persons; the 'special means of knowledge' are required to be had not by the witness but the person whose opinion by conduct the witness sought to prove: A.I.R. 1976 P.&H. 24: 1975 Rev.L.R. 567.

A member of a family can depose about what he has learnt about his own ancestors, provided it is an expression of his own independent opinion (even if based on hearsay derived from the dead); it is not merely the repetition of hearsay opinion of others provided the opinion is expressed by conduct; thus, where a member of the family deposed that he had heard the names of his ancestors being mentioned at the *fateha*, *held*, the offering of *fateha* together with mentioning of the ancestors' names, is certainly admissible. [A.I.R. 1954 S.C. 601, Rel. on]: A.I.R. 1972 Mad. 228 (D.B.).

A villager may have the special means of knowledge to know the relationship evidenced by conduct between the parties who are co-villagers: A.I.R. 1974 Ori. 120: (1973) 1 Cut.W.R. 809 (D.B.).

Where none of the witnesses professes himself to be a member of the family, nor claims to have any special memo of knowledge on the subject, *held*, this section is not attracted: (1988-2) 94 Punj.L.R. 680: (1988) 2 Rev.L.R. 245.

Where the witness, aged about 75 years at the time of deposition, was merely a co-villager and neighbour of the party about whose relationship he was speaking and there was no relationship, *held*, his evidence to form opinion about relationship could not be inferred in absence of some special circumstances under which he could form such opinion: A.I.R. 1994 Ori. 298.

The person whose opinion is expressed by conduct is relevant only if he is a member of the family or otherwise has special means of knowledge about relationship; thus, a rickshaw-puller, living at a distance of 100/150 cubits or a *bidi* binder living at a distance of 100 cubits, both men of straw, are not competent witnesses under S. 50 where the property involved is located in Calcutta, not in a mofussil town. [A.I.R. 1959 S.C. 914, Rel. on]: A.I.R. 1982 Cal. 294: (1982) 1 Cal.L.J. 256: (1982) 1 Cal.H.N. 206 (D.B.).

Question whether certain persons are members of joint family—Refers to relationship of persons—S. 50 applies—Opinion of persons is relevant: I.L.R. (1960) Bom. 139: (1960) 62 Bom.L.R. 336: A.I.R. 1961 Bom. 136.

4. Marriage.—Where the evidence is that a man and woman lived and were treated as husband and wife for a number of years, and in the absence of any material pointing to the contrary conclusion, a presumption might have been drawn that they were lawfully married. But the presumption which may be drawn from long cohabitation is rebuttable, and if there are circumstances which weaken or destroy that presumption the Court cannot ignore them. Where the cumulative effect of the other circumstances warrants the conclusion that the man failed to prove the factum of his marriage with the woman his claim to succeed to the woman's estate as heir under the customary law of Punjab must fail: A.I.R. 1952 S.C. 231: 1952 S.C.R. 825.

The doctrine that the proof as to whether there was a marriage between two parties is to include a consideration of the character and conduct of various relatives and an estimate is to be formed as to whether on the whole these relatives prefer the tie of concubinage to that of marriage is a wrong doctrine regarding proof of marriage. The evidence on this subject should not be allowed as it is without competence: 56 I.A. 201: I.L.R. 10 Lah. 725: A.I.R. 1929 P.C. 135: 57 M.L.J. 366 (P.C.).

The word 'solemnize' means in connection with a marriage, 'to celebrate the marriage with proper ceremonies and in due form'. It follows therefore, that unless the marriage is celebrated or performed with proper ceremonies and due form, it cannot be said to be 'solemnized'. If the marriage is not a valid marriage according to the law applicable to the parties, no question of its being void by reason of its taking place during the life of the husband or wife of the person marrying arises. If the marriage is not a valid marriage, it is no marriage in the eye of law. The bare fact of a man and a woman living as husband and wife does not, at any rate, normally give them the status of husband and wife, even though they may hold themselves out before society, as husband and wife and the society treats them as husband and wife. [A.I.R. 1959 S.C. 514 and 1564, Foll.]: 1977 R.D. 362: 1977 All.W.C. 53 (Rev.).

The law as to presumption in favour of marriage under Ss. 50 and 114 is well crystallised. When a man and a woman lived together as husband and wife for sufficiently long time and were treated as husband and wife by friends, relatives and neighbours, there is always a presumption in favour of their marriage; birth of children to the couple would give rise to a further presumption of their legitimacy; such presumption is not mitigated or weakened merely because there is no positive evidence of their marriage having taken place. However, the existence of some evidence on record that the couple had gone through some form of marriage, strengthens the presumption. Thus, even though the marriage ceremony may not be valid, their marriage can yet be said to be valid by force of habit and repute; the onus of rebutting such a marriage would be on the person who denies the marriage; the presumption of law in favour of marriage and legitimacy cannot be repelled lightly by mere balance of probability but the rebuttal evidence must be strong, satisfactory and conclusive. [A.I.R. 1952 S.C. 231; A.I.R. 1978 S.C. 1557; A.I.R. 1984 Bom. 229 and A.I.R. 1972 Ori. 143, Foll.]: A.I.R. 1987 Bom. 27: 1986 Mah.L.J. 186: (1986) 2 Hindu L.R. 29: 1986 Mah.L.R. 864: (1986) 2 Bom.C.R. 146: I.L.R. (1986) Bom. 1281.

On a question of the legality of the form of marriage, conduct of parties is admissible: I.L.R. 48 Mad. 1: 93 I.C. 705: A.I.R. 1925 Mad. 497.

In case of first marriage, not only the presumption under S. 50 but also the admissions, declarations and other circumstantial evidence let in by the parties can be taken into consideration. However, there is a distinction with regard to the mode of proof of the first marriage and proof of the second marriage; the second marriage has to be proved strictly in accordance with the Hindu rites and customs. [(1976) 1 A.P.L.J. 339; 1977 Cr.L.J. 208, Foll.]:

(1989) 1 Hindu L.R. 410: (1989) 1 Crimes 19 (Andh. Pra.).

The presumption of marriage taking into account long cohabitation is a rebuttal one. It is necessary to show that the man and the woman not merely should be living together, but should profess themselves to be husband and wife and should be treated as such by relations and friends. Such conduct and recognition must extend over a long period of time. If there are circumstances which weaken or destroy that presumption, the Court cannot ignore them: (1977) 2 M.L.J. 141.

To raise a presumption of marriage, the circumstances such as whether the man has treated the woman as lawfully wedded wife in company of friends, relatives and other members of the society and whether their friends and relatives had treated them as such, have to be taken into account: (1990) 1 An.L.T. 41 (N.R.C.).

Unlike a matrimonial proceeding where strict proof of marriage is essential, in a proceeding under S. 125 of the Code of Criminal Procedure such standard of proof is not necessary as it is summary in nature meant to prevent vagrancy; the Court in such proceeding can conclude that the parties were married relying upon the evidence of persons referred to under S. 50: (1980) 6 Hindu L.R. 332 (Cal.); (1986) 1 Karn.L.J. 41: I.L.R. (1985) Karn. 3969.

Maintenance proceedings—Marriage—Standard of proof—Opinion expressed by conduct of persons having special means of knowledge is sufficient. [A.I.R. 1953 Ori. 10; 1967 M.L.J. (Cr.) 311 (Ker.), Rel. on; A.I.R. 1965 S.C. 1564, Disting.]: A.I.R. 1970 Mys. 305: (1970) 2 Mys.L.J. 15.

Where in maintenance proceeding under S. 125, C.P.Code there was evidence of prosecution witnesses that couple was living as husband and wife, *held*, it was sufficient proof of marriage, notwithstanding absence of evidence of performance of sampradhan and saptapadi: 1985 Cr.L.J. 979.

Where in a suit for maintenance, the wife produced the priest who deposed about the wedding ceremonies performed and also her cousin, who deposed about his participating in negotiations that preceded the wedding, *held*, it was clearly proved that the plaintiff was legally wedded wife of the defendant: A.I.R. 1984 Karn. 112 (D.B.).

Where a man and a woman lived together as husband and wife for a pretty long time and they were so recognised not only by close relations, but also by persons of the locality and there was also good evidence that the two married according to social custom, *held*, in such circumstances, legal and valid marriage between the two, as well as relationship of husband and wife must have to be presumed. [A.I.R. 1929 P.C. 135; A.I.R. 1952 S.C. 231; A.I.R. 1978 S.C. 1557 and A.I.R. 1951 Ori. 337, Foll.]: A.I.R. 1989 Ori. 10: (1989) 1 Hindu L.R. 482: (1988) 1 Ori.L.R. 253.

The evidence of witnesses that a certain man and a woman were regarded as man and wife by the members of the community does not come within the purview of S. 50, not being an opinion expressed by conduct as to existence of such relationship of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, and there is no other statutory provision under which the evidence can be let in to prove marriage: A.I.R. 1933 All. 130: 1932 All.L.J. 208. *See* also A.I.R. 1927 Sind 126: 31 Sind L.R. 71.

A statement by a witness that a certain man and a woman were regarded as man and wife by members of the locality, does not come within the purview of S. 50. At the utmost this amounts to an expression of opinion, but according to the words of the section only that opinion is relevant which is expressed by conduct: A.I.R. 1949 East Punj. 35: (1948) 50 Punj.L.R. 151.

Where there was overwhelming evidence to prove that the parties had been living as husband and wife for a number of years and they were being taken as such by the world at large and even at the time of recording of the mutation which was sanctioned in the presence of the parties, their relationship was not denied, *held*, the parties' living as husband and wife for 25 years was evidence of marriage by habit and repute: A.I.R. 1973 P.&H. 124.

Where the relationship of husband and wife was a fact in issue and the opinion expressed by conduct was testified to by the brother of the husband as well as by *purohits*, *held*, their evidence was admissible under S. 50 because the former was a family member and the latter had otherwise special means of knowledge about the relationship. [A.I.R. 1959 S.C. 914, Foll.]: (1992) 1 Hindu L.R. 197 (Him. Pra.).

Where a party to the marriage testified that the marriage was performed in the *saptapadi* form, that the spouses had cohabited together for long and had children from their union who were treated by the community as their children, *held*, the validity of the marriage stood established by evidence of opinion by conduct: (1991) 1 Hindu L.R. 402 (Madh. Pra.).

Where the marriage was established by eye-witness evidence of performance of marriage ceremonies and other evidence also lent support to it, *held*, the conduct evidence of the couple treating each other as husband and wife is not required; the standards set out in the section need not be satisfied: A.I.R. 1971 Ori. 49.

Where in a suit for possession, the plaintiff denied that the defendant was legally wedded wife of his deceased brother but the defendant's witnesses had categorically stated that the defendant was married to deceased, owner of suit land, and that they had been seeing the deceased with the defendant living together as husband and wife, *held*, the defendant was the widow of the deceased owner: (1985-1) 87 Punj.L.R. 640: (1985) 1 Cur.L.J. 311.

Where the widow had testified to having been married to the deceased in *saptapadi* form which was solemnised in the presence of two other witnesses who were present at, and had been instrumental in settling the marriage, *held*, the evidence is relevant under S. 50 as opinion expressed by conduct; it cannot be discarded because the widow and the witnesses had not stated that she and they had been treating the widow and the deceased as husband and wife; that kind of evidence is necessary if there be no direct evidence of marriage: (1992) 2 Hindu L.R. 171 (P.&H.).

Evidence of a person witnessing performance of a marriage need not fulfill the requirements of S. 50; merely because he could not tell the names of persons constituting the marriage party, *held*, is not sufficient to disbelieve him where the marriage party belonged to a different village: (1980) 2 Hindu L.R. 45 (P.&H.).

Offering *neonda* (invitation) at the time of marriage of his relation, *held*, exhibits conduct which falls squarely within the ambit of S. 50: 1980 Rev.L.R. 230: (1980) 82 Punj.L.R. 308.

Plaintiff claiming to be the wife of *M* brought a suit for possession of certain properties against the defendant who claimed to be in possession as the legitimate son of *M* by another wife. The plaintiff herself, her husband and his brothers acknowledged and recognised defendant as legitimate son, his mother as lawful wife of *M*. This was long before the present litigation and at a time when there was no motive or interest on the part of any one to state anything calculated to help the defendant and his mother knowing it to be false. *Held*, that evidence of this kind was admissible under S. 50, Evidence Act, and the defendant must be held to be the legitimate son of *M*: A.I.R. 1956 Mys. 17: I.L.R. (1955) Mys. 578 (D.B.).

Where in a prosecution under Ss. 498-A and 304-A of the Indian Penal Code, the accused admitted that the deceased was his wife and his father had categorically deposed that the accused and the wife, married by exchanging garlands and reading out *pramana patrika*, lived together as husband and wife with one pregnancy terminated and a child born to them died, *held*, the prosecution has established the factum of the accused and the deceased to be husband and wife; marriage need not be proved by direct evidence of its solemnisation by the proof of requisite rites; the proviso to S. 50 was not attracted: 1990 Cr.L.J. 1666: (1989) 3 An.L.T. 529.

Where first wife of the accused contended that both the accused and second wife converted their religion into Islam and got married according to Muslim rites but the evidence revealed that they had no faith inIslam and they were not following Mohammadanism prior to or subsequent to the marriage, *held*, the marriage contracted for convenience without conviction in Mohammadanism by two Hindu (male and a female) could not be treated as a valid marriage: 1988 Cr.L.J. 1849: (1988) 2 A.P.L.J. (H.C.) 252.

Where witnesses deposing to the second marriage were neither related to nor belonged to the caste of the parties and they deposed about attending the marriage feast and not marriage ceremonies gone through by the couple, *held*, their evidence fell far short of the requirements of S. 50; factum of the second marriage not established: A.I.R. 1985 Ori. 11: (1985) 2 D.M.C. 176 (D.B.).

Where petitioner wife alleged that her husband contracted a second marriage during the subsistence of first marriage and the parties belonged to *Kamma* community where

saptapadi was a must for a valid Hindu marriage but there was no proof that *saptapadi* took place, *held*, no valid second marriage according to Hindu law took place: 1988 Cr.L.J. 1849: (1988) 2 A.P.L.J. (H.C.) 252.

When no relative of the parties was produced nor there was any other evidence to prove that the deceased and the defendant were ever recognised as husband and wife, *held*, the lower Court rightly concluded that the defendant could not be said to be widow of the deceased. [A.I.R. 1973 P.&H. 124, Disting.]: (1982) 8 Hindu L.R. 620 (P.&H.).

Where two Roman Catholics entered into a registered agreement to marry each other and might possibly have exchanged rings but in the absence of proof that they had indeed solemnised their marriage in accordance with the requirement under the Indian Christian Marriage Act, *held*, mere long co-habitation as such and birth of their off-spring would not render either the marriage as valid or the off-spring as legitimate: (1988-1) 101 Mad.L.W. 76.

Where there was no direct evidence about the performance of second marriage but there was consistent evidence of witnesses to show that the lady in question was living with him, *held*, although parties had failed to prove the second marriage, it was clearly established that they were living together: (1987) 1 Hindu L.R. 105 (Bom.).

5. Adoption.—Evidence of notoriety of an adoption must be the evidence of a number of people who owing to their circumstances are in a position to say what the attitude of the alleged adoptive parent was towards the claimant. A mere statement as to an opinion does not come within the scope of S. 50, the only provision of Evidence Act, under which evidence of repute is admissible: A.I.R. 1936 Rang. 518. *See* also A.I.R. 1940 Rang. 181.

Where the fact of adoption has been acquiesced in by the members of the adopting family for a long period there is a very strong presumption in favour of the validity of the adoption and the burden is very heavy on the person who challenges the adoption. But this principle has no application if there is no clear evidence to the effect that for a long period the parties behaved on the footing that the adoption had been recognised: A.I.R. 1949 Ori. 27.

If unimpeachable oral evidence can be had from which a person can be found to have been treated as adopted son in the family covering over a pretty length of time and, where evidence of giving and taking is not available, there is no reason why the adoption should not be upheld on the identical principle purely on oral evidence: (1973) 39 Cut.L.T. 635 (D.B.).

The fact of adoption must be proved like any other fact; but where a long period has lapsed between the adoption and its being questioned, every allowance for absence of evidence to prove adoption must be favourably entertained as direct evidence may not be available. But it is equally well settled, if direct evidence is available despite lapse of time, such relaxation is not permissible. Thus, where all those present at the adoption were not dead and were available to be examined *held*, the examination of only one witness claiming to have witnessed the adoption ceremony and whose evidence did not satisfy the requirements of Ss. 50 and 60, was not sufficient to prove adoption. [A.I.R. 1970 S.C. 1286; A.I.R. 1925 P.C. 201 and A.I.R. 1969 S.C. 1359, Foll.]: A.I.R. 1985 Ori. 22 (D.B.).

A person who claims title on the basis of adoption must prove the adoption and it has to be established that the essential ceremony of giving and taking did take place. That burden, however, shifts to the person who challenges the adoption to disprove the adoption when on account of long lapse of years, direct evidence of giving and taking has disappeared: A.I.R. 1985 Ori. 171 (D.B.).

In a case where the fact under dispute was whether or not the plaintiff was adopted son of one *G*, *held*, deposition of a farm servant that he worked as sankhuna in the adoption ceremony and that the plaintiff called *G* as his father and *G*'s wife as his mother, was admissible under S. 50: A.I.R. 1974 Ori. 120: (1973) 1 Cut.W.R. 809 (D.B.).

A witness cannot be disbelieved if he does not keep a note of the Tithi or the date when the adoption took place. Adoption is of no concern to a relation and there is no reason why a relation should be so over-zealous as to note the Tithi or the date of adoption of another relation: A.I.R. 1974 Ori. 120: (1973) 1 Cut.W.R. 809 (D.B.).

Where in a case in which the fact of adoption was in question, a witness who though related to the defendants and was produced by them was not going to gain anything by the

decision of the case one way or the other, *held*, his testimony could not be rejected as that of an interested witness: A.I.R. 1974 Ori. 120: (1973) 1 Cut.W.R. 809 (D.B.).

Ss. 50 and 32 (5)—Question whether *M* was adopted son of *B*—Document executed by *W* widow of *B*, stating that *B* had taken *M* in adoption during his lifetime is admissible under S. 50—*Held*, further as *M* was dead and statement was made before any dispute regarding *M*'s adoption was raised, it was also admissible under S. 32(5): 1969 Raj.L.W. 507.

6. Paternity.—Where the paternity of a boy was in dispute, the School teacher's conduct in admitting him as the son of '*V*' and having given him lessons in the School and marked his attendance was no expression of opinion that the boy was the son of '*V*'. His testimony was not direct evidence within the meaning of S. 60 of the Evidence Act and, hence, teacher's testimony with regard to his conduct did not constitute evidence of paternity of the child in dispute within the meaning of S. 50: A.I.R. 1968 All. 58.

When there is other evidence available on the record, which proves paternity of a person, there is no necessity to resort to this section: (1986) 99 Mad.L.W. 901: (1986) 2 M.L.J. 235.

S. 50, falling under Ch. II of the Act, also deals with relevance of facts; thus, opinion expressed by conduct as to the existence of relationship between two or more persons by a family member or otherwise having special means of knowledge on the subject is a relevant fact; such opinion evidence affords guarantee for its trustworthiness; thus, a mere statement about a person being son of another unless based on conduct is not admissible: (1991-1) 39 B.L.J.R. 720. *See* also 1986 All.W.C. 826; 1985 All.L.R. 74: 1985 All.W.C. 625.

The gathering of special means of knowledge is not confined only to the members of the family, but has been given a wide connotation by the expression 'otherwise'. Special means of knowledge must, however, be proved independent of the opinion expressed by conduct. If, however, the opinion of a third person is expressed by different types of conduct as expressing the opinion at different times, special means of knowledge would be established thereby.

Though the third person must himself form an independent opinion as to the existence of the disputed relationship, the Court is not precluded in a fit case to come to its own independent conclusion from the disjointed statements of facts not narrated in logical sequence.

In a case where the dispute related to whether *A* is the daughter of *B*, the opinion expressed by *C*—a third person who attended the marriage of *A* at which *B* acted as Kanyakarta—was held inadmissible under S. 50 of the Evidence Act for the reason that the single occasion as above could not be taken to establish the special means of knowledge of relationship in '*C*'. It was so even though *C*'s opinion had been expressed by his conduct that he attended *A*'s marriage: 33 Cut.L.T. 740: I.L.R. (1967) Cut. 430.

Evidence of a person whose *Karna* Guru was the deceased for fifty years and who had family relations with the deceased, *held*, is relevant to prove whether the girl in question was daughter of the deceased: A.I.R. 1985 N.O.C. 154 (Ori.).

The opinion expressed by conduct will not in all circumstances entail requirement of stating that the witness was treating the person whose relationship is in dispute in a particular manner with whom such relationship has to be proved; conduct can be expressed by direct evidence like that of a nurse stating in Court that the named child was born to the named mother and that she herself was present at the time of delivery; so also the mother's evidence that she had given birth to the child: (1992-1) 101 Punj.L.R. 449: (1992) 2 Rev.L.R. 174.

Nature of evidence admissible—Witness merely saying that *A* is the son of *B* or that they used to treat each other as father and son—Evidence not admissible under S. 50: (1968) 70 Punj.L.R. 83: 1968 Cur.L.J. 162, overruled on another point in A.I.R. 1973 Punj. 213.

Law presumes in favour of marriage and against concubinage. Long co-habitation raises a rebuttable presumption of wedlock. In a suit instituted by the father and his son a statement in the plaint by the father describing the son without describing as to whether he was an illegitimate son amounts to an acknowledgment that the son was legitimate. The fact that the descendants of common ancestor who were defendants in the suit did not challenge the legitimacy in the suit would be an important circumstance in favour of the legitimacy

of the son. Similarly, a statement in a decree in a subsequent title suit by the father and his another son describing the son as illegitimate, which statement was based on a statement contained in the plaint is also admissible (it was, however, held that this did not outweigh the acknowledgment of legitimacy, made in the earlier suit). Acknowledgment and repudiation of legitimacy, both being conduct are admissible in evidence under S. 50: A.I.R. 1964 Pat. 316.

Proof of paternity in case of a person claiming as illegitimate son. *See* I.L.R. 27 Mad. 32.

Where the plaintiff's own real mother stated that he was her son from her first husband, *held*, no reliance could be placed by him on *kutumb* register and voters' list where he was shown as son of his mother's second husband: 1983 All.W.C. 87 (Rev.).

'Acts amounting to conduct'—Dispute as to whether '*A*' is the daughter of '*B*'—Witness, a son-in-law of *B*, thus having special knowledge of the relationship between *A* and *B*, deposing that he had seen *A*'s husband at Sradha ceremony of *B*—Witness's opinion as to the disputed relationship was held not expressed by conduct—Conviction of the witness that *A*'s husband was the son-in-law of *B* could not be judged from the presence of the said person at Sradha ceremony of *B*: 33 Cut.L.T. 740: I.L.R. (1967) Cut. 430.

7. Proviso.—The proviso applies only to cases under the Indian Divorce Act, 1869, and prosecutions under Ss. 494, 495, 497 or 498 of the Indian Penal Code; it was inserted because strict proof of marriage was required: A.I.R. 1976 Ker. 34.

Though Ss. 498-A and 304-B were incorporated by amending the Indian Penal Code when the proviso to S. 50 was already on the statute book, the bar embodied in the proviso cannot be extended to criminal trials under Ss. 498-A and 304-B on the ground that though Parliament had intended but it did not correspondingly amend the proviso to S. 50; the presumption is that Legislatures enact law with complete knowledge of all existing laws on the same subject: 1990 Cr.L.J. 1666: (1989) 3 An.L.T. 529.

Scope and effect of—Charge under S. 494, Penal Code—Marriage alleged to have been celebrated according to Hindu rites—Proof of ceremonies—Nature of evidence required: A.I.R. 1970 Tripura 30.

In case of adultery and enticing away a married woman, fact of marriage must be strictly proved: I.L.R. 5 Cal. 566 (F.B.); 13 C.L.R. 125; I.L.R. 5 All. 233; I.L.R. 20 All. 166; (1915) 17 Bom.L.R. 75; 100 I.C. 535: A.I.R. 1927 Oudh 140.

Proviso—Offence of bigamy—Strict proof of marriage is necessary—Parties to second marriage—Hindus—Ceremonies such as Saptapadi, not proved—Merely from presence of priest at alleged marriage presumption that all ceremonies must have been performed cannot be drawn: 1965 Kash.L.J. 125: (1965) 2 Cr.L.J. 640: A.I.R. 1965 J.&K. 105.

Proviso—Opinion of Court as to relationship of parties—Not sufficient to prove marriage—Admission of party not enough: 30 Cut.L.T. 294: (1964) 6 Ori.J.D. 160: 1964 All.W.R. (Supp.) 33: 1964 All.Cr.R. 463.

Contempt proceedings—Proviso to S. 50 is not applicable: A.I.R. 1970 Raj. 83.

8. Miscellaneous.—In a suit for partition, it is open to plaintiffs to give evidence regarding jointness of the parties and to prove that the immovable properties in dispute had been purchased from joint funds. Such evidence fulfils the conditions of S. 50, Evidence Act: A.I.R. 1969 Pat. 329.

The plaintiff's evidence that her grandmother used to say in the presence of others that the plaintiff being the sole descendent of her family would be the only owner of the suit property after her death, *held*, goes a long way in establishing her title when there is other evidence supporting her case: A.I.R. 1976 Cal. 238.

Where relationship between persons is in dispute, a finding thereon in *inter partes* proceeding before a Settlement Officer, a public officer acting in discharge of his public duties, is relevant and admissible in subsequent civil suit between those parties: A.I.R. 1985 N.O.C. 154 (Ori.).

Where the deceased had executed a special power-of-attorney in favour of a relation, *held*, even if that power-of-attorney was subsequently cancelled, it did not wipe out the effect of the admission made by the deceased about his relationship with the special attorney: 1980 Rev.L.R. 230: (1980) 82 Punj.L.R. 308.

51. Grounds of opinion, when relevant.—Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

Illustration

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

CHARACTER, WHEN RELEVANT

52. In civil cases character to prove conduct imputed, irrelevant.—In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant.

Section 51—Notes.

[*See* also Notes under Ss. 45 and 50].

Considering provisions of Ss. 48 and 51, it is undoubtedly true that while giving opinion evidence, it is not absolutely necessary for the person giving his opinion, that he should have personal knowledge about the facts sought to be proved by him. However, such a witness should possess sufficient experience which would go to suggest that he is 'likely to know' of the existence of the custom sought to be proved by him. In other words, the witness in question should possess experiential qualifications before his evidence gathers any credibility. If he fails in having this experiential qualification, he should show on what grounds his opinion is based. His opinion may be based on the study of some ancient documents; it may also be based on the personal inquiry conducted by him from the persons who are contemporaneous to the exercise of the custom in dispute; or it may be based on any other method which would give him reliable and true evidence about the existence of the custom. But so long as it is not found that the expression of his opinion is based on some such reliable information, his mere repetition of hearsay would not carry any weight. In other words, a mere *ipse dixit* of these witnesses is not admissible and relevant under the provisions of the Indian Evidence Act, and would not carry any evidentiary value: A.I.R. 1971 Guj. 188 (D.B.).

The Excise Sub-Inspector is an expert in his own department, and is able to distinguish liquors, but the Court should under S. 51 ascertain the grounds on which his opinion is based so as to test it: 1935 Cr. C. 80; A.I.R. 1935 Nag. 13; 1959 Cr.L.J. 13: 1956 All.W.R. (H.C.) 216: A.I.R. 1959 All. 53. Chemical Examiners' report—Value of: 1933 All.L.J. 1617: A.I.R. 1933 All. 394.

Though the Excise Inspectors may be treated as experts in their own branch and may be able to distinguish liquors, it is the duty of the Court to ascertain from them the reasons on which their opinion is based in order that the Court may come to its own conclusion as to the correctness or otherwise of the opinion given by them: (1961) 1 Cr.L.J. 88 (1): A.I.R. 1961 Madh. Pra. 5.

Adoption—Ancient adoption—Evidence showing that the boy was treated for a long time as the adopted son at a time when there was no controversy is sufficient to prove the adoption although evidence of actual giving and taking is not forthcoming—Burden lies on the other side to show that the adoption did not take place: A.I.R. 1964 Ori. 117.

Proof of contents of letters: (1960-61) 65 Cal.W.N. 1206.

Report of Government Analyst is not admissible unless he is examined: 1968 Cr.L.J. 1561: A.I.R. 1968 Madh. Pra. 238 (F.B.).

Section 52—Notes.

S. 52 deals with the relevancy of character evidence in civil cases. The character of a party to a civil suit cannot be relevant to the decision of an issue arising in that suit. But this section has no bearing on a case where the veracity of witness is in question. This is governed by S. 146, under which a witness can be cross-examined to shake his credit by injuring his character. Character evidence may not be relevant to decide an issue in a case, but cross-examining Counsel is given liberty under this section for the purpose of shaking the credit of a witness to put questions to him affecting his character. Ss. 52 and 155 deal with different matters. S. 52 prohibits character evidence in regard to the subject-matter of the suit whereas S. 155 prescribes the manner of impeaching

53. In criminal cases previous good character relevant.—In criminal proceedings the fact that the person accused is of a good character, is relevant.

---

the credit of a witness. S. 155 cannot, therefore, be construed as an exception to S. 52. Further Ss. 155 and 146 are not in conflict with each other. Ss. 138, 140, 145, 148 and 154, provide for impeaching the credit of a witness by cross-examination: (1954) 2 M.L.J. (Andhra) 39: A.I.R. 1954 Andhra 39.

Courts are primarily concerned with the questions of fact or law in controversy before them; they have to confine themselves to the materials properly brought on the record, uninfluenced by the parties, antecedents, activities, conduct, general reputation, controversies, unconnected with the suit transactions; to ensure a fair and impartial adjudication of matters in suit and to safeguard against the possibility of extraneous material influencing the judicial mind, particularly, the Courts should subject all materials on record to closer scrutiny or otherwise sift it appropriately: (1984) 25 Del.L.T. 1.

Where the civil Court discarded a witness's evidence not on the sole ground that he had previously been convicted by a criminal Court but also on other grounds, including circumstantial evidence, *held*, the Court committed no error in discarding his evidence: A.I.R. 1978 All. 215: (1978) 4 All.L.R. 181.

Earlier conviction of a defendant or his witness in a criminal case, *held*, is not very relevant in civil cases under S. 52: (1988-2) 102 Mad.L.W. 292 (D.B.).

Unchastity of woman—Allegation of unchastity made against second wife in written statement of husband in maintenance suit filed by former—Question not considered and suit dismissed as not maintainable—Title suit filed by daughter—Question whether second wife was unchaste—Allegations in written statement in maintenance suit held not admissible in evidence in title suit: (1970) 2 An.W.R. 94.

Where the contention that certain pro-notes had been obtained from the insolvent while he was under the influence of drink, has been found to be baseless, *held*, mere general bad character of the insolvent would be quite irrelevant in a civil case to prove want of consideration: A.I.R. 1958 All. 54.

Section 53—Notes.

Evidence of character—Conduct—State of mind. *See* A.I.R. 1954 S.C. 51, cited under S. 8, *supra*. *See* A.I.R. 1928 Lah. 647 as to value of past good character.

Evidence of character, conduct and state of mind is admissible under Ss. 8, 14 and 53: 1980 M.P.L.J. 300 (D.B.).

Fact that accused is of a good character is relevant in weighing probabilities in doubtful case but it can be dispensed with in cases where prosecution case has not been proved: 1967 Cr.L.J. 52: A.I.R. 1967 Goa 4 (F.B.).

Ss. 53, 55—The evidence of general reputation and general disposition is relevant in a criminal proceeding. Under the Indian Evidence Act, unlike in England, evidence can be given both of general character and general disposition. Disposition mean the inherent qualities of a person, reputation means the general credit of the person amongst the public. There is a real distinction between reputation and disposition. A man may be reputed to be a good man, but in reality he may have a bad disposition. The value of evidence as regards disposition of a person depends not only upon the witnesses' perspicacity but also on their opportunities to observe a person as well as the person's cleverness to hide his real traits. But a disposition of a man may be made up of many traits some good and some bad, and only evidence in regard to a particular trait with which the witness is familiar would be of some use. But in any case, character evidence is a very weak evidence; it cannot outweigh the positive evidence in regard to the guilt of a person. It may be useful in doubtful cases to tilt the balance in favour of the accused or it may also afford a background for appreciating his reactions in a given situation. It must give place to acceptable positive evidence: (1964) 2 S.C.R. 378: (1965) 1 Cr.L.J. 608: A.I.R. 1965 S.C. 682.

Where the accused's letters and his diaries as well as his subsequent conduct showed that he was a man with abnormal psychology, a sex pervert and an alcoholic addict, *held*, same was relevant in his prosecution for murder of his wife: 1980 M.P.L.J. 300 (D.B.).

---

[1][**54. Previous bad character not relevant, except in reply.**—In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Explanation 1.—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2.—A previous conviction is relevant as evidence of bad character.]

---

1. Substituted by Act 3 of 1891, S. 6, for the original section.

Section 54—Notes.

General evidence of bad character cannot in the first instance be given against accused unless evidence has been given that he has a good character in which case it becomes admissible: 7 W.R. 7 (Cr.); 6 W.R. 92 (Cr.); 2 L.L.J. 653.

In our system of law an accused starts with a presumption of innocence; his bad character is not relevant unless he gives evidence of good character in which case by rebuttal, the evidence of bad character may be adduced. Thus, where the trial Court in a dacoity and murder case took note of the fact that the accused persons were habitual 'law breakers', *held*, the trial Court's approach was incorrect: A.I.R. 1977 S.C. 1936: 1977 Cr.L.J. 1566: (1977) 3 S.C.C. 268. *See* also (1977) 4 Cr.L.T. 10: 1977 Ch.L.R. 20 (P.&H.).

Ss. 54, 11, 7, 8, 9, 14 and 15—*Prima facie* S. 54 cannot be given overriding effect. The section itself is not so worded as to be directly contradictory to the Ss. 7, 8, 9, 11, 14 and 15. What is made inadmissible is the evidence of bad character. True that the use of such evidence of prior transactions which is given by the prosecution must be confined within its proper and legitimate limits only. The Court cannot, merely because there was evidence of similar actions on the part of the accused some time previous, infer that the offence under inquiry must also necessarily have been committed by the accused, and to that extent one may with advantage restrict the operation of S. 11. If that were not done, under the provisions of the widely worded S. 11, the Court would be invited to hold the accused guilty or not by direct evidence regarding the crime charged but by means of evidence in respect of previous incidents. Very high degree of probability is required. Facts which are of merely probative force cannot be offered in evidence under the section.

If the evidence is relevant under S. 14 or S. 15 merely because it might show previous misconduct of the accused it is not inadmissible because of S. 54. In other words, S. 54 would not control the other sections.

It is doubtful if under the Indian Evidence Act, and evidence if relevant and satisfied the condition laid down in the various sections of the Court could possibly exclude it only on the ground that it may deepen suspicion against the accused: (1967) 69 Bom.L.R. 808: 1968 Cr.L.J. 1584: A.I.R. 1968 Bom. 400.

In cases of crime where it is thought desirable by the prosecution to bring evidence of previous conduct of similar character to the suggested crime, before the jury, the intention of S. 54 is not infringed and evidence pointing to directly similar conduct is admissible; S. 54 refers to specific evidence of bad character not confined to acts similar to the crime, which was being investigated which may influence the jury on the question of motive which is dealt with in the same conviction. Such a motive must be the same kind of motive that in all probability actuated the mind of the accused or may have actuated his mind in committing the crime for which he is being tried: A.I.R. 1936 Cal. 469.

Evidence suggestive of the accused's bad character is not admissible: A.I.R. 1959 Cal. 693: 1959 Cr.L.J. 1313. But the section does not apply to cases in which the bad character of the person is itself a fact in issue: A.I.R. 1928 Oudh 430. *See* also A.I.R. 1930 Bom. 157.

Such evidence is not generally admissible to prove commission of offence: (1896-97) 1 Cal.W.N. 146; 5 O.W.N. 760: A.I.R. 1928 Oudh 215. But *see* also I.L.R. 27 Cal. 139; I.L.R. 38 Cal. 408.

Where the bad character of the accused is not in issue, the constant reference to the accused as a goonda in the charge to the jury

s bound to adversely affect the accused in so far as the crime against him is concerned: A.I.R. 1955 Cal. 559: 1955 Cr.L.J. 1358; A.I.R. 1959 Cal. 693. But if the evidence of bad character is introduced in order to establish a relevant fact, which cannot be proved *aliunde*, the evidence of bad character is admissible. Evidence of previous conviction is admissible not as proof of bad character but as evidence to prove habit and association: I.L.R. 9 Luck. 22: A.I.R. 1933 Oudh 355.

Where an answer to a question put to a witness is relevant to ascertain the motive for murder and not for determining whether the accused was of bad character, the question is admissible: (1978-79) 83 Cal.W.N. 248: (1979) 1 Cal.L.J. 119: 1979 Cr.L.J. (N.O.C.) 129 (D.B.).

The fact that an accused is of bad character or is reputed to be a thief or a habitual thief is no evidence against him for a charge under S. 401, I.P. Code: 13 P.R. 1914 (Cr.): 26 I.C. 625. *See* also 60 I.C. 331: 5 P.L.R. 706.

Evidence of bad character of accused is admissible to prove the motive for crime: I.L.R. 5 Pat. 63: A.I.R. 1926 Pat. 232; A.I.R. 1928 Oudh 430. *See* also A.I.R. 1957 S.C. 199: 1957 Cr.L.J. 325.

S. 54 of the Evidence Act cannot control S. 3(2) of the Official Secrets Act, 1923, and, therefore, the acts or omissions referred to in S. 3(2) of the Official Secrets Act, 1923 are relevant and do not run counter to S. 54 of the Evidence Act, 1872: 1989 Cr.L.J. 691 (Bom.) (D.B.).

Statement by a prosecution witness in a prosecution for riot, that he had brought a case under S. 107, Cr.P.Code, against some of the accused who had been bound over, is admissible not for proving the bad character of the accused, but as part of the *res gestae*, the events which had transpired before and which led up to the riot with which the accused were charged: 17 I.C. 565: I.L.R. 40 Cal. 367: 13 Cr.L.J. 821. As to evidence of conduct as affecting character, *see* 25 Sind L.R. 55: A.I.R. 1927 Sind 22.

In a proceeding under S. 110, Cr.P.Code the bad character of the person against whom the proceeding is started is itself a fact in issue. That being so, S. 54, Evidence Act, has no application. On the other hand, sub-S. (4) of S. 117, Cr.P.Code makes evidence of general repute admissible in evidence. Therefore, the objection that such evidence is not admissible under S. 54 cannot be entertained: 1961 B.L.J.R. 528.

In a proceeding under S. 110, Cr. P.Code, a list of crimes which a Police Officer has suspected the accused to have committed, is inadmissible to establish the reputation of the accused: 13 I.C. 102: 13 Cr.L.J. 9; 62 I.C. 543: (1920) 22 Bom.L.R. 1274.

The past history of a gang of dacoits would be significant only if an offence under S. 400, Penal Code, has been made out: (1911-12) 16 Cal.W.N. 69: 13 Cr.L.J. 39.

A statement elicited from a prosecution witness in a Sessions trial by way of cross-examination as to the opinion of another witness about the bad character of the accused, does not amount to evidence of bad character, when the statement was not elicited for the purpose of proving what sort of the character accused bore, but with the collateral object of showing that the other witness was resiling from the evidence which he gave before the committing Magistrate, and the admission of that statement does not, therefore, contravene the provisions of S. 54: I.L.R. (1939) 1 Cal. 337. *See* also 1939 Pat.W.N. 627: A.I.R. 1940 Pat. 14.

In criminal proceedings, evidence of general bad character of an accused cannot be given unless general bad character of the accused is a fact in issue or unless evidence has been given of his good character. In cases under Ss. 400 and 401, Penal Code, general bad character of accused is not a fact in issue. The fact in issue in a case under S. 401 is a particular trial of bad character, namely, association for the purpose of habitually committing offences of robbery or theft. Evidence can be given of that particular trait of bad character but not of general bad character. In such a case evidence cannot be given that the accused is a murderer or immoral person or a cheat: 1960 Cr.L.J. 1204: A.I.R. 1960 Guj. 5: (1960) 1 Guj. L.R. 27.

Scope—General tendency of accused cannot be proved: 1968 Cr.L.J. 1584: A.I.R. 1968 Bom. 400.

Bad character of accused—Relevancy in criminal proceedings: 1969 Cr.L.J. 129: A.I.R. 1969 All. 61.

Where the accused murdered the District Magistrate by throwing bomb and soon thereafter when he was apprehended by the public he confessed that he did so at the instance of

55. Character as affecting damages.—In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

Explanation—In sections 52, 53, 54 and 55, the word "character" includes both reputation and disposition; but [1][except as provided in section 54,] evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

PART II

ON PROOF

CHAPTER III

FACTS WHICH NEED NOT BE PROVED

56. Fact judicially noticeable need not be proved.—No fact of which the Court will take judicial notice need be proved.

57. Facts of which Court must take judicial notice.—The Court shall take judicial notice of the following facts:—

---

1. Inserted by Act 3 of 1891, S. 7.

---

his Guru as the District Magistrate had done great harm to his Guru and had also demolished his Ashram, *held*, when both the parties, *i.e.*, the accused and the prosecution had led evidence in respect of character and antecedent of the accused, no prejudiced could be said to have been caused to the accused to attract S. 54. [A.I.R. 1957 S.C. 199; 1968 Cr.L.J. 1584, Rel. on]: (1987-1) 35 B.L.J.R. 127 (D.B.).

Use of previous conviction.—The wording of S. 54 is no doubt wide but the object clearly is to lay down that evidence of bad character including a previous conviction is as a rule irrelevant to help to establish an accused person's guilt but that is not to lay down that it may not be taken into account in passing sentence. [I.L.R. 39 Bom. 326, Foll.]: I.L.R. 52 Mad. 358: 56 M.L.J. 595.

Previous conviction, when can be proved: 1960 Cr.L.J. 1302: A.I.R. 1960 Andh. Pra. 490.

S. 54 does not relate to the manner of proof of previous convictions, and relates only to the proof of previous convictions in certain cases: I.L.R. (1941) Kar. 38: A.I.R. 1941 Sind 173.

Where a previous conviction is relevant with reference to the question of the applicability of S. 562, Cr.P.Code, and also on the question of punishment, it may be taken into consideration in giving punishment after the accused is found guilty: I.L.R. 39 Bom. 326: 26 I.C. 995. On this point, *see* also I.L.R. 5 Cal. 768: U.B.R. (1908) 2nd Gr. Evidence 1: 8 Cr.L.J. 411; U.B.R. (1892-1906) Vol. I, 82; 26 P.W.R. 1910; (1914) 16 Bom.L.R. 934: 16 Cr.L.J. 83; 7 P.R. 1895 (Cr.); 1886 A.W.N. 47; (1903) 5 Bom.LR. 1034: I.L.R. 14 Cal. 721; 2 Weir 760; (1926) 28 Punj.L.R. 313: A.I.R. 1927 Lah. 549.

Proper object of proof of previous conviction is to determine amount of punishment if the accused be found guilty of offence charged: 11 B.H.C.R. 90. *See* also I.L.R. 32 Mad. 526; A.I.R. 1928 Oudh 215.

Bad character—Relevancy—Previous conviction—Relevancy and effect of: (1970) 2 M.L.J. 668.

Evidence of dishonest intention of accused—Previous judgment convicting accused for same offence is relevant and admissible to prove such intention: (1961) 2 Cr.L.J. 787: A.I.R. 1961 Manipur 43.

Ss. 53, 54, *Expl.* (1).—*See* 7 O.W.N. 862: A.I.R. 1930 Oudh 455.

Section 55—Notes.

See (1905-6) 10 Cal.W.N. 522: 3 Cal.L.J. 349: I.L.R. 33 Cal. 537 (P.C.); 2 C.P.L.R. 198; 41 I.C. 696; A.I.R. 1932 Nag. 158.

Reputation evidence—Admissibility: (1961) 63 Punj.L.R. 794: A.I.R. 1961 Punj. 215: (1961) 1 Cr.L.J. 710.

Sections 56 and 57—Synopsis.

1. Scope.
2. Sub-S. (1) of S. 57.
3. Sub-S.(4) of S. 57.
4. Sub-S.(6) of S. 57.
5. Sub-S.(7) of S. 57.

[1][(1) All laws in force in the territory of India;]

(2) All public Acts passed or hereafter to be passed by Parliament [2][of the United Kingdom], and all local and personal Acts directed by Parliament [2][of the United Kingdom] to be judicially noticed;

(3) Articles of War for [3][the Indian] Army, [4][Navy or Air Force];

[5][(4) The course of proceeding of Parliament of the United Kingdom, of the Constituent Assembly of India, of Parliament and of the Legislatures established under any laws for the time being in force in a Province or in the States;]

(5) The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland;

(6) All seals of which English Courts take judicial notice: the seals of all the [6][Courts in [7][India]] and of all Courts out of [7][India] established by the authority of [8][the Central Government or the Crown Representative]; the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorized to use by [9][the Constitution or an Act of Parliament of the United Kingdom or an] Act or Regulation having the force of law in [7][India];

---

1. Substituted by the A.O. 1950, for the former paragraph.
2. Inserted, *ibid.*
3. Substituted by *ibid.*, for "Her Majesty's".
4. Substituted by Act 10 of 1927, S. 2 and Sch. I, for "or Navy".
5. Substituted by the A.O. 1950, for the former paragraph (4).
6. Substituted by the A.O. 1948, for "Courts of British India".
7. Substituted by Act 3 of 1951, S. 3 and Sch., for "the States".
8. Substituted by the A.O. 1937, for "the G.G. or any L.G. in Council".
9. Substituted by the A.O. 1950, for "any Act of Parliament or other".

---

6. Sub-S. (9) of S. 57.
7. Sub-S. (10) of S. 57.
8. Sub-S. (11) of S. 57.
9. Matter of public history, literature, etc.
10. Illustrative cases.

---

1. Scope.—The list of facts enumerated in S. 57 of which judicial notice is permissible is not exhaustive or exclusive, and the tendency of modern practice is to enlarge the field of judicial notice. The rule of exclusion, which not a rule of universal application, should not be applied in construing statutes, when the application of this rule is calculated or likely to lead to injustice: I.L.R. (1960) 1 Punj. 303: (1961) 2 Cr.L.J. 272.

The list of facts mentioned in S. 57 of which the Court can take judicial notice is not exhaustive; the object of the section is to empower the Court to take judicial notice of certain facts rather than to exhaust the category of facts to be taken judicial notice of. Recognition of facts without formal proof is a matter of expediency; no one has ever questioned the need and wisdom of accepting the existence of facts unquestionably within public knowledge. The date of poll, the passing away of a man of eminence and events that rocked the nation need no proof and are judicially noticed; proof by judicial notice is of equal force: A.I.R. 1977 S.C. 1108: (1977) 2 S.C.C. 611: 1977 Cr.L.J. 947: (1977) 2 S.C.R. 991: 1977 U.J. (S.C.) 271.

Judges are entitled to take judicial notice of any notorious fact without requiring actual positive evidence: 24 M.L.J. 211: 18 I.C. 257.

Refusal to take judicial notice must be by the trial Court: I.L.R. (1960) 1 Punj. 303: (1961) 2 Cr.L.J. 272.

2. Sub-S. (1) of S. 57.—Court can take notice of historical facts taken into consideration in enacting a statute: (1984) 1 A.P.L.J. (H.C.) 113: (1984) 1 An.L.T. 286 (D.B.).

It is legitimate to look at the state of law prevailing leading to a legislation so as to see what was the mischief at which the Act was directed. The Supreme Court has on many occasions taken judicial notice of such matters as the reports of Parliamentary Committees, and of such other facts as must be assumed to

(7) The accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any State, if the fact of their appointment to such office is notified in [1][any Official Gazette];

(8) The existence, title and national flag of every State or Sovereign recognized by [2][the Government of India];

(9) The divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the Official Gazette;

(10) The territories under the dominion of [2][the Government of India],

(11) The commencement, continuance and termination of hostilities between [2][the Government of India] and any other State or body of persons;

(12) The names of the members and officers of the Court and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakils, pleaders and other persons authorized by a law to appear or act before it;

(13) The rule of the road [3][on land or at sea].

In all these cases, and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact it may refuse to do so, unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

---

1. Substituted by the A.O. 1937, for "the Gazette of India, or in the Official Gazette of any L.G.".

2. Substituted by the A.O. 1950, for "the British Crown".

3. Inserted by Act 18 of 1872, S. 5.

---

have been within the contemplation of the Legislature when the Acts in question were passed: A.I.R. 1980 S.C. 387: (1980) 2 S.C.C. 31: (1980) 2 S.C.R. 77.

Judicial notice ought to be taken of such matters as the reports of Parliamentary Commissions and of such other facts as must be assumed to have been within the contemplation of the Legislature when the Acts in question are passed: (1955) 2 All E.R. 833.

Under S. 57(1), the Court shall take judicial notice of all laws in force in India; even if the definition of 'Indian Law' in the General Clauses Act is accepted as the 'law' in force in India, a notification cannot be said to be such a law; no judicial notice can be taken of a notification issued by any authority in the exercise of its executive functions; under the last paragraph of S. 57, the Court has a discretion to refuse to take judicial notice of a notification made in the delegated power of the legislation unless the notification is produced the production of the Gazette printed under the authority of the Government would be sufficient proof of the notification under S. 78 1984 M.L.J. (Cr.) 85.

A comparison of S. 57 and S. 78 goes to show that acts, orders or notifications of the Central or any State Government require proof in the manner prescribed by S. 78, unless they amount to law in force and can be taken judicial notice of under S. 57: A.I.R. 1977 Madh Pra. 68: 1977 Jab.L.J. 124: 1977 M.P.L.J. 176 1977 Cr.L.J. 597 (F.B.).

The bye-laws framed by the Municipal Committee in exercise of the powers conferred on it by S. 188(*c*) of the Punjab Municipal Act, 1911 constitute 'law' within the meaning of S. 57; the Court must take judicial notice thereof: A.I.R. 1972 P.&H. 199: (1972) 7 Punj.L.R. 67.

Bye-laws framed by a Market Committee under S. 19 of the Madras Commercial Crop Markets Act are framed in the exercise of delegated power of legislation and have the force of law and as such Courts can take judicial notice of them under S. 57 of the Evidence Act: 1961 Ker.L.J. 639: (1961) Ker.L.R. 62: 1961 Ker.L.T. 510: (1962) Cr.L.J. 546.

Judicial notice of a statutory notification issued by the State Government can be taken even without making the Government a party to the proceeding: A.I.R. 1972 P.&H. 46: 1971 Ren.C.R. 935.

Judicial notice of the notification issued under S. 4 of the W.B. Estates Acquisition Act, 1953 and published in the Gazette, can be taken even if only copies of it were placed before the Court. [(1970-71) 75 Cal.W.N. 880, Reversed]: A.I.R. 1987 S.C. 1713: (1987) 3 S.C.C. 465: (1987) 2 U.J. (S.C.) 310.

The notification, if any, issued under the provisions of the Madras Village Panchayat Act, would be saved under S. 18 of the Madras General Clauses Act, read with S. 121 of the States Reorganisation Act. A Court is not entitled under S. 57 to take judicial notice of any notification issued by the Government. The proof of the notification has to be offered either by production of the Gazette or a certified copy of the notification coupled with a proof of publication of the same, in the Gazette: 1967 M.L.J.(Cr.) 199: 1967 Ker.L.T. 161.

Production of a Gazette is sufficient proof of Court notification: A.I.R. 1928 All. 355.

A legislative notification is a law in force within the meaning of S. 57(1). Thus, the Court can take judicial notice of a legislative notification bringing into force the proviso to S. 34 of the C.P.Code, without further proof of the same: A.I.R. 1989 Ker. 302.

Notifications issued under S. 11-B and S. 123(2) of the Customs Act, 1962, are laws within the meaning of S. 57 of the Evidence Act and the Court is bound to take judicial notice of said notifications. [(1951) 52 Cr.L.J. 1361 (S.C.); A.I.R. 1957 S.C. 790; A.I.R. 1975 S.C. 460; A.I.R. 1987 S.C. 1713 and A.I.R. 1987 S.C. 1802, Rel. on]: 1988 Cr.L.J. 1217 (Ker.) (D.B.). *See* also (1971) 2 Mys.L.J. 422: 1972 Cr.L.J. 406.

A notification issued by the Central Government under S. 7(1) of the Telegraph Wires (Unlawful Possession) Act, 1950, empowering certain officers to make complaints in respect of offences under the Act, being legislative in nature, amounts to law and, therefore, judicial notice must be taken of the said notification under S. 57(1). [A.I.R. 1954 Nag. 296, Overruled]: A.I.R. 1977 Madh. Pra. 68: 1977 Jab.L.J. 124: 1977 M.P.L.J. 176: 1977 Cr.L.J. 597 (F.B.).

S. 4 of the T.N. Forest Act, 1882, requires that whenever it is proposed to constitute any land a reserved forest, the Government shall publish a notification in the Official Gazette and in the Official Gazette of the District; S. 6 says that when a notification has been issued under S. 4, the Forest Settlement Officer shall publish in the Official Gazette of the district a proclamation specifying as nearly as possible, the situation and the limits of the land proposed to be included within the reserved forest; if such notifications were not filed during the trial, they could not be filed in appeal: 1984 M.L.J. (Cr.) 85.

Kerala Forest Act, 1961 (IV of 1962), Ss. 19, 27—Offence under S. 27—Proof of notification under S. 19 necessary—No judicial notice can be taken—Notification is a public document—Proof—Nature of: 1966 Ker.L.J. 76.

S. 57 does not take in notifications of the kind required to be issued under S. 19 of the Kerala Forest Act, 1961 or under the corresponding provisions of the predecessor Acts, which are issued in exercise of executive functions of the Government; no judicial notice of a notification under S. 19 of the Kerala Forest Act can be taken. [1966 Ker.L.T. 1022; 1971 M.L.J. (Cr.) 302; 1970 Ker.L.T. 991 (F.B.); 1970 Ker.L.T. 691 and 1970 Ker.L.T. (S.N.) 17, Rel. on]: 1983 M.L.J. (Cr.) 295.

Presumption with regard to a notification in respect of reserve forest can arise if original notification or a certified copy thereof is produced: 1983 M.L.J. (Cr.) 295.

A copy of notification issued under S. 20 of the Indian Forest Act was attached to the chalan. But no steps were taken to prove the said notification in the manner required by law.

Held, that judicial notice of a Government notification cannot be taken by the Court under S. 57 of the Evidence Act, but the production of the Gazette printed under the authority of the Government will be sufficient proof of the notification under S. 78 of the Evidence Act: 1961 M.P.L.J. (Notes) 263.

Court taking into consideration—State Government Gazette for holding the relevant notification under S. 24(2)(*b*) of the Prevention of Food Adulteration Act, had received previous publication: (1965) 1 Cr.L.J. 580: A.I.R. 1965 Pat. 176.

The expression 'all laws in force in the territory of India' has not been defined in the Evidence Act or in the General Clauses Act, 1897. It is, however, pertinent to note that Art. 372 of the Constitution speaks of the continuance of 'all the laws in force in the territory of India'. There is no material difference between an 'existing law' as defined in Art. 366 (10) and 'a law in force'; that the words 'law in force' as used in Art. 372 are wide enough to include not merely a legislative enactment but also any regulation or order which has the force of law, that an order must be a legislative and not an executive order before it can come within the definition of law. Art. 366(10) of the Constitution makes no mention of a notification. But there can be no doubt that if a notification is a part of any Act, Ordinance or Order, it would be within the definition of law or existing law. If an order contemplated by Art. 366(10) must be one in the nature of a legislative provision, and if the order is not made by the Legislature itself, it follows that it must then necessarily be one made in the exercise of the power delegated in that behalf. Judicial notice can, therefore, be taken of a notification issued by the Government or any competent authority in the exercise of delegated power of legislation, as such a notification is a part of the law itself. Judicial notice cannot, however, be taken of a notification issued by any authority in the exercise of its executive functions. Under the last paragraph of S. 57, Evidence Act, a Court has a discretion to refuse to take judicial notice of a notification made in the exercise of delegated power of legislation, unless the notification is produced: 1956 Cr.L.J. 621: A.I.R. 1956 Madh. Bh. 138 (F.B.).

Where the notifications related to orders of the Ruler of Gwalior State and they were published in various issues of the Government Gazette, *held*, that no proof of these notifications were necessary: 1959 Jab.L.J. 139: A.I.R. 1959 Madh. Pra. 269: 1959 M.P.L.J. 505.

Proclamation of emergency—Court can take judicial notice of and disallow complaints of violations of Art. 19: (1964) 15 S.T.C. 505: A.I.R. 1965 All. 86.

Provisions of law—Courts have a duty to take notice of: I.L.R. (1960) 1 Punj. 303: (1961) 2 Cr.L.J. 272.

Notification by the Government declaring Mallah to be socially and educationally backward class—Ordinarily, the decision of the State Government would prevail subject, of course, to the right of a party to satisfy the High Court that it was based on irrational or irrelevant grounds: A.I.R. 1968 Pat. 337 (F.B.).

Contention that Railway Amendment Act (XXXVIII of 1961) came into effect on 1st January, 1962 and, hence, applies to case not raised in lower Court though taken in revision petition—Judicial notice can be taken of law in force on any particular relevant date and such law alone is to be applied irrespective of whether any party referred to it or not—Amendment Act applied not because it is quoted by any party but because the main Act, by such Amending Act, was the law in force on relevant date binding on all parties and requiring no consent of any of them: A.I.R. 1968 Andh. Pra. 327.

3. Sub-S. (4) of S. 57.—The Court has to take judicial notice of the proceedings of both the Houses of Parliament and is expected to treat the proceedings of the two Houses of Parliament as proved on the production of the copies of the journals or the reports containing proceedings of the two Houses of Parliament which are published by them. Thus, as the Lok Sabha Debates and the Rajya Sabha Debates are the journals or the reports of the two Houses of Parliament which are printed and published by them, the publication in said journals is adequate publication of the resolutions of both Houses of the Parliament approving Proclamation of Emergency; it is not necessarily required to be published in Official Gazette: A.I.R. 1988 S.C. 440: 1988 (Supp.) S.C.C. 401.

4. Sub-S. (6) of S. 57.—(*See* also S. 85, *infra*). The purpose of Ss. 57 and 85 is to cut down recording of evidence; for such matters, like the due execution of a power-of-attorney in the present day of international commerce, there is no reason to limit the words 'Notary Public' in S. 85 or S. 57 to Notaries appointed in India; they include the Notary Public of foreign countries also. [A.I.R. 1971 S.C. 761, Foll.]: A.I.R. 1976 Del. 263: (1976) 78 Punj.L.R. 71: 1976 Rajdhani L.R. 356: (1976) 12 Del.L.T. 69: I.L.R. (1976) 1 Del. 559; (1992) 47 Del.L.T. 659.

A presumption of correctness arises in respect of a power-of-attorney attested in a foreign country, under Ss. 57 and 85, regarding the genuineness of the seal of the said Notary; no proof is required from that country as to whether the person attesting was in fact a duly appointed Notary or not: A.I.R. 1989 Del.

144: (1989) 37 Del.L.T. 88: (1988) 2 Ren.C.J. 698: (1989) 1 Ren.L.R. 39; (1990) 2 Ker.L.T. 318.

5. Sub-S. (7) of S. 57.—Under S. 57(7) the Court is bound to take judicial notice of the District Magistrate's posting, name and signature and, hence, under S. 56 prosecution need not prove the District Magistrate's signature on the sanction to prosecute: I.L.R. (1955) Patiala 715: A.I.R. 1956 Pepsu 11: 1956 Cr.L.J. 102.

Signature of persons filling public office. *See* I.L.R. (1953) Patiala 267: A.I.R. 1954 Pepsu 84.

Honorary Magistrate's signature is taken judicial notice of only when made in his official capacity: 5 I.C. 537. Courts take judicial notice of attestation and signature of Sub-Registrar: 105 I.C. 422: A.I.R. 1928 Cal. 154. As to signature of Justice of the Peace, *see* 1 Beng.L.R. 15 (Cr.).

The Court can take judicial notice of the signature of a Gazetted Officer of the Government and, therefore, the genuineness of his signature is not a matter which unless the Court deems it necessary, need be proved. The applicability of the sub-section is not contingent on the exhibition of a copy of Fort St. George Gazette containing a notification of his appointment as such officer: 44 M.L.J. 557: A.I.R. 1953 Mad. 600.

In 10 C.L.R. 469, the Court refused to take judicial notice of the seal of a Kazi or Sudr Amin whose appointment said to have been made about in 1820, was not proved. Though Courts take judicial notice of judgments, it does not follow that all statements of facts contained in judgments must be taken judicial notice of: 19 Sind L.R. 576: A.I.R. 1926 Sind 161.

Where a Food Inspector, required to be appointed by a Gazette notification, has claimed to have been so appointed in the complaint, *held*, the Court is bound to take judicial notice thereof; if the Court entertained some doubt, it had to refer to the Gazette itself if easily available or to require the complainant to produce the same; it is only on the Inspector's failure to produce it that the Court may refuse to take judicial notice: A.I.R. 1971 Ker. 193: 1971 Ker.L.J. 177: 1971 Ker.L.T. 19 (F.B.).

Prevention of Food Adulteration Act, 1954, S. 20(1)—Notifications authorising Food Inspectors to institute complaints published in Official Gazette—Court is bound to take judicial notice under sub-S. (7): I.L.R. (1967) 2 Ker. 340: 1967 Cr.L.J. 1719.

A judicial notice of the sanction, under S. 29, Arms Act, can be taken under the provisions of S. 57(7) of the Evidence Act. Where the letter 'D.M.' with a signature which is not decipherable are found at the bottom of the endorsement, judicial notice can be taken of this signature under S. 57(7) of the Evidence Act. The words 'Prosecution sanctioned' can also be held to be proved. In view of the provisions of the Evidence Act which relate to the proof of public documents, no formal proof of this endorsement is necessary and it can be held to be proved as an original public document. The Police charge-sheet being a public document could be proved by its presentation in original and no other proof is needed. As the endorsement of the District Magistrate is on this very document, judicial notice of it can be taken under the provisions of Ss. 56 and 57(7) of the Evidence Act. There is thus, a valid sanction on the record of the case and it cannot be said that the proceedings are vitiated for want of sanction: 1960 Cr.L.J. 19: A.I.R. 1960 All. 40. As to judicial notice of power of-attorney given under seal of notary public, *see* I.L.R. (1939) Bom. 295: (1939) 41 Bom.L.R. 530: I.L.R. (1939) Bom. 347.

It is not necessary for the prosecution to prove the signature of the sanctioning authority on a sanctioning order as under the combined effect of Ss. 56 and 57(7) of the Evidence Act, the Court can take judicial notice of the signature and can justifiably make a presumption that the signature under the order of the sanction is the genuine signature of the authority concerned: (1968) 70 Punj.L.R. 318.

Trial Court after finding that accused contravened provisions of S. 18(*a*)(*ii*) and 18(*c*) of the Drugs Act—Acquittal on ground that the sections were not shown to have been brought in force in the State—Failure of prosecutor to produce notifications—Effect—Order of acquittal: (1964) 2 Cr.L.J. 443: A.I.R. 1964 Pat. 477.

Appointment of Drugs Inspector—Judicial notice of—Copy of relevant notification need not be put as exhibit. *See* 1960 Cr.L.J. 845: A.I.R. 1960 Pat. 243.

Signature of District Magistrate on sanctioning order—Proof of: A.I.R. 1958 All. 39: 1958 Cr.L.J. 9.

Prosecution under S. 39 read with Ss. 38 and 44 of Travancore-Cochin Medical Practitioners Act (IX of 1953)—Court is not bound, even on strength of S. 57(7) of the Evidence Act, to take judicial notice of Gazette notification contemplated by S. 1(3) bringing into force various sections of Act—Prosecution must not only produce but also put in as exhibit such notification to enable Court to record finding that prosecution has proved charge—In absence of such production and proof, conviction cannot be sustained: 1969 Ker.L.T. 629: 1969 Ker.L.R. 986.

6. Sub-S. (9) of S. 57.—Where though the order of detention under Gujarat Prevention of Anti-Social Activities Act, 1985 was passed on 13-6-1987, the grounds thereof were sent to the State Government only on 16-6-1987, *held*, though the Court may take judicial notice of the fact that 13th was a closed Saturday and 14th was Sunday, but the authorities could have prepared the papers on 15th and dispatched the same by post or otherwise to the State Government on 15th or 16th; failure to do so resulted in the non-compliance of the statutory mandate under S. 3(3) of the 1985 Act; continued detention was bad and illegal: 1989 Cr.L.J. 1573 (Guj.) (D.B.).

7. Sub-S. (10) of S. 57.—Under S. 57(10), the Court can certainly take judicial notice of the fact whether a particular territory is a part of India or not. If there were any public notification or declaration by which the Government declared a particular territory as a part of the territory of India, the Court would be bound to take notice of it. But the case of a foreign territory seized in course of a combat is different: A.I.R. 1973 Raj. 49: 1972 W.L.N. 495 (D.B.).

"Territories as may be acquired"—Question as to whether Pondicherry is territory of India—Question forwarded to Union Government by Supreme Court—Answer received is binding on Court—"Pondicherry is not territory acquired" within the meaning of Art. 1(3)(*c*)—No appeal lies to Supreme Court—Per Majority (*Sarkar and Das Gupta, JJ., Contra*)—No writ petition can be entertained: A.I.R. 1962 S.C. 727.

8. Sub-S. (11) of S. 57.—Hostilities—Judicial notice of: 1968 Cr.L.J. 187: A.I.R. 1968 Manipur 23.

9. Matter of public history, literature, etc.—In order to prove ancient facts of a public nature, public histories of repute are receivable in evidence as public documents. The opinion of standard authors may be referred to. The Court, however, can dispense with the evidence of what may be regarded as notorious facts of public history. S. 60 makes provision for treating the opinion of experts as expressed in treatises of persons who are dead as evidence in proper cases. The authors of such learned treatises must be shown to be properly qualified to make statements upon the subject: A.I.R. 1981 Madh. Pra. 82: 1981 M.P.L.J. 429: 1981 Jab.L.J. 617 (D.B.).

Before judicial notice could be taken of passages in books relating to an alleged tradition something more than the mere existence of the passages would have to be proved before the passages could be regarded as evidence of the existence of the tradition. It must be shown that the writer had special knowledge of the alleged tradition or the tradition is a repetition of that given in the history: A.I.R. 1937 Lah. 529. A Court may take judicial notice of the course of proceedings in the Legislative Assembly but there should be some indication on the record when and in what circumstances, the specified statements were made. The Court should also be careful to avoid the impression of mixing up proof of the making of the statements and of the truth of such statements themselves: A.I.R. 1941 Lah. 298.

Under S. 57, the Court may presume that any book referred to by it for information on matters of public or general interest was written and published by the person at the time and place, by whom or at which it purports to have been written or published; on questions of public history, the Court can only dispense with evidence of notorious or undisputed facts. But before any judicial notice is taken of any passages in such books, something more than the mere existence of the passage would have to be proved; it must be shown that the writer had any special knowledge of the tradition or that the tradition was a repetion of what is given in the history. Thus, where there was no evidence on the record to establish as to who was the author and publisher of the book which was not produced by either of the parties before the Court, even during arguments, *held*, no judicial notice could be taken of the facts contained therein: (1992-1) 10 Punj.L.R. 193 (D.B); (1992-2) 29 Rev.L.R. 6 (P.&H.) (D.B.).

The statement of facts contained in the Official Gazette on private affairs or historical facts in some cases is the best evidence of facts stated therein; though entitled to due consideration, it is not conclusive of the matters requiring judicial adjudication; in an appropriate case where the evidence on record is not sufficient to prove the fact in issue, the statement of such facts in the Official Gazette may be relied upon without further proof as corroborative evidence. Thus, where the question in issue was whether Dhangars (by caste) of Bombay Province were governed by the Banaras School of Hindu Law, *held*, the facts stated in the Indore State Gazette regarding their social status and habitation may be relevant and may in an appropriate case presumed to be genuine but not conclusive; however, in complete absence of evidence to prove the party's family or ancestors' migration from Mathura area, the Indore State Gazette could not be accepted as sufficient to prove such migration for connecting Holkars of Indore with Dhangars of Bombay Province: (1990) 1 Hindu L.R. 306 (S.C.).

Facts of which Court may take judicial notice—'History of Hydraulic showing in India' by N. Barraclogh—Court may resort to this treatise by an expert as a document of reference under S. 57, penultimate para. even though it may not be admissible under S. 60, para. 5, first proviso, as not satisfying the tests of being offered for sale and the author being dead, unavailable, etc: (1965-66) 70 Cal.W.N. 1108.

It is clear from S. 57 of the Evidence Act that in all cases where the Court is bound to take judicial notice, the Court may resort for its aid to appropriate books or documents of reference. There is, thus, a duty cast on the Court to refer to the necessary documents for the purpose of taking judicial notice of something of which it is bound to take judicial notice. Therefore, if that were necessary, the Court should have looked into the Gazette or other book or document of reference for the purpose of ascertaining whether or not the law here in question had been brought into force. It is only where a document of reference for the purpose of deciding such a question is not readily available that the question of the Court calling upon the party concerned to produce it would arise. Here both sides proceeded before the learned Magistrate on the basis that the provisions in question were in force. They were, in fact, in force; the Court apparently knew they were in force and, therefore, no question arose of the Court calling upon anybody to produce the necessary document, namely, the notification, much less prove it: 1970 Ker.L.J. 1011: 1970 Ker.L.T. 981 (F.B.).

Under S. 57, the Courts can take judicial notice of all matters of common knowledge like Ramayana being sacred to Hindus and Rama, Krishna, Brahma and Gandhi are held in highest esteem by them; they are 'notorious' facts of public history. The Courts can also take judicial notice of religious history, prevalence of a particular religious persuasion or faith or distinctions between the beliefs and ideas of different sects. And on all matters of history, literature, science or art, the Court may resort to reference books and documents: 1976 Cr.L.J. 98: 1975 All.L.J. 601 (F.B.).

The Court can take judicial notice of the facts that (*a*) Islam is an accepted religion of a large number of persons in India and outside. (*b*) Koran is the basic religious text or scripture of Islam. (*c*) The followers of Islam believe that Koran is of divine origin being revelations made by God to Mohammad, the Prophet of Islam. (*d*) The Koran is considered to be a holy book by the followers of Islam. Thus, where a writ of *mandamus* for seeking declaration that each copy of the Koran whether in original Arabic or in its translation in any other language be forfeited to the Government as it incited violence and insulted the religion or religious beliefs of other communities in India, *held*, the Courts could not sit in judgment over the Koran or the contents thereof in any legal proceedings: 1988 Cr.L.J. 739 (Cal.) (D.B.).

Undoubtedly a Court is entitled to take judicial notice of matters with which men of ordinary intelligence are acquainted and to act upon his general knowledge of local affairs. The Court can certainly refer to what is stated in the articles in journals and books by authors though living acquainted with such affairs as mentioned by them in their articles and books: A.I.R. 1978 Pat. 172: 1978 Pat.L.J.R. 96: 1978 B.L.J.R. 32: 1978 B.L.J. 1: 1978 B.B.C.J. (H.C.) 86 (F.B.).

S. 57 would become nugatory if it is held otherwise, but treatise on Medical Jurisprudence cannot be looked into for weighing evidence of a Doctor when passages sought to

be relied upon were not put to him in the witness box. [A.I.R. 1978 Pat. 172 (F.B.), Foll.]: (1989-2) 37 B.L.J.R. 18: 1989 Cr.L.J. (N.O.C.) 186 (D.B.).

For cases where appropriate books were referred to, *see* I.L.R. 17 All. 456 (P.C); 12 C.L.R. 86; (1917-18) 22 Cal.W.N. 745; I.L.R. 32 Cal. 1 (P.C.); I.L.R. 1 Bom. 367; Law Reports: I.L.R. 28 Cal. 289; 12 C.L.R. 86; I.L.R. 10 Cal. 140; I.L.R. 24 All. 445; I.L.R. 15 Bom. 452 (457); Medical works: 12 C.L.R. 86; I.L.R. 10 Cal. 140; I.L.R. 24 All. 445; I.L.R. 15 Bom. 452 (457); I.L.R. 23 Cal. 604 (608). Mill's History of India, Mill's Political Economy, Harrington's Analysis, Sanads Treaties. *See* 3 W.R. (Act 10 Rul.) 29; 7 B.L.R. 63; 15 W.R. (Cr.) 25; I.L.R. 15 Mad. 241. As to other histories (as) Menon's History of Travancore, *see* I.L.R. 12 Mad. 495.

Vernacular histories which have never received any recognition as historical works of value and reliability relating to matter of public or general interest, are inadmissible in evidence: I.L.R. 18 Luck. 346: A.I.R. 1943 Oudh 91.

The question whether a particular village was granted to a particular person by a former ruler is not a matter of public history. It cannot really be contended that statements as to title of a certain person to a certain property, if found in some book written by somebody a century or two ago, would be relevant and admissible evidence to prove that title. Statements in Nensi's Khyat with respect to the grant of a particular jagir to a particular person is not a matter of public history, and therefore, Courts cannot take judicial notice of it: 1955 Raj.L.W. 338: A.I.R. 1955 Raj. 45.

Russel's Castes and Tribes and the Report of Census are admissible in evidence under S. 57 of the Evidence Act: A.I.R. 1952 Nag. 133: I.L.R. (1952) Nag. 597.

The statements contained in 'Castes and Tribes of Southern India' by Thurston cannot be considered to be a conclusive authority in regard to the second hand information collected by him and not unoften found to be at variance with actual experience. There have also been marked changes in the customs and distinctive characteristics of all communities in South India since Thurston compiled his monumental works: (1955) 1 M.L.J. 355: A.I.R. 1955 Mad. 144.

10. Illustrative cases.—The list given is far from complete; and Anglo-Indian Courts take judicial notice of the ordinary course of nature, the meaning of English words, and all other matters which they are directed by any other Act to notice, such as in Bengal, lists of landholders who have not made road cess returns (Beng. Act IX of 1880, S. 19); in Madras, by-laws framed by the Commissioner of Police (Mad. Act III of 1886, S. 4); in Bombay, notifications in the Gazette, (Bom. Act X of 1886, S. 4); in Oudh, the list of talukdars and grantees published by the Chief Commissioner (Act I of 1868, S. 10) Whitely Stokes' Vol. II. p, 837). *See* also A.I.R. 1937 Pat. 463 (Sifton's Settlement Reports).

A Court can take judicial notice of facts transpiring in Court: 121 I.C. 337.

The Court is empowered to take judicial notice of facts and events which occur before it and are within its personal knowledge; such facts need not be proved; it is well settled that judicial notice is taken of the common affairs of life which are of general knowledge; matters formally known to the majority of mankind or to those familiar with a particular matter may properly be taken judicial notice of. Judicial notice is continuously extended to keep pace with advent of Art, Science and General Knowledge. Thus, where in a proceeding for demolition of a dilapidated building there was no mention in the Police report of incessant rains for 3 days and of forecast of further heavy rains, and the Sub-Divisional Magistrate residing in the same town passed demolition order stating that the structure may collapse at any moment because of continuous rains which is going on in the town for the last 3 days and there is forecast of heavy rains for coming 3 days from Meteorological Department, *held*, the Magistrate having personal knowledge could take judicial notice of rains while passing the impugned order: 1992 Cr.L.J. 379 (Bom.).

Notable event—Drought in Eastern Orissa for 3 to 4 years is notable event: A.I.R. 1969 Ori. 266.

Judicial notice of the fact that in 1966-67 there had been for district of 24 Paraganas a Public Prosecutor, appointed generally: A.I.R. 1969 Cal. 321.

Rules of Business made under Art. 166(3) of Constitution are Statutory Rules—Judicial notice has to be taken of the rules—Certified copies of the Rules are admissible in evidence—Constitution of India, Art. 166(3)—

Rules of Business under, are Statutory Rules: A.I.R. 1969 Del. 330.

The Court cannot take judicial notice of the fact that a Panch or Sarpanch in the Gram Panchayat would be hardly literate, and would not be able to take down the numbers of ballot papers or would not be in a position to lay foundation in the election petition on the basis of which a recount could be done: A.I.R. 1980 Raj. 149.

Industrial Dispute—Inquiry Against workmen—Court can take judicial notice of the fact that many of the industrial workers are illiterate: A.I.R. 1964 S.C. 708.

Where it is common knowledge that all polling days were declared holidays, the Court can take judicial notice of the fact that every employer was instructed to allow all his employees a chance of exercising their franchise: 1958 M.P.L.J. 786: A.I.R. 1959 Madh. Pra. 58.

Stay under S. 151, C.P.Code—Difference in approach in exercising power under S. 34 and under S. 151, C.P.Code—Indian firm contracting with foreign State-owned trade enterprise for supply of machinery, technical design and assistance—Contract later *alias* providing for arbitration of any dispute at place of defendant to such dispute—Contract, except for one amendment, signed and executed in India—Contract providing shipment F.O.B. foreign port and payment in foreign country—Last substantial shipment to be considered as fulfilment of deliveries—Firm suing enterprise for damages alleging supplied machinery to be not as stipulated—Enterprise seeking stay of suit—No clear statement by parties as to proper law of contract applicable—Presumption as to applicability of foreign law does not arise—Court entitled to take judicial notice of existence of serious difficulties in obtaining foreign exchange—Court has power to stay suit in interest of justice either under S. 34 or under S. 151, C.P.Code—Question of proper law of contract applicable to such case is debatable—Suit not in abuse of process of Court—Sufficient grounds also available to refuse stay in such a case: (1968-69) 73 Cal.W.N. 192.

Courts are bound to take judicial notice of prorogation and presume the regularity of these actions which must be interpreted as far as possible so that the thing done may be valid rather than invalid: (1969) 2 S.C.A. 299: (1969) 1 Jm. N.P. 60: A.I.R. 1969 S.C. 903.

Court can take judicial notice of fact that by 19th December, 1961 territories of Goa, Daman and Diu were completely liberated from colonial rule: 1969 Lab.I.C. 942: A.I.R. 1969 Goa 76.

The Court would be entitled to take judicial notice of the explosive ferment of mounting hatred on both sides of the Radcliffe line more especially in the month of August, 1947: (1960) 62 Punj.L.R. 241: A.I.R. 1960 Punj. 523.

It is a notorious fact of which the Courts are justified in taking judicial notice that in cases in which communal feelings have been exploited and communal frenzy has been worked up, violence has invariably resulted sooner or later whether such violence was advocated or not: 1957 Cr.L.J. 1361: A.I.R. 1957 All. 782.

It is true that a Court can take judicial notice of what are known as 'notorious facts', but the question whether the conditions in U.P. in February, 1950, so far as communal disturbances were concerned, were fully settled is a matter of opinion and somewhat controversial. The Court cannot smuggle into the evidence its own opinion of controversial situations disguised as notorious facts: (1963) 1 Cr.L.J. 724: A.I.R. 1963 All. 260.

Revision of wages and pay scales or dearness allowance—In such revision, Court can take judicial notice of commodity prices, general level of wages, appointment of Wage Boards to fix wages and revisions, if any, already taken place in some industries: (1967) 1 S.C.W.R. 730: (1967) 2 S.C.R. 463: A.I.R. 1967 S.C. 1175.

The practice of charging interest on the amount overdrawn is so common with the banks that the Court is justified in taking judicial notice of that practice: A.I.R. 1953 All. 637: I.L.R. (1954) 1 All. 268.

Judicial notice of Arrack. *See* (1955) 1 M.L.J. 54.

The Court can take judicial notice of the fact that 'the present political movement' is in fact a movement prejudicial to the public safety or peace: I.L.R. 60 Cal. 351: A.I.R. 1933 Cal. 186.

Court may take judicial notice of the fact that a registered letter takes at least 25 hours longer than an ordinary letter: 99 I.C. 622: A.I.R. 1927 All. 215.

It is not correct to say that a lease because it is executed by the special manager of the Court of Wards is entitled to be taken into

consideration by Courts even if they are not proved: 1942 O.W.N. (B.R.) 152.

In a suit for injunction, the plaintiff relied on the Santha or Grant by the Ruler of Mandi, more than 30 years old, and the same was admitted in evidence and the suit decreed. *Held*, that the Santha though not incorporated in any act of the State or otherwise notified and as such not falling under S. 57 of the Evidence Act, it can be acted upon as it was more than 30 years old and satisfied the other conditions of S. 90 of the Act: A.I.R. 1952 Him. Pra. and Bom. 41.

Propaganda by State Government calling upon people to help it in finding out corruption and promising them protection against prosecution for being accomplices—Courts can take judicial notice of this propaganda: (1953) 1 M.L.J. 75: A.I.R. 1953 Mad. 481.

Court can take judicial notice of the fact that the Central Government is located at New Delhi: I.L.R. (1955) Bom. 346:A.I.R. 1955 Bom. 381.

In a dispute related to utilization of the river water and equitable distribution thereof in terms of S. 4 of the Inter-State Water Disputes Act, 1966, between the States, *held*, judicial notice can be taken of the fact that the Government at the Centre was run by one political party while the respective Governments in the two States are run by different political parties: A.I.R. 1990 S.C. 1316.

The Court can take judicial notice of the fact that Sambalur district is a surplus district as regards rice and there was extensive smuggling from the district to the adjacent States such as Bihar and Central Provinces: 1953 Cr.L.J. 544: A.I.R. 1953 Ori. 53.

Judicial notice can be taken of the low attainment in life of hill tribe people while recording confession of accused persons belonging to such tribes: (1970) 36 Cut.L.T. 774.

Courts can take judicial notice of the fact that there is a flourishing colony of Satsangis at Agra and there are centres in most of the big cities in U.P. including Allahabad: I.L.R. (1953) 2 All. 758: A.I.R. 1954 All. 291.

Judicial notice—Judicial notice can be taken of wide-scale disturbances in August, 1947: (1970) 72 Punj.L.R. 17.

Judicial notice—Communal disturbances in August and September of 1947, after partition of India and Pakistan—Court can take judicial notice thereof: 1965 S.C.D. 831: (1965) 2 S.C.W.R. 599: A.I.R. 1965 S.C. 1666.

While the Court is entitled to take judicial notice of the factum of the partition of India, insecurity of life and property of the Hindu population in what is now Pakistan as well as the mass migration of the Hindu population to the territories now forming part of India, it is not possible to take any judicial notice either of the fact that the pledged goods in question were taken over as evacuee property or not or were subjected to loot or arson; the take over of the property by the Custodian has to be proved like any other fact: A.I.R. 1976 Del. 115.

Judicial notice should be taken of the fact that after the partition, entry of any citizen of India into the territory which now forms part of Pakistan, was regulated by permits and visas: A.I.R. 1960 J.&K. 91.

Goods on railway wagon looted during disturbance after death of Pooti Siramulu in connection with formation of Andhra Province—Court can take judicial notice of disturbances—But Railway not absolved in absence of proof that wagon in which consignment was kept was looted: I.L.R. (1962) Cut. 395: A.I.R. 1963 Ori. 66.

The Courts cannot take judicial notice of theft on Railways: A.I.R. 1928 Lah. 837: I.L.R. 10 Lah. 329.

(*Obiter*) Claim for compensation from Railway for goods damaged in transit by rain—Tariff Rules requiring consignments to be covered by tarpaulin during monsoon months—Courts can take judicial notice of the fact that consignment in question was booked during monsoon season: A.I.R. 1967 Pat. 328.

Where in a claim case arising from a railway accident, the *Ad hoc* Claims Commissioner relied on specific facts not proved by the evidence in the case but known to him personally because he tried the other claim case arising out of same accident, *held*, he was not right in doing so: A.I.R. 1985 All. 52: 1985 All.L.J. 66 (D.B.).

Courts can take judicial notice of facts of general knowledge: A.I.R. 1968 Bom. 229.

Assuming that the date as to the establishment of a new Telephone Exchange in the City of Calcutta is not such a matter of public history as is contemplated by the paragraph following Cl. (13) of S. 57, at least it is a matter

which may be readily proved before the Court by competent officers of the Calcutta Telephone office and where the fact is provisionally proved before the Magistrate by an affidavit, it is within his power to take notice of the fact and come to a *prima facie* decision on the assumption that the fact alleged is true: (1961) 2 Cr.L.J. 204: A.I.R. 1964 Cal. 461 (F.B.).

Court before whom award filed, held rightly amended the discretion of the defendant by substituting "Hirakud Dam Construction Organization by Union of India": I.L.R. (1961) Cut. 544.

Judicial notice of rule—Replacement of old stamps—Courts can take judicial notice of rule providing for return of old and obsolete stamps to Government Press on receipt of new ones—[Printing Manual/Printed and published by Government of Madras, R. 225]: 1969 Mad.L.W. (Cr.) 68.

Judicial notice—Question of sovereignty—Court must accept without challenge: 1968 Cr.L.J. 316: A.I.R. 1968 Goa 17.

Press reports regarding 'gheraos'—Court took judicial notice since reports showed that gheraos and Government attitude towards them met with adverse reception in many quarters: (1967-68) 72 Cal.W.N. 441: A.I.R. 1968 Cal. 407 (S.B.).

Application for increasing maintenance allowance—Husband producing decree for judicial separation—Wife held not entitled to maintenance—Magistrate held could take judicial notice of decree: 1966 Cr.L.J. 47: A.I.R. 1966 All. 133.

Bihar Tenancy Act (VIII of 1885), S. 21-A introduced by Act XXIII of 1947)—Plaintiff claiming occupancy right under S. 21-A—Court cannot leave it to Counsel to point out appropriate notification by which the Act was brought into force and dismiss suit on failure of Counsel to do so—*Held*, also question as to whether the other co-sharers had given any consent or not was a mixed question of law and fact which could not be considered in second appeal: 1965 B.L.J.R. 420: A.I.R. 1965 Pat. 489.

Scope of—Right to drain off surplus water through particular vent or channel—Such right is customary — Proof of it need not be given: (1964) 2 An.W.R. 39.

It is not open to the Court to take judicial notice of the Clearing House Rules: A.I.R. 1956 Cal. 399.

Judicial notice of Agra division records being destroyed during the Great Indian Mutiny. *See* I.L.R. 22 All. 224.

No judicial notice can be taken of the fact that the first information report, after having been recorded, must have been sent to the Police post and to the Elaqha Magistrate; this fact has to be proved like any other fact: A.I.R. 1978 S.C. 59: (1977) 4 S.C.C. 420: 1978 Cr.L.J. 177.

Where in respect of a land measuring about 5000 sq. ft. situated in a busy suburb of Pune, the plaintiff claimed *mesne profits* at the rate of Rs. 25 p.m. but there was no evidence to show that the land would have fetched such an amount, *held*, judicial notice could be taken of the fact that land so spacious could not but fetch an income of at least Rs. 25 p.m.: (1990) 2 Mah.L.J. 1056.

The Court can take judicial notice of the fact that many blind persons have made a name for themselves and have acquired great academic distinctions: A.I.R. 1993 Pat. 22: 1992 B.B.C.J. 225: (1992) 2 B.L.J. 122: (1992) 1 Pat.L.J.R. 636 (D.B.).

The Court can take judicial notice of the fact that congestion of road traffic naturally creates a very tense situation likely, at any moment, to result in causing accidents and damage to life and property; to avoid such accidents it is necessary to maintain proper and adequate road communication to ensure smooth traffic. Thus, if the Government decided to take immediate possession of properties under the urgency provisions of the Land Acquisition Act, 1894 for widening roads, *held*, it could not be said to have acted arbitrarily and without applying its mind: A.I.R. 1992 Karn. 241: (1991) 2 Karn.L.J. 143.

Though the Law Commission had in 1967 advised against the risk of abolishing death penalty as an experimental measure nevertheless even if there is no empirical study showing that the situation prevailing in 1967 was still continuing, *held*, the Court could take judicial notice of the fact that the law and order situation in the country had since not only not improved but it had deteriorated over the years and was fast worsening; the present was, therefore, the most inopportune time to reconsider the law on the subject: A.I.R. 1992 S.C. 395: 1992 Cr.L.J. 514: (1992) 1 S.C.C. 96.

An accredited Ambassador or a Consul has always been and must be held to have sufficient authority to represent his Government; this is a matter of judicial notice: A.I.R. 1983 N.O.C. 75 (Cal.).

In writ proceedings challenging the right of pre-emption based on consanguinity contained in S. 15 of the Punjab Pre-emption Act, 1913, *held*, the Court can take judicial notice of the fact of green, white and industrial revolutions in Haryana, which have led to setting up of industries throughout the State; they have also resulted in the State population being in a state of constant flux and movement whereby traditional integrity of the village and family as also the tribal loyalties have disappeared and weakened the family ties: A.I.R. 1986 S.C. 859: 1986 Punj.L.J. 191: (1986-1) 89 Punj.L.R. 329: (1986) 2 S.C.C. 249: 1986 U.J. (S.C.) 642.

The Court can take judicial notice of the different ages of retirement prevailing in the several services in India; in almost all the public sector Corporations, Central Services and State Services 58 years age is considered to be a reasonable age of retirement. So, the determination of 58 years as the age of superannuation, by itself, cannot be considered to be arbitrary: A.I.R. 1987 S.C. 1527.

In a case filed by the retired employees for increase of pension amount, *held*, judicial notice can be taken of the fact that the rupee has lost its value to a considerable extent: A.I.R. 1988 S.C. 1407.

While making deduction on account of family pension payable to the family of the deceased—a Government employee, while determining amount of compensation under the Motor Vehicles Act, *held*, the Court could take judicial notice of enhancement in pay scale and pension: A.I.R. 1987 Ori. 146: (1987) 63 Cut.L.T. 508.

The Courts may take judicial notice of the common knowledge that schedules for University examinations are very often changed, declaration of results takes inordinately long time, and there is a good bit of uncertainty about the commencement and closure of academic sessions; the picking up of the cut-off date for the purpose of admission to post-graduate medical courses on the basis of academic sessions set out in the University Statutes ignoring the actual state of affairs, prevailing during the relevant year would be unreasonable and arbitrary. [A.I.R. 1982 Ori. 120; A.I.R. 1986 Or. 277 and A.I.R. 1987 Ori. 14, Overruled]: A.I.R. 1988 Ori. 124: (1988) 65 Cut.L.T. 113: (1988) 1 Ori.L.R. 90 (F.B.).

The Court cannot take judicial notice of the facts stated in a news item being in the nature of hearsay secondary evidence, unless proved by evidence *aliunde*: A.I.R. 1988 S.C. 1274: (1988) 2 Crimes 107: 1988 Cr.L.J. 1783: (1988) 3 S.C.C. 319; A.I.R. 1990 Mad. 217; (1994) 2 M.L.J. 23; (1994) 1 J.T. 452. But there is no bar to taking notice of such statements and reports averred in affidavits and not controverted in counter-affidavit: (1987) 1 Cal.H.N. 152: (1987) 1 Cal.L.J. 172.

Power of Court to take judicial notice of conduct and behaviour of people in rural areas and urban areas. *See* (1971) 37 Cut.L.T. 667.

The Court can take judicial cognizance of the fact that certain area is terrorist stricken area: A.I.R. 1994 All. 376 (D.B.).

Where information as to who was Bhindranwale and for what he stood for was available in the Government of India's white paper on the Punjab Agitation, *held*, no formal evidence in this regard was necessary to be gathered by the investigation, judicial notice could be taken thereof: A.I.R. 1987 P.&H. 5: 1986 Cr.L.J. 1757: (1986-2) 90 Punj.L.R. 109: I.L.R. (1986) 2 P.&H. 231 (F.B.).

In absence of any evidence, the Court cannot take judicial notice of the fact that generally the sale deed's are under-valued and the correct prices paid by the purchaser is not mentioned in order to evade payment of stamp-duty and registration charges: A.I.R. 1994 All. 66.

Judicial notice can be taken of the fact that the areas which now constitute the State of Rajasthan prior to independence of India were independent States of different dimensions and the local conditions and needs of the people inhabiting those areas considerably varied. It is open to the State Government on the basis of local conditions and needs to prescribe different rates in relation to different municipalities in the matter of rates of taxes to be levied. Varying duty of octroi is, therefore, not open to challenge: A.I.R. 1988 S.C. 388: 1987 (Supp.) S.C.C. 301: (1988) 1 U.J. (S.C.) 204.

Properties of Indian Iron and Steel Company mortgaged with World Bank—Such fact is of common knowledge, public history and universal notoriety—Particular sale deed alleged by company to be in custody of World Bank—Judge can take judicial notice of such

custody under S. 57 read with the International Monetary Fund and Bank Act: (1966-67) 71 Cal.W.N. 302.

Where the incident took place at about 7.00 A.M. in the month of April, *held*, the Court could take judicial notice that it was not dark at that time: 1989 Cr.L.J. 2475 (Del.) (D.B.).

The Court can take judicial notice of the fact, without formal proof, that railway strike was imminent on a particular day and that a strike paralysing the civil life of the Nation was undertaken by a section of workers on another day: A.I.R. 1977 S.C. 1108: (1977) 2 S.C.C. 611: 1977 Cr.L.J. 947: (1977) 2 S.C.R. 991.

The Court can take judicial notice of the fact that agricultural debtors are weaker and oppressed section of the society and money lenders while lending money to them on execution of usufructuary mortgages make unconscionable bargaining: A.I.R. 1978 Pat. 172: 1978 Pat.L.J.R. 96: 1978 B.L.J.R. 32: 1978 B.L.J. 1: 1978 B.B.C.J. (H.C.) 86 (F.B.).

The Court can legitimately take judicial notice of the fact that 'Harijans' are socially, educationally and economically backward: A.I.R. 1974 Ori. 115: I.L.R. (1973) Cut. 623 (D.B.).

The prevalence of economic depression is a notorious or historical fact which can be taken into account by any Court: A.I.R. 1977 Mad. 34: (1976) 89 Mad.L.W. 462: (1976) 2 M.L.J. 161.

In a suit by plaintiff of specific performance of agreement for purchase of land, the Court can take judicial notice of the fact that the prices of the land have risen considerably, manifold, but the Court cannot take judicial notice of the exact rate of the increase. The measure of damages would be the excess price that would be required to be paid by the plaintiff to purchase similar lands on the date of the suit, on account of the breach of the agreement on the part of the defendant: A.I.R. 1988 Bom. 82: 1988 Mah.L.R. 732.

The rise in prices of lands nearabout the developing towns being almost a continuous and unending phenomenon, the Courts while determining the market value of the acquired lands should take judicial notice of it: A.I.R. 1986 P.&H. 305: (1986-1) 89 Punj.L.R. 59: 1986 Rev.L.R. 38: 1986 Punj.L.J. 133: (1986-1) 89 Punj.L.R. 453; A.I.R. 1978 Ori. 74: (1977) 2 Cut.W.R. 631: I.L.R. (1977) 2 Cut. 465 (D.B.); A.I.R. 1981 Pat. 81 (D.B.); (1988) 1 Cal.L.J. 96; (1988) 1 Cal.L.J. 416.

As explanation to S. 6(2) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 continues to be same without responding to the sea-change in the price structure, *i.e.*, the value of rupee has been eroded to less than 1/10th of its original value, *held*, suggestions made by the Rajasthan Law Commission in the year 1993 on the lines of the Model Rent Control Legislation proposed by the Government of India, Ministry of Urban Development, in July, 1992, can be taken into consideration: 1994 D.N.J. 415 (Raj.).

The judicial notice can be taken of the fact that rent has escalated every where: A.I.R. 1992 S.C. 184. *See* also A.I.R. 1986 S.C. 1444: (1986) 3 S.C.C. 385: (1986) 99 Mad.L.W. 325; (1991)2 Cal.L.J. 397: (1991) 2 Cal.H.N. 198.

Where a notification was issued for acquisition of a residential building in a congested area of the city for expansion of a College, *held*, the Court could take judicial notice of the fact that it is impossible to have alternative accommodation at a reasonable rent by a tenant who had been residing in such a building for a number of years; the tenants could not be asked to vacate without providing them alternative accommodation: A.I.R. 1985 Cal. 159: (1984) 2 Cal.L.J. 53: (1985) 1 Cal.H.N. 179.

The question as to whether in a given circumstance alternative accommodation is available or not is not a matter of which any judicial notice can be taken but is one which has to be proved by evidence. Thus, where the tenant brought no material on record to indicate that he made any attempt to seek an alternative accommodation and was unable to get it, *held*, the Court could not take judicial notice of the fact that no alternative accommodation was available to him: A.I.R. 1991 S.C. 266: 1990 All.L.J. 881.

It is well established that the Court is entitled to take judicial notice of facts which are of general knowledge. Some such facts are: (*1*) land values differ very materially in different towns in which Municipalities are established; (2) that different types of mills and factories require different types of buildings and that their relative value do not vary according to their floor areas and that; (*3*) buildings of mills and factories have different age and the value of a building decreases with its age: (1967) 69

58. Facts admitted need not be proved.—No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under

---

Bom.L.R. 656: 1967 Mah.L.J. 1025: A.I.R. 1968 Bom. 229.

Where acquisition of certain land for defence purposes, requisition order for which was passed in October 1966, was challenged, *held*, the Court could take judicial notice of the fact that the war with Pakistan started in June 1965 and, thus, it could not be said that there was no need of the land for defence purposes in October 1966. [A.I.R. 1969 Assam 7, Reversed]: A.I.R. 1981 S.C. 1957: (1981) 4 S.C.C. 283.

The Supreme Court took judicial notice of the fact that the vast majority of the petitions under Art. 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other; the practice of granting interim order which practically give the principal relief sought in the petition just on making out a *prima facie* case, was deprecated: A.I.R. 1985 S.C. 330: (1985) 1 S.C.C. 260: (1985) 5 Guj.L.H. 25: (1985) 19 E.L.T. 22: (1985) 2 S.C.R. 190.

Judicial notice can well be taken of the fact as to how overburdened the writ jurisdiction of High Courts has become in the last two decades; therefore, it is hardly a sound discretion for the High Court to entertain a mere money claim in its extraordinary writ jurisdiction when the same can be adequately dealt with in other forums: A.I.R. 1976 P.&H. 304: (1976) 78 Punj.L.R. 708: 1976 Punj.L.J. 454: I.L.R. (1976) 2 Punj. 537 (F.B.).

If the Courts have recognised the custom in a particular matter for a long time, that is considered to be the law and it is not necessary to prove it. The Courts can take judicial notice of such a custom. [A.I.R. 1959 S.C. 1041 and (1922) I.L.R. 49 Cal. 120 (P.C.), Rel. on]: A.I.R. 1982 P.&H. 282: (1982) 84 Punj.L.R. 237.

Custom—Existence—If can be taken judicial notice of. *See* 1982 All.L.J. 543.

Nothing need be proved of which the Courts can take judicial notice. When a custom has been judicially recognised by the Court then it passes into the law of the land as proof of it becomes unnecessary: (1989-2) 104 Mad.L.W. 477 (D.B.).

Power of Court to take judicial notice of custom: A.I.R. 1959 S.C. 1041.

What received judicial recognition of the Supreme Court in A.I.R. 1955 S.C. 266, A.I.R. 1960 S.C. 1118, A.I.R. 1968 S.C. 806 is the custom recorded in para 23(2) of the Rattigan's Digest dealing with the rights of unmarried daughters to succeed to the self-acquired property of their father in preference to his collaterals and not his mother who is not a collateral. Though para 23(1) refers to para 22, no decision had been cited wherein the Courts may have recognised the custom of the mother of the last male holder being preferred to his daughters; even by implication the Courts have not recognised any such custom: A.I.R. 1987 P.&H. 138: 1987 Rev.L.R. 35: (1987) 91 Punj.L.R. 247: I.L.R. (1987) 2 P.&H. 322.

The general custom under which the deceased's sister's sons are entitled to succeed to his agricultural lands in preference to his collaterals, *held*, is so widely recognised all over the Punjab that Courts are entitled to take judicial notice of the same without independent proof in each and every case. [1970 Cur.L.J. 85 (Punj.) and A.I.R. 1959 S.C. 1041 Rel. on]: A.I.R. 1982 N.O.C. 306 (P.&H.).

Customary law—Custom repeatedly recognised by Courts—Courts would be entitled to take judicial notice of such custom 1970 Cur.L.J. 85 (Punj.).

Right of privacy—Nature of—Proof of custom: A.I.R. 1969 Raj. 31.

Books dealing with custom of communities by public officer: I.L.R. 49 All. 848: A.I.R. 1925 All. 648. Custom of Right of Privacy in Oudh. *See* 13 Oudh L.J. 512: 93 I.C. 332: A.I.R. 1926 Oudh 352. As to judicial notice of the existence of a local custom, *see* also 91 I.C. 583 A.I.R. 1926 Oudh 101.

Section 58—Notes.

Facts admitted need not be proved. *See* A.I.R. 1954 Him. Pra. 21.

S. 92 is controlled by S. 58: A.I.R. 1983 J.&K. 44: 1982 Srinagar L.J. 346 (D.B.).

Admissions in pleadings or judicial admissions made at or before the hearing, *held*

their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

---

stand on a higher footing than evidentiary admissions; the former fully bind the party and constitute a waiver of proof; evidentiary admissions are, however, not conclusive ones: A.I.R. 1974 S.C. 471: (1974) 1 S.C.C. 242; 1978 Raj.L.W. 260; (1987) 1 Cal.L.J. 188: (1987)1 Cal.H.N. 220: (1986-87) 91 Cal.W.N. 971.

The plaintiff need not prove the averments in the plaint which have been admitted by the defendants in written statement: (1994) 2 An.L.T. 539 (D.B.).

Under S. 58, no fact need be proved in any proceedings which parties thereto or their agents agree to admit at the hearing. Hence, where a Counsel of a party admits a fact, it need not be proved against that party: 1942 O.W.N. (B.R.) 180: 1942 O.A. (Supp.) 274.

Admission by legal adviser—Party appearing as witness—Opportunity of explaining admission should be given—Natural justice—Rule of: I.L.R. (1963) Cut. 901.

Where Counsel for the opposite party did not object to exhibition of a document while he was cross-examining the plaintiff's witness, *held*, it amounted to neither an admission of the document nor its contents; the Counsel could show that the document was not genuine so as to prove the defence: A.I.R. 1973 Bom. 40: (1973) 75 Bom.L.R. 318: I.L.R. (1973) Bom. 1197.

Though it is true that an admission does not operate as an estoppel against the party making it, nevertheless it remains as an admission and, under S. 58, admissions are quite relevant to prove the facts admitted: 1948 R.D. 441(2): 1948 All.W.R. (Rev.) 252.

Law is well settled that an admission is not conclusive unless it amounts to estoppel. An admission is, however, a very strong piece of evidence. The maker thereof is, however, entitled to prove the admission to be wrong, unless displaced by satisfactory explanation an admission is also determinative of the facts admitted: (1973) 39 Cut.L.T. 774 (D.B.).

A document which is not a public document or not admitted cannot be exhibited and looked into unless it is proved by oral evidence or otherwise: A.I.R. 1986 All. 126: (1985) 11 All.L.R. 566.

Section applies to criminal trial as well as criminal cases: 27 Cr.L.J. 57: A.I.R. 1926 Oudh 245. *See* I.L.R. 5 Bom. 143; U.B.R. 1907, Evid. 1; 6 M.I.A. 510 (proof of will); 6 B.L.R. App. 49 (proof of documents not disputed); I.L.R. 1 Rang. 405: A.I.R. 1924 Rang. 155.

Scope—Admission—What is—Kinds of admission—Judicial and extra-judicial admissions—Distinction: A.I.R. 1957 All. 1.

It is only when a witness denied his prior contradictory statement that it is required to be proved by its recorder; the earlier statement need not be proved unless the witness denies it and is required to be confronted with the contradictory portions of his earlier statement: (1972) 1 An.W.R. 33.

S. 68 relates to those documents which require to be proved at the trial of a suit. If by any rule of law or of pleadings, such proof is not required, S. 68 cannot operate to insist on formal proof by calling an attesting witness. S. 58 has to be read as overriding S. 68 and as obviating the necessity for calling an attesting witness, unless the execution of the will or the attestation is in dispute. Thus, in view of O. 8, R. 5, C.P.Code, in the absence of any such plea in the written statement, it will be the height of technicality and waste of judicial time to insist on examination of an attesting witness, before a document could be used as evidence. [1980 Ker.L.T. 493 held not good law]: A.I.R. 1990 Ker. 226: (1990) 1 Hindu L.R. 235: (1990) 1 Ker.L.J. 114 (D.B.).

Where the plaintiff himself produced the will and admitted its execution but impeached only validity of bequeathment of certain properties, *held*, it is S. 58, and not S. 68, which is attracted: A.I.R. 1994 Andh. Pra. 284: (1994) 1 An.L.T. 217 (D.B.). But *see* (1990) 1 An.L.T. 17: (1990) 2 Hindu L.R. 536.

Where attestation of a registered will was not proved but a document mentioning the will and submitted to the Income-tax Department was admitted by the opposite party, *held*, the admission of the execution of document did not extend to the execution of the

will; the will remained unproved and inadmissible: A.I.R. 1992 Andh. Pra. 270: (1992) 2 Hindu L.R. 655: (1992) 2 An.L.T. 495 (D.B.).

Where the plaintiff sued for a declaration that the sale deed executed by his virtually insane father in 1940 was void, and the plaintiff then being in his mother's womb and on attaining majority, he realized that the defendants were illegally trying to dispossess him which was contended by the defendants to be an admission in pleadings of the plaintiff attaining majority in 1961 as conclusive, *held*, the averment of the plaintiff was obviously to some extent misleading; it was neither unambiguous nor clear nor true; it was not a kind of admission which could be taken as conclusive in a Court of law: A.I.R. 1985 Pat. 158: 1985 Pat.L.J.R. 199: 1985 B.L.J. 261.

S. 58 cannot be used to bind the party who has made an admission of the genuineness of a document, when such admission is accompanied by a legal plea that the contract and the other facts mentioned in that document could not be relied upon by the opposite party owing to the provisions of the statutory law relating to registration: A.I.R. 1935 Pesh. 12.

Court can base its decision on admission of parties—Trial Courts finding on admission of wife and other evidence that child was conceived by petitioner before marriage. It is not right for High Courts to remit issue for recording finding on question whether the child was conceived after marriage: A.I.R. 1965 S.C. 364.

An admission in a pleading is 'binding' in the case in which it is made; it certainly is not binding in the sense of dispensing with proof in a subsequent case. But, that does not mean that it has lost all evidential value. It still remains a piece of evidence which can be used on any subsequent occasion. [A.I.R. 1969 Bom. 153, Foll.; A.I.R. 1941 Bom. 144, Expl.]: (1984) 1 Ren.C.R. 52: (1984) 1 Ren.L.R. 428: I.L.R. (1984) 1 Del. 214.

Admission in pleadings to be binding must be taken as a whole—Admissions in witness box: A.I.R. 1965 S.C. 364.

While a Court of law is entitled to accept a part of the evidence of a witness and to reject another part, a pleading cannot be so dissected, but must be taken either as a whole or left alone altogether. In other words, if a written statement contains an admission of certain facts which are favourable to the plaintiff but contains a denial of other facts favourable to him or an assertion of other facts which are unfavourable, the plaintiff must, if he wants to avail himself of the admission, take not only the first set of facts as truly stated, but also other second set of facts: (1954-55) 59 Cal.W.N. 223: A.I.R. 1955 Cal. 465.

Admission in written statement—Cannot be disjuncted from other portions of the pleading: A.I.R. 1967 Cal. 294.

A plaintiff cannot be allowed to dissect a written statement; if the plaintiff wants to avail of those parts of the written statement or the additional written statement which are favourable to him and to discard the other parts not favourable to him, such dissection of written statement being not permissible, the plaintiff's suit cannot be allowed to succeed in view of the variance between the written statement and the evidence of the defendant: A.I.R. 1985 Cal. 233 (D.B.).

Splitting up the pleadings in the written statement is impermissible. [A.I.R. 1965 S.C. 364, Foll.]: 1980 Hindu L.R. 654 (P.&H.) (D.B.).

Admissions made in a suit have special value in view of the provisions of S. 58 of the Evidence Act. But admissions made in other proceedings though relevant, would not be conclusive and it can be shown that the admission made is incorrect or based on a misunderstanding: I.L.R. (1962) Bom. 139: (1960) 62 Bom.L.R. 336: A.I.R. 1961 Bom. 136.

Fact admitted in pleadings—No need to read evidence to prove them: A.I.R. 1969 Bom. 255.

Admission in pleading conclusive between parties—Differs from evidentiary admission: 1969 Cur.L.J. 979 (Punj.).

Construction of pleadings—Should not be construed strictly: A.I.R. 1968 Del. 68.

Documents marked on admission—Effect—Proof of contents of document—When necessary: A.I.R. 1967 Cal. 191.

Absence of specific denial—When there is no case by defendant in his written statement that date of birth mentioned by plaintiff in his plaint was wrong, he cannot be allowed to dispute correctness of plaintiff's birth date: 1966 Ker.L.J. 1076.

Where the defendant admits execution of thumbmark on the khata bahi of the plaintiff indicating the liability to pay a certain amount with interest, but, denies in his written

statement and deposition on oath, that the mark was obtained by exercise of undue influence, and that he was minor when it was executed. It is not possible to spell admission of liability on the part of the defendant from the bare execution of the document. The admission is qualified and is not sufficient to fasten liability on the defendant under S. 58: 1964 Raj.L.W. 573: I.L.R. (1965) 15 Raj. 31: A.I.R. 1965 Raj. 47.

Essential facts constituting cause of action—Proof of—Burden on plaintiff unless it is admitted: A.I.R. 1963 Cal. 500.

An admission in pleading as to the execution of a document dispenses with the necessity of proof of execution even though such document is one required by law to be in a certain form or proved in a certain way. But such an admission does not dispense with the proof of the right of the plaintiff to sue on such mortgage when he is only a transferee of the mortgage right and when there is a denial of the transfer in plaintiff's favour: I.L.R. (1943) Kar. 420: A.I.R. 1944 Sind 61.

Ordinarily, an admission may dispense with a formal proof of the thing admitted; but if the thing sly after complying with certain legal requirements in certain forms and such requirements have not been complied with, an admission, however, clear and unconditional, cannot be pressed to cure such illegality. Thus, where the mortgage was to be created by a registered instrument under the relevant laws of Sikkim but had not been so created, *held*, a suit for redemption of such mortgage cannot lie and must fail and even admission of the defendants as to the factum of mortgage in their written statement and otherwise could not cure the illegality and sustain the suit for redemption: A.I.R. 1980 Sikkim 1: (1978) 1 Sikkim L.J. 23 (D.B.).

(Partition admitted—Unregistered deed—If admissible). Admission made in course of examination—No necessity to prove. *See* 8 Bur.L.T. 18. Mortgage unregistered—Effect of an admission. *See* 6 Bur.L.T. 131: 20 I.C. 666.

Admission of mortgage in written statement—Proof of loss of original or contents of certified copy—Not necessary: A.I.R. 1934 Lah. 898. Admission of mortgage in pleadings—Attestation by one witness—No proof required. *See* 4 Bur.L.T. 182: 11 I.C. 850. *See* also 20 Nag.L.J. 21: 169 I.C. 323; 13 Nag.L.R. 121; I.L.R. 42 Bom. 352: (1918) 20 Bom.L.R. 354; I.L.R. 42 Mad. 41: 35 M.L.J. 555.

. Suit to recover mortgage-money—Executants of mortgage-bond and their minor sons parties to suit—Executants admitting mortgage—Proof of execution—Effect of not filing original mortgage deed: A.I.R. 1959 Ori. 126.

The object of S. 58 is only to use the admission of execution of a document as an alternative to its formal proof; such admission is not a lever to circumvent other provisions of law like inadmissibility of an unstamped or insufficiently stamped document under S. 35 of the Stamp Act: A.I.R. 1977 J.&K. 61: 1977 Kash.L.J. 79 (D.B.).

Unstamped document—Execution admitted in pleadings—No relief can be granted on basis of admission as it would amount to acting upon unstamped document: A.I.R. 1968 Mad. 294; A.I.R. 1957 Raj. 47.

In spite of waiver of proof by an admission under S. 58, a note or other instrument insufficiently stamped cannot be acted upon or decree given upon it, unless apart from the note, there is an independent cause of action for the loan: A.I.R. 1933 Mad. 117: 64 M.L.J. 79.

Suit on promissory note—Defendant admitting execution and pleading discharge—Promissory note subsequently discovered to be insufficiently stamped—Objection to suit—Sustainability: A.I.R. 1932 Mad. 693: 63 M.L.J. 303.

When an agreement sued upon is admitted by the defendant, proof of it is dispensed with. A Court cannot dismiss a suit based on an admitted document on the ground that the document was not sufficiently stamped: 4 Bur.L.T. 171: 11 I.C. 810. *See* also (1947) 2 M.L.J. 116: A.I.R. 1947 Mad. 422.

When the fact of an execution of a document is admitted, it need not be proved and this would be so even when the document in question is not admissible on account of any provisions of the Stamp Act. Where in a suit to recover amounts lent on unstamped handletters, the defendant admits the execution of the documents but only pleads substitution of liability by the execution of another promissory note and partial discharge towards it, there is no necessity for the plaintiff to adduce proof of his claim by seeking to get the handletters admitted in evidence. The plaintiff will be entitled to a decree on the failure of the defendant to substantiate the plea set up by him in defence: A.I.R. 1947 Mad. 422: (1947) 2 M.L.J. 116.

Plaintiff admitting copy of document filed by defendant though original was in his possession—Production of original or proof of same is not necessary even though it is inadmissible for want of sufficient stamp: A.I.R. 1957 Andh. Pra. 784.

The custodian appointed under S. 4 of Regulation (II of 1962) in respect of the branches of B.N.U. in Goa brought suits against the defendants on the basis of bills of exchange and promissory notes executed in favour of the branches of the Bank. The negotiable instruments could not be produced by the plaintiff in Court as they had been removed by the officials of B.N.U. elsewhere at the time of occupation of Goa by the Indian forces. The plaintiff had given in the plaint particulars of those documents and the execution of these instruments had been admitted by the defendants.

Held, (*i*) that as the execution of the negotiable instruments had been admitted by the defendants, their non-production in Court was of no consequence. They have to be deemed as good as lost and so the Court could adjudge the rights of the parties arising out of these negotiable instruments on the footing that they had been executed and accepted, and the sureties furnished respecting them, in the manner set out in the respective plaints; (*ii*) that the defendants who were parties to the instruments were immune from another suit at the hands of the endorsees of those instruments from B.N.U. the holder thereof, in view of the combined operation of Arts. 2, 34, 53, 70 and 77 of the uniform law on bills of exchange and promissory notes: A.I.R. 1970 Goa 11.

Fact alleged in plaint and not denied in written statement may be established as admission. *See* 4 Bur.L.T. 26: 9 I.C. 470.

The doctrine of implied admission can only be invoked when a party on whom the burden lies, fails to allege facts in support of it or when the facts specifically alleged by a party in support of its plea are not denied by the other party. Further, the doctrine of implied admission is invoked only against a party who was under obligation to allege certain facts. Moreover the rule of implied admission cannot be invoked where there is express evidence to the contrary. The failure on the part of a party to discharge the burden which lies upon it, give rise to an assumption against the party on whom the burden lies and not to an assumption in his favour. It would be strange if a party who fails to discharge the onus that lies upon it under law be given the right to take advantage of its own weakness and be allowed to erect an admission against the other party on the basis of its own default: A.I.R. 1957 All. 575.

Pleader consenting to admit inadmissible evidence in criminal case—Conviction on such evidence—Propriety: I.L.R. 39 Mad. 449: 28 M.L.J. 329.

Accused's pleader admitting possession of cocaine—Court acting on the same is irregular: I.L.R. 52 Bom. 686: A.I.R. 1928 Bom. 241.

Where the trial Court wrongly construed the written statement as admitting the plaintiff's plea of having entered the agreement of sale, *held*, the case remanded for proving the agreement by adducing evidence: A.I.R. 1985 N.O.C. 32 (Pat.).

Where in a title suit the defendant, in his written statement, admitted that his father was married to plaintiff's mother in accordance with *'Henga'* form of marriage, *held*, even though he did not come to the witness box in support of his said averment, he could not be allowed to say that there was no marriage between the above mentioned parties according to *'Henga'* custom of marriage: A.I.R. 1981 Gau. 42 (D.B.).

Even where the allegation of adultery made by the husband in a proceeding for dissolution of marriage under the Indian Divorce Act, 1869, with a named adulterer was admitted by the wife, *held*, decree of dissolution of marriage could not be passed when that adulterer had not been made a party and the petitioner had not been excused from so doing on any of the grounds stated in S. 11 of the 1869 Act: A.I.R. 1988 Gau. 50: (1988) 1 D.M.C. 405: (1988) 1 Gau.L.R. 261: (1988) 2 Hindu L.R. 93 (S.B.).

Where in a motor accident claim case, the owner of the vehicle contended that no reliance could be placed on the Insurance policy as it had not been formally proved, but he himself had relied on that policy to enforce the liability of the insurer to satisfy the full claim, *held*, the owner himself having invoked insurer's liability under that policy, the policy must be deemed to have been admitted by the owner: 1987 M.P.L.J. 633.

CHAPTER IV

OF ORAL EVIDENCE

59. Proof of facts by oral evidence.—All facts, except the contents of documents, may be proved by oral evidence.

Where tenant in his affidavit did not deny the execution of rent deed which clearly showed the petitioner to be landlord owner and rather he admitted the execution of same as well as the terms contained therein but subsequently, took the plea that the said rent deed was obtained by fraud being perpetuated on him and his signatures thereon had been obtained by false mis-representation, *held*, the trial Court was justified in relying on the said deed. [A.I.R. 1982 S.C. 1518, Rel. on]: A.I.R. 1994 Del. 209.

Where the tenant admitted the receipt of notice to quit but challenged its validity on the ground that the landlord had only filed a copy prepared not from the original but from another copy of the notice, *held*, it was for the tenant to file the original notice received by him to substantiate his plea: A.I.R. 1978 All. 144.

Where plea of ownership of the shop in the plaint was not denied in the written statement and it was construed as an admission but since the proviso to S. 58 as also the proviso added to O. 8, R. 5 of the Code of Civil Procedure vests discretion in the Court to nevertheless call for proof of the fact otherwise than by such admission, the Court may in appropriate cases use the discretion: A.I.R. 1978 Cal. 533.

Where the landlord, the trespasser and the sub-tenant's pleas were at variance, *held*, it is a fit case where the Court may require the proof of the fact otherwise than by admission: (1990-1) 31 Guj.L.R. 209: (1990) 1 Bom.C.R. 334 (D.B.).

Section 59—Notes.

Proof by oral evidence; (*a*) of adjustment of accounts. *See* Beng.L.R. (Supp. Vol.) (F.B.) 3; (*b*) of payment of money: I.L.R. 1 All. 442. Value of documentary evidence. When there is conflict of oral evidence, *see* 4 M.I.A. 403: 2 Beng.L.R. (P.C.) 4 (8). *See* also 1 M.I.A. 43.

Oral evidence of a solitary witness can be relied upon, if not discredited by other witnesses: 1972 B.L.J.R. 97: 1971 Pat.L.J.R. 587.

S. 59 permits proof of all facts, except contents of documents, by oral evidence; S. 118 lays down that all persons are competent to testify unless the Court considers them to be unable to understand the questions that may be put to them or answer those questions because of tender years, extreme old age, disease of body or mind or any other similar cause; S. 133 makes even an accomplice a competent witness though under S. 114(*b*) the Court 'may' presume an accomplice to be unworthy of credit unless corroborated in material particulars. A prosecutrix is not an accomplice but a victim of the sex-offence; the Act nowhere provides that her evidence cannot be accepted unless corroborated. However, the Court must be alive to and conscious of the fact that evidence of the prosecutrix is that of a person interested in the trial's result; if she is an adult and possesses full understanding and her evidence is found truthful and trustworthy, the conviction can be based solely on the same; no rule of law or practice requires that it must necessarily be corroborated: (1990) 2 Bom.C.R. 630 (S.C.).

Per *Mahapatro, J.*—When the moot point is about the service under S. 7, Administration of Evacuee Property Act, proof of its contents alongwith proof of its issue and service has to be established. About the contents of the notice, there cannot be any oral evidence (*vide* S. 59 of the Evidence Act) they can only be proved either by primary or secondary evidence (*vide* S. 61); if the notice itself could not be produced before the Court and so primary evidence was absent, under S. 63(5), secondary evidence of that, if at all, might have been given by oral accounts of the contents of the notice by some persons who had himself seen it. Since the notice was a public document within the meaning of S. 74, the only kind of secondary evidence that could be given under S. 65(*e*) was by a certified copy of that document and no other kind of secondary evidence was admissible: A.I.R. 1964 Pat. 338.

Oral evidence cannot be rejected on the ground that no documentary evidence was produced: 1971 Mys.L.J. (Sh. N) 66.

A tenant's oral evidence of having paid the rent in time supported by the money order receipts and letter of the Superintendent of Post Offices, *held*, is sufficient to prove timely payment: A.I.R. 1982 All. 44: 1981 All.W.C. 612: (1982) 8 All.L.R. 70.

Where in the absence of clear documentary evidence of the husband's second marriage, the husband examined only himself to deny it when he could have examined other witnesses from the village as it could not be believed that the entire village was inimical towards him, *held*, the oral evidence on record adduced on behalf of the wife should be considered not disjointedly and combined result of the oral testimony of all witnesses be considered and accepted; the second marriage stood established: (1987) 1 Hindu L.R. 432: (1987) 2 Karn.L.J. (Sh. N.) 294: I.L.R. (1987) Karn. 15 (D.B.).

Prevention of Food Adulteration Act, 1954, S. 7—Charge under—Proof—Evidence of Food Inspector—Admissibility—Quantity of stuff carried—Not material: (1961-62) 66 Cal.W.N. 102.

Appreciation of evidence—Proof of fact—Does not rest on any prescribed quantum of evidence—Credibility of oral testimony is primarily the satisfaction of trial Court which has first-hand knowledge of witnesses: (1966) 1 An.W.R. 65.

Application by defendant for stay of suit under S. 34, Arbitration Act—Plaintiff denying existence, genuineness and validity of arbitration agreement—Trial Court is bound to record oral evidence or order that particular fact be proved by affidavit: A.I.R. 1968 Madh. Pra. 33.

Where due execution of the will was proved by its scribe and the attesting witnesses, *held*, its propounder had satisfactorily proved the will by its executant. [A.I.R. 1959 S.C. 443, Rel. on]: A.I.R. 1976 Gau. 94 (D.B.).

A title deed, being a solemn document, cannot be easily ignored; no inference can be drawn against its contents unless the person asserting the transaction to be *benami* is able to show that the ownership in reality vested in another person: (1992-1) 109 Mad.L.W. 131 (D.B.).

Conflict between oral evidence of eye witnesses and the medical evidence—Duty of Court: A.I.R. 1969 Cal. 321.

Merely because the witnesses resiled from their previous statements on certain particulars, their evidence cannot be brushed aside as wholly unreliable; either party may rely upon it and the Court can come to its own conclusion; the *maxim 'falsus in uno falsus in omnibus'* is not a sound rule to apply in this country; it is the Court's duty where a witness has given unreliable evidence on certain particulars, to scrutinize the rest of his evidence with care and caution; if the remaining evidence is trustworthy and the substratum of the prosecution case remains intact, the Court should uphold the prosecution to the extent it is safe and trustworthy. [1970 S.C.D. 123, Foll.]: (1974) 40 Cut.L.T. 159 (D.B.).

Where the lower appellate Court did not consider the oral testimony of witnesses, *held*, it vitiated the lower appellate judgment which ceased to be binding on the High Court; Courts have to consider both oral and documentary evidence: A.I.R. 1984 Pat. 274: 1984 B.B.C.J. (H.C.) 295: 1984 B.L.J. 572.

Where a child aged 5/6 years alone was said to have been the accused administering endrine poison to the infant but her testimony being inconsistent with her statement to the Police was rejected as unreliable, *held*, the accused could not be convicted for murder in the absence of direct evidence: 1979 Bom.C.R. 721 (D.B.).

Where after the accused had been charged in the Court for committing offences under Ss. 120-B, 417, 511, 462, 468 and 471 read with S. 34 of the Indian Penal Code, the complainant filed an affidavit in the Court that he had falsely implicated the accused at an official's instance whereupon the trial Court discarded entire prosecution evidence as unbelievable and thereby condemned all witnesses even before they were examined and the affidavit was formally proved and tested by cross-examination, *held*, even if the affidavit was filed *bona fide*, it could not be considered at that stage; the prosecution is entitled to test the truthfulness of the complainant's affidavit evidence; it is only after the prosecution evidence had been recorded that the Court could assess the affidavit's impact thereon; it is the totality of all features that ultimately mould the Court's final conclusion: (1985) 1 Bom.C.R. 609.

60. Oral evidence must be direct.—Oral evidence must, in all cases whatever, be direct; that is to say—

if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

Section 60—Synopsis.

1. Scope.
2. Direct and circumstantial evidence.
3. Inadmissibility of hearsay evidence.
4. Evidence of fact which could be seen.
5. Consent—Effect of.
6. Opinion evidence.
7. Opinion evidence as to relationship.
8. Evidence in case of fraud.
9. Proviso first.
10. Miscellaneous.

---

1. Scope.—*See* 12 Beng.L.R. (App.) 18; A.I.R. 1924 Rang. 363; A.I.R. 1928 Cal. 498; (1957) 1 An.W.R. 15: A.I.R. 1957 Andh. Pra. 595 (object and principle of section). The evidence given by persons who say that they recognised after some time a particular person as the son of so and so cannot be excluded. That evidence really relates to their own perception when they saw that particular person after his appearance and the recollection of their past perception of the said person before his disappearance: (1942-43) 47 Cal.W.N. 9: A.I.R. 1942 Cal. 498 (S.B.).

It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court. Ss. 60, 64 and 91 of the Indian Evidence Act, 1872 are based on this rule: 1995 Cr.L.J. 76 (Ori.).

S. 60 lays down the basic rule of law of evidence that the proof of any fact in Court must be by direct evidence which is always the best evidence; evidence is direct when the witness deposes as to a fact perceived by him with his own senses; thus, the section excludes evidence of reputation, opinions and beliefs of others to prove the existence of any fact in relation to them unless the reputation, opinions or beliefs are themselves relevant; the latter fall in the category of what is commonly called hearsay evidence. [(1968) 70 Punj.L.R. 83, Overruled]: A.I.R. 1973 P.&H. 213: I.L.R. (1972) 2 Punj. 424: (1972) 74 Punj.L.R. 625 (F.B.).

It is inherent that oral evidence in order to be admissible should in all cases whatsoever, be direct: 1981 All.W.C. 13 (Rev.).

S. 48 read with S. 60 requires that the person who holds the opinion should be called as a witness. Statements made by deceased persons after the controversy had arisen and therefore inadmissible under S. 32 are not admissible under S. 48 or under S. 32(7). The value of the evidence, admissible under Ss. 32, 49 and 60 depends on the character of the witnesses who depose to what they heard from deceased persons and also on the characters of the deceased and whether they were expressing their own opinion or merely repeating hearsay: A.I.R. 1933 Sind 213. Statements cannot be called instances: I.L.R. 8 Luck. 455: A.I.R. 1933 Oudh 246. *See* also (1936-37) 41 Cal.W.N. 1103.

Prior statement—Mode of proof.—Ss. 60 and 67 deal respectively with the proof of oral

and written statements. These two sections do not lay down that such statements can be proved only by calling the deponents: 1941 R.D. 503: 1941 O.A. (Supp.) 460.

Modes of giving evidence—Two alternative modes allowed by Act—Before second mode is adopted first has to be fulfilled—Depositions in prior judicial proceeding—Admission in present suit—Before admission conditions mentioned in S. 33 have to be fulfilled—Consent of parties is not enough: (1962) 3 Guj.L.R. 418: A.I.R. 1962 Guj. 68.

The state of mind of a person may be proved directly by the person himself giving evidence of his own mental feelings or indirectly by other witnesses speaking to the outward expression of the condition of the person at the time (*res geste*) by circumstantial evidence of facts which lead to an inference as to the person's state of mind. Where a witness merely asserts that the accused, charged with murder, entertained a suspicion that the deceased had murdered his father, without even mentioning the grounds of his knowledge as to the state of the mind of the accused, his evidence merely amounts to what he thought was in the mind of the accused and does not satisfy the requirement of S. 60: I.L.R. (1962) Andh. Pra. 313: (1963) 2 Cr.L.J. 70.

It follows from what S. 60 says that the witness proving the information must state in Court what the information was and a mere formal proof of the memo. of information by proving the signatures of the Police Officer who recorded it, will not be sufficient: I.L.R. (1964) 14 Raj. 715: 1964 Raj.L.W. 171.

Where neither the informant deposed to by the Police Officer as having given him information about some accused would carry prohibited liquor in a truck from Baroda to Ahmedabad and would be followed by other accused in a taxi nor the owner of the truck deposed to by another witness claiming to have been made the truck's nominal owner was examined as witnesses in the Court, *held*, the evidence was inadmissible for being hearsay: A.I.R. 1983 S.C. 906: 1983 Cr.L.J. 1276: (1983) 1 Crimes 1070: 1983 U.J. (S.C.) 722.

2. Direct and circumstantial evidence.—Legal evidence may be direct or indirect. Direct evidence is what is defined in S. 60 *vis-a-vis* oral evidence. As against direct evidence postulated by Ss. 60, 62 and 63, there is also another type of evidence known as circumstantial evidence. Therefore, when one speaks of direct evidence it is to distinguish it from circumstantial evidence. But both direct evidence and circumstantial evidence would be legal evidence: (1979) 2 L.L.N. 480: (1980) 56 F.J.R. 261: 1979 Lab.I.C. 1041 (Del.) (D.B.).

Where the fact in issue is the particular time when an appointee filled up a particular post, *held*, that person's evidence thereon would be direct evidence within the meaning of S. 60; on that evidence being challenged, he would have to produce other evidence like the order of his appointment, if in writing; if he does not do that, it would be for the Court to determine on appreciation of evidence whether he should be believed; but his oral evidence is undeniably relevant and admissible: A.I.R. 1971 Ker. 193: 1971 Ker.L.T. 19: 1971 Ker.L.J. 177: 1971 M.L.J. (Cr.) 89 (F.B.).

Circumstantial evidence is evidence which without going directly to prove the existence of a fact gives rise to a logical inference that such a fact does exist. The conviction can safely be based on circumstantial evidence provided the several circumstances relied upon by the prosecution are established beyond doubt that the incriminating facts are such as to be incompatible with the innocence of the accused and incapable of explanation on any reasonable hypothesis other than that of the accused's guilt. The circumstantial evidence, however, in case where a conviction is based thereon, should be scrutinised properly and then alone a conviction can be based on circumstantial evidence when the facts proved are incapable of explanation except the guilt of the accused. In certain cases the circumstantial evidence may be much more stronger than what is called a direct evidence: 1967 Cr.L.J. 484: 1967 Kash.L.J. 162: A.I.R. 1967 J.&K. 22.

Appreciation of evidence—Criminal trial—Circumstantial evidence—Where evidence is of circumstantial nature circumstances from which conclusion of guilt is to be drawn should in first instance be fully established and all facts so established should be inconsistent with any other hypothesis but guilt of accused: 1967 All.W.R. (H.C.) 352. *See* also A.I.R. 1967 Del. 14: 1967 Cr.L.J. 628; 28 Cut.L.T. 305.

Circumstantial evidence—Appreciation of—When can be made basis of conviction—Benefit of doubt: 1965 M.L.J. (Cr.) 553: (1963) 2 S.C.R. 405: (1963) 1 Cr.L.J. 235: A.I.R. 1963 S.C. 200.

Circumstantial evidence not excluded: A.I.R. 1928 Cal. 498.

Murder trial. *See* Evidence Act, 1872, S. 5: 1967 Cr.L.J. 357: A.I.R. 1967 Goa 21.

Abandonment of possession is a question of fact and it can be inferred or proved from circumstances or circumstantial evidence: A.I.R. 1967 Punj. 252.

3. Inadmissibility of hearsay evidence.— Rule against receiving hearsay evidence is designed to save people from indirect indictment on the basis of testimonial assertion which is *per se* not direct in character: (1991) 4 Karn.L.J. 398: (1991) 1 Crimes 688 (D.B.).

Hearsay evidence is treated as untrustworthy because the original declarant of the statement is not put on oath, nor subjected to cross-examination; the truth of the original statement is diminished in course of repetition; admissibility of hearsay evidence would open up opportunities for fraud, and would encourage substitution of weaker for stronger proof of a fact in issue or a relevant fact: (1971) 37 Cut.L.T. 477: (1971) 1 Cut.W.R. 960 (D.B.); 1982 M.P.W.N. 388.

The concept of what is commonly known as hearsay evidence is entirely different. When witness *A* says that *B* told him about the happening of event *X* (though *B* is not before the Court), *A*'s assertion about the event *X* being not based on his own observation, he is not qualified to speak of it; hearsay evidence is inadmissible to prove a fact but it does not necessarily preclude evidence as to a statement having been made upon which certain action was taken or certain results followed: (1979) 2 L.L.N. 480: (1980) 56 F.J.R. 261: 1979 Lab.I.C. 1041 (Del.) (D.B.). *See* also 1982 M.P.W.N. 446.

Phipson in his Law of Evidence points out infirmities of hearsay evidence: (*1*) the source of hearsay may be irresponsible, neither stating on oath nor subject to cross-examination; (2) depreciation of truth by repetition; (3) opportunities of fraud it may open up; (4) tendency to protract legal inquires; and (5) encouraging weaker instead of stronger proofs. Phipson, however, did not consider such evidence as truly irrelevant. Statutory changes in England have made first hand hearsay admissible; even in India great evidentiary value is attached to dying declarations and retracted confessions. [1975 Lab.I.C. 986: 1975 Cur.L.J. 1 (P.&H.), Overruled]: A.I.R. 1976 P.&H. 381: (1976) 78 Punj.L.R. 842 (F.B.).

What a person finds as a result of investigation is absolutely shut out by S. 60 as hearsay evidence. It is the duty of the Court to disallow hearsay evidence even if it is not objected to by either side. Judges should stop witnesses from giving hearsay evidence: (1965) 6 Guj.L.R. 776: (1965) 2 Cr.L.J. 448.

Hearsay evidence—Admissibility in evidence. Per *Majority*.—It is true that the statement of the wife as to what her husband told her would be merely hearsay and would not be admissible in evidence as a statement of the husband but where the evidence of the wife shows that she herself was displeased with the party concerned and it was really to emphasize the displeasure of her family and its head that the husband's name was brought in the party concerned cannot derive any advantage from the technical objection to the reception of the husband's statement as being second-hand: A.I.R. 1964 S.C. 72.

Hearsay evidence, what is—Distinction between fact and truth—Statement made to a witness by person not called as witness hearsay when object is to establish contents of statement—It is not hearsay when the fact of its having been made sought to be established mentioning an eye-witness in F.I.R.—Statement of person recording F.I.R. admissible to prove that informant mentioned as eye-witness. *Held*, on the facts of the case, that the evidence (of the person recording the F.I.R.) was inadmissible to prove that the particular witness named in F.I.R. was in fact present at the time of occurrence but it was admissible to prove that the informant had mentioned his name to the person recording the F.I.R.: 1961 M.P.C. 82: (1961) 1 Cr.L.J. 270: A.I.R. 1961 Madh. Pra. 45.

History sheet maintained in the Police Station is not admissible in evidence at all as proof of a man's character because it may be based on information that the Police receives from time to time. It would, therefore, be hit by the provisions against hearsay evidence: 1959 Cr.L.J. 694: A.I.R. 1959 Cal. 342.

Hearsay evidence—Evidence of the person though not present at time of execution of distress warrant that the property of accused was found locked, is merely hearsay evidence and is inadmissible: 1969 Mad.L.W. (Cr.) 241.

Statement of dead person having special means of knowledge—Even if such statement as based on hearsay is admissible, provided it is *'ante litem motam'*: 1965 All.W.R. (H.C). 75.

Opinion evidence is hearsay and becomes relevant only if the condition laid down in S. 47 is first proved. Thus, where there was oral evidence identifying the signature but the witness did not depose that he was familiar with the handwriting of the person whose signatures were to be identified, *held*, no reliance could be placed on evidence of such witness alone: A.I.R. 1975 S.C. 290: (1974) 2 S.C.C. 660.

Where in an industrial dispute pertaining to the charge of fraud by a bank cashier established in a domestic enquiry wherein the complainant was not examined, and the Tribunal set aside the enquiry as based on 'hearsay' evidence, *held*, the Tribunal committed an error of law; the law is well-settled that the strict rules of evidence do not apply to domestic enquiries: A.I.R. 1982 S.C. 673: (1982) 1 S.C.C. 143.

Though there is no bar against the reception of hearsay evidence by domestic tribunals, the extent of its receipt and use must depend on the facts and circumstances of each case and the principles of natural justice. [1975 Lab.I.C. 986: 1975 Cur.L.J. 1 (P.&H.), Overruled]: A.I.R. 1976 P.&H. 381: (1976) 78 Punj.L.R. 842 (F.B.).

Any person can give evidence about what he heard; but it would be inadmissible for proving the truth of that statement as hearsay; even before a domestic tribunal, it must be made in the presence of the persons against whom an enquiry is held; if made behind his back, it ought not to be treated as substantive evidence; this is one of the basic principles which cannot be ignored on the mere ground that domestic tribunals are not bound by the technical rules contained in the Evidence Act: 1973 Lab.I.C. 771 (Del.) (D.B.).

The rule against hearsay is patently unclear; a piece of evidence may be hearsay in one part and not in the other; thus, where the witness deposed that the Police Officer had told him that vehicles and drivers of the Janata Party were detained in the Police Station under the Home Minister's instructions, *held*, the evidence in respect of the Home Minister's instructions alone is inadmissible as hearsay: A.I.R. 1978 N.O.C. 173 (Gau.).

Admissibility of evidence actually heard by witness. *See* 1984 Cr.L.J. 209 (Bom.).

Where the testimony of a witness is entirely hearsay and on some matters, hearsay of hearsay, it cannot be admitted in evidence: 1958 M.P.L.J. 833: A.I.R. 1959 Madh. Pra. 84.

Hearsay—Plaintiff deposing that his deceased mother gave names in respect of family pedigree—No corroboration by independent evidence—Statement is inadmissible—Not covered by S. 32(5): (1968) 2 M.L.J. 487: (1968) 81 Mad.L.W. 421.

A catalogue or a price list is a statement put out by the sellers regarding the price at which they are prepared to sell the goods or articles mentioned in it. It contains an invitation to make an offer, to purchase at the price stated which the seller is prepared to accept. It cannot be regarded as hearsay evidence. Any person who receives a catalogue can prove it and thereby prove the statement made by the sellers regarding the price at which he would be prepared to sell. Such a catalogue is, therefore, admissible in evidence without the seller issuing it being called in as a witness: I.L.R. (1948) Nag. 922: A.I.R. 1949 Nag. 282.

Statement by person as to what another reported to him how far evidence, *see* 97 I.C. 785: A.I.R. 1926 Mad. 1003.

The failure of an advocate to object to the admission of evidence cannot so alter the character of testimony as to convert into corroborative evidence that which the law regards as merely fit for rejection as hearsay: I.L.R. (1963) 2 Punj. 263: (1963) 65 Punj.L.R. 1029: A.I.R. 1963 Punj. 449.

Election Tribunals under the U.P. Municipalities Act are 'Courts' and the Act is applicable—Hearsay evidence, therefore, not admissible—Two out of fifty petitioners speaking to the fact that they were all misled by a mistake in the spelling of the name of a candidate—Statement of two on behalf of others is hearsay evidence not admissible: 1967 All.L.J. 5.

Where the truth of what *A* told *B* is in issue, what *B* says *A* told him is hearsay and inadmissible in the absence of evidence of *A*. The outlook would, however, be otherwise where the object of such evidence is not to establish the truth of *A*'s statement but only the fact that *A* did make a statement: A.I.R. 1970 Cal. 38: (1969-70) 74 Cal.W.N. 168.

A newspaper report as to proceedings of a Legislature is only hearsay evidence. Such report is not one of the documents referred to in S. 78(2) by which such proceedings may be proved: A.I.R. 1953 Him. Pra. 41.

Newspaper report—Presumption of genuineness—Proof of facts reported: (1961) 63 Punj.L.R. 794: A.I.R. 1961 Punj. 215: (1961) 1 Cr.L.J. 710. *See* also (1988) 2 Cal.L.J. 184.

Where the affidavits of those who had actually heard the Chief Minister's press statement were not filed but the reports carried thereabout in the press alone were filed in the Court, *held*, the press reports are no substantive evidence; they are not admissible: A.I.R. 1972 Goa 1.

Where on a charge of plying a car for hire without permit the constables only deposed to what a passenger told them (and that passenger was not examined), *held*, such evidence was excluded by S. 60: 1933 Mad.W.N. 1424. When hearsay relevant evidence, *see* (1904) 6 Bom.L.R. 34; I.L.R. 5 Rang. 18; A.I.R. 1927 P.C. 15: 52 M.L.J. 376 (P.C.); 24 Mad.L.W. 227: A.I.R. 1926 Mad. 1003; (1936-37) 41 Cal.W.N. 1103 (evidence of family tradition).

Hearsay evidence—There is no rule against hearsay in giving first information—Cr.P. Code, 1898, S. 154: I.L.R. (1967) 1 Ker. 640.

Where *A* in his deposition refers to a talk he had with *B*, the accused, saying that he had scuffle or fight with deceased *C*, *A* who heard it so said can speak about it and that would be direct oral evidence in respect of that fact, and if *A* then spoke to *D* and *D* so says in Court, would become hearsay type of evidence as it would not fall under S. 60 of the Evidence Act with regard to the fact sought to be established in the case. Such evidence can become admissible under S. 157 of the Evidence Act, inasmuch as it is sought to corroborate the testimony of *A*. But that can arise only if *A*'s evidence of such fact is to be corroborate. If, therefore, *A* does not refer to any such talk he had with *B*, the accused, in his evidence before Court, there cannot arise any question of corroboration and S. 157 of the Evidence Act cannot come into play for admitting evidence of *D*: 1968 Cr.L.J. 54: A.I.R. 1968 Guj. 11.

Where the witness saw the accused's wife running out of the house crying *bachao-bachao* and that the accused had killed the children and was going to kill her and he was also told by the wife of the accused's younger brother that the accused was killing the children, and another witness also heard the accused's wife that the accused had killed the children and would beat her with scissors, *held*, the evidence of both the witnesses is admissible; they are not hearsay but relevant facts. [1978 Cr.L.J. 26 (S.C.), Rel. on]: 1988 Cr.L.J. 627 (D.B.) (Del.).

4. Evidence of fact which could be seen.—No material can be relied upon to establish a contested fact which are not spoken to by persons who are competent to speak about them and are subjected to cross-examination by the party against whom they are sought to be used. If a letter or other document is produced to establish some fact which is relevant to the case, the writer must be produced or his affidavit in respect thereof be filed and opportunity afforded to the opposite party who challenges this fact. This is both in accord with the principles of natural justice as also according to the O. 3, C.P.Code and the Evidence Act, both of which incorporate these general principles: A.I.R. 1993 Del. 330.

5. Consent—Effect of.—The correctness of the contents of the letters cannot and does not stand proved as soon as it is admitted that the letter had passed between the parties: (1960-61) 65 Cal.W.N. 1206.

6. Opinion evidence.—The portion of S. 60 which provides that the person who holds an opinion must be called to prove his opinion does not necessarily mean that it must be proved only by the person whose conduct expressed the opinion; it can be proved either by the testimony of the person himself whose opinion is evidence under S. 50 or by some other person acquainted with the facts which express such opinion: A.I.R. 1972 Ori. 141: (1972) 38 Cut.L.T. 44.

Opinion evidence—Not to be given by witness other than expert—Witness stating 'Signature seems to have been ceased' by accused—Witness not an expert—Evidence cannot be allowed: (1965) 6 Guj.L.R. 776: (1965) 2 Cr.L.J. 448.

As to persons, who can give opinion evidence, *see* I.L.R. 25 Mad. at page 209; I.L.R. 23 All. 37 (P.C). As to evidence of admission, *see* I.L.R. 5 Mad. 239; 4 L.B.R. 121; 2 Weir 762.

The object of identification of the dead body by the Doctor is to relate the post-mortem report to the dead body and to rule out all chances of confusion; therefore, the

prosecution must establish by positive legal and admissible evidence that the post-mortem report relates to the dead body of the deceased; the doctor's evidence of such identification is obviously hearsay he having no personal acquaintance with the deceased: (1971) 37 Cut.L.T. 477: (1971) 1 Cut.W.R. 960 (D.B.); (1986) 3 Crimes 145 (Cal.).

Where a Doctor who examined the injuries was not examined and injury reports were taken in evidence under S. 294, Cr.P.Code, *held*, the injury reports could not be used by the prosecution for proving injuries on the injured: 1988 Cr.L.J. 1431 (Pat.).

A medical certificate tendered by a party without the medical man giving the certificate swearing an affidavit, is the worst form of hearsay evidence, because it is merely what the Doctor had told him in writing. The certificate is wholly inadmissible in evidence: A.I.R. 1950 Cal. 173. *See* also 1957 M.P.L.J. 633 (Report of Health Officer).

7. Opinion evidence as to relationship.— [*See* also S. 50]. When oral evidence is led to establish relationship, that evidence must be of an opinion and such opinion may be given by any person who has any special means of knowledge on the subject either being member of the family or otherwise, but such opinion must be expressed by conduct and such conduct can only be proved under S. 60 by a person who has actually seen or experienced the conduct which means an overt act. The opinion, which means coming to a conscious judgment or conviction, must emanate from the conduct exhibited showing that the person concerned has formed such a judgment or conviction: A.I.R. 1987 Ori. 187.

Opinion evidence as to relationship—S. 60 does not delimit the scope of S. 50—Opinion as expressed by conduct may be proved by any other acquainted with the facts constituting the conduct: A.I.R. 1968 All. 58.

Opinion on relationship expressed by conduct—Evidence of mere general reputation (without conduct) is not admissible as proof of relationship: 1969 B.L.J.R. 932.

It is the conduct or outward behaviour which must be proved in the manner laid down in S. 60: A.I.R. 1985 Ori. 171 (D.B.).

Proof of relationship by evidence of conduct—S. 50: A.I.R. 1960 Pat. 480.

Requisites of S. 50—Opinion evidence of relationship—School teachers admitting boy into school, giving lessons and marking attendance—Conduct not such as could express opinion on the boy's paternity—Evidence not direct: A.I.R. 1968 All. 58.

Determination of relationship—Opinion expressed by conduct is admissible: A.I.R. 1968 Pat. 481.

Evidence as to relationship—Quality of oral evidence has to be considered, besides any documentary evidence on point: 1969 B.L.J.R. 932.

Conduct of member of family—Person watching the conduct of members to be treated as person with special means of knowledge—Such person's evidence is admissible under S. 60: A.I.R. 1961 Pat. 82.

Where the plaintiff and her witness both testified orally that the deceased during his life time and the plaintiff used to treat each other as father and daughter, *held*, it is not hearsay evidence because neither of them stated to be present when the deceased so conducted himself, it cannot be rejected on that count; it is indeed admissible evidence under S. 50: A.I.R. 1976 P.&H. 24: 1975 Rev.L.R. 567.

The plaintiff's evidence that her grandmother used to say in the presence of others that the plaintiff being the sole descendent of her family would be the only owner of the suit property after her death, *held*, goes a long way in establishing her title when there is other evidence supporting her case. [A.I.R. 1959 S.C. 914, Foll.]: A.I.R. 1976 Cal. 238.

Rule of exclusion of hearsay evidence—It is relaxed in cases where marriage or relationship of one person to another has to be proved. *See* Evidence Act, 1872, S. 50: 1969 All.W.R. (H.C.) 579.

Where in the absence of clear documentary evidence of the husband's second marriage, the husband examined only himself to deny it when he could have examined other witnesses from the village as it could not be believed that the entire village was inimical towards him, *held*, the oral evidence on record adduced on behalf of the wife should be considered not disjointedly and combined result of the oral testimony of all witnesses be considered and accepted; the second marriage stood established: (1987) 1 Hindu L.R. 432: I.L.R. (1987) Karn. 15: (1987) 2 Karn.L.J. (Sh. N.) 294 (D.B.).

The oral testimony of three witnesses to the effect that the husband was living with another woman who gave birth to a child during her cohabitation with the man, *held*, such evidence is admissible and establishes that the husband during the subsistence of his earlier marriage was living in adultery: (1986) 1 Hindu L.R. 379 (Madh. Pra.).

The fact of adoption must be proved like any other fact; but where a long period has lapsed between the adoption and its being questioned, every allowance for absence of evidence to prove adoption must be favourably entertained as direct evidence may not be available. But it is equally well settled, if direct evidence is available despite lapse of time, such relaxation is not permissible. Thus, where all those present at the adoption were not dead and were available to be examined *held*, the examination of only one witness claiming to have witnessed the adoption ceremony and whose evidence did not satisfy the requirements of Ss. 50 and 60, was not sufficient to prove adoption: A.I.R. 1985 Ori. 22 (D.B.). *See* also (1979-2) 20 Guj.L.R. 317 [A deed of adoption, even if registered, cannot be pressed into service to prove the factum of adoption, which, if challenged, must be established by oral testimony of persons who were present at the ceremony deposing to the effect that all the formalities including the act of physical giving and taking of the boy in lawful manner had taken place].

A person who claims title on the basis of adoption must prove the adoption and it has to be established that the essential ceremony of giving and taking did take place. That burden, however, shifts to the person who challenges the adoption to disprove the adoption when on account of long lapse of years, direct evidence of giving and taking has disappeared: A.I.R. 1985 Ori. 171 (D.B.).

Ancient adoption—Boy taken in adoption soon after birth—His evidence as to ceremony of giving and taking is hearsay: A.I.R. 1970 S.C. 1286.

Evidence of birth—Nature of evidence: I.L.R. (1961) Bom. 963: A.I.R. 1963 Bom. 25.

8. Evidence in case of fraud.—The party alleging fraud is bound to establish it by cogent evidence and suspicion cannot be accepted as proof. Unless, therefore, the proved circumstances are incompatible with the hypothesis of the person charged with fraud having acted in good faith, they cannot be accepted as affording sufficient proof of fraud: I.L.R. (1959) Cut. 526.

9. Proviso first.—In order to prove ancient facts of a public nature, public histories of repute are receivable in evidence as public documents. The opinion of standard authors may be referred to. The Court, however, can dispense with the evidence of what may be regarded as notorious facts of public history. S. 60 makes provision for treating the opinion of experts as expressed in treatises of persons who are dead as evidence in proper cases. The authors of such learned treatises must be shown to be properly qualified to make statements upon the subject: A.I.R. 1981 Madh. Pra. 82: 1981 M.P.L.J. 429: 1981 Jab.L.J. 617 (D.B.).

When the author of a book, a passage from which is relied on as to the usages and tenets of any body of men and family as of a person having special means of knowledge, is still alive, *held*, his opinion in aforesaid passage is not admissible in evidence because of the provisions of S. 60: A.I.R. 1973 Pat. 206: 1973 Pat.L.J.R. 153 (D.B.).

Facts of which Court may take judicial notice—'History of Hydraulic showing in India' by N. Barraclough—Court may resort to this treatise by an expert as a document of reference under S. 57, penultimate para. even though it may not be admissible under S. 60, para. 5, first proviso, as not satisfying the tests of being offered for sale and the author being dead, unavailable, etc.: (1965-66) 70 Cal.W.N. 1108.

Reliance to text-books without expert evidence. *See* (1917-18) 22 Cal.W.N. 745; I.L.R. 38 Mad. 466.

Proof of will—Proviso does not apply to original of will: (1967) 2 An.W.R. 83.

10. Miscellaneous.—A copy of an affidavit is not admissible in evidence where even the original affidavit is not produced and no case is made out for the admission of secondary evidence of the affidavit. [A.I.R. 1937 Lah. 593, Rel. on]: 1966 Cr.L.J. 1132: A.I.R. 1966 Him. Pra. 52.

Where a person, closely related to the victim as well as the convict, had filed an affidavit in the trial Court exonerating the convict of the offence of homicide not amounting to murder but was not examined as a defence witness, *held*, the Courts below had rightly

ignored the affidavit; the law requires that a living person's evidence in judicial proceedings must be tendered by examining him as a witness in the Court and not by way of affidavit unless the law permits or the Court expressly allows it; non-consideration of the affidavits by the Courts occasioned no miscarriage of justice. [1978 W.L.N. (U.C.) 103: 1978 Cr.L.R. 328 (Raj.), Affirmed]: A.I.R. 1989 S.C. 705: 1989 Cr.L.J. 845: (1989) 2 Crimes 181.

In appreciating oral evidence in each case it is to be seen whether the witness is truthful and whether there is anything to doubt his veracity in any particular matter in his deposition; if he is found to be untruthful on material facts the matter ends; if he is partly truthful, the Court may take the precaution of seeking some corroboration, adequate and reasonable to meet the demands of the situation; but it is not entitled to reject his evidence merely because he is a government servant, who, in the course of his duties or otherwise, might have come into contact with Investigating Officers and might have been requested to assist them. [(1985) 1 Scale 697, Foll.]: (1985) 60 Cut.L.T. 309.

Where in the absence of direct oral evidence, one witness orally deposed on the basis of information obtained from others that the vehicle at the time of the accident was being driven by a particular person, *held*, that particular person could not be said to have been proved as driving the vehicle when the accident occurred: A.I.R. 1983 All. 87 (D.B.). *See* 1981 B.L.J. 588.

Where the witness was independent and nothing special was suggested to him, *held*, his evidence is rightly believed by the Court below: (1991) 2 Rev.L.R. 45.

Evidence of statements made by a child to other people, or of conduct amounting to a statement, is not admissible in a criminal trial, when such child is not examined as a witness by reason of incompetency to depose: I.L.R. (1941) 2 Cal. 180: A.I.R. 1942 Cal. 214.

Where the evidence of the witness examined for a party stands on no higher footing than mere hearsay evidence, it is not open to any Judge to exercise a dispensing power and to admit evidence not admissible by the statute, because to him it appears that the irregular evidence would throw light upon the issue: I.L.R. (1954) Cut. 265: A.I.R. 1954 Ori. 198.

There is a distinction between factum and truth of a statement. Statement made by a person who is not examined as a witness is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admisible when it is proposed to establish by evidence not the truth of the statement but the fact that it was made: (1968-69) 73 Cal.W.N. 751. Where the informant of the first information report died a natural death before he could be examined as a witness, the evidence of the witness who recorded the report if inadmissible to prove that certain person was in fact present at the time of the occurrence but his statement is admissible to prove that the informant had mentioned his (eye-witness's) name to him: 1961 M.P.L.J. (Notes) 309: 1961 M.P.C. 82: A.I.R. 1961 Madh. Pra. 45.

Where the statement of a prosecution witness, examined earlier, to another prosecution witness, who is examined later, is sought to be made use of by the prosecution without the earlier prosecution witness having been asked about it in his examination, the earlier prosecution witness to whom the statement is ascribed must be given an opportunity to explain it. The witness should at least be recalled for the purpose. In the absence of such opportunity, the statement of the earlier prosecution witness is inadmissible in evidence: 1957 Nag.L.J. 1: A.I.R. 1956 S.C. 738.

A panchanama can never be treated as substantive evidence of the facts recorded therein. These facts have to be proved independently of the panchanama by the testimony on oath of the panch who had seen these facts and who was a party to the panchanama. The panchanama is useful only to corroborate or contradict the panch witness or to refresh his memory: 6 Sau.L.R. 517: A.I.R. 1955 Sau. 32.

Statements recorded in an inquest report by a headconstable as per direction and in the presence of the Sub-Inspector in a totally different case where no body would have thought of fabricating evidence in connection with the present case, can be deposed to by the Sub-Inspector in a case where these entries are relevant: 1969 Mad.L.W. (Cr.) 168.

A statement of the Investigating Officer in the Inquest Report of what he observed and found on the spot is direct primary evidence;

it is, in the eye of law, the best evidence; unless proved to be suspect, unreliable, perfunctory or dishonest, it may safely be relied upon; besides, not being a statement of a witness recorded in investigations, it is not hit by S. 162 of the Cr.P.Code. [A.I.R. 1956 S.C. 425; A.I.R. 1975 S.C. 667 and A.I.R. 1977 S.C. 135, Dist.; A.I.R. 1976 S.C. 1421, Expl.]: A.I.R. 1978 S.C. 1558: (1978) 2 S.C.C. 518.

Report of the Probation Officer as to previous conviction of accused received behind the back of the accused cannot be used against the accused, when Probation Officer has not been examined, and his report has not been formally proved: 1957 Ker.L.T. 633: 1957 M.L.J. (Cr.) 655: 1958 Cr.L.J. 175.

'Statement of persons as to cause of his death or as to any circumstances of the transaction which resulted in his death'—Conviction based on identification: 1967 Ker.L.T. 466.

Question whether woman is prostitute and running a brothel in her house—Proof—Nature of evidence: (1963) 2 An.W.R. 336: A.I.R. 1964 Andh. Pra. 400: 1963 M.L.J. (Cr.) 529.

Where, none of the informants from whom, the prosecution witnesses had learnt about the bride burning was examined by the prosecution, *held*, the evidence of the prosecution witnesses is not admissible: (1992-2) 40 B.L.J.R. 779 (D.B.).

Where a prosecution witness in a bride burning case disclosed the complicity of a convict to whom the witness was inimical, for the first time only four days after the occurrence with no explanation therefor, *held*, his testimony as an eye witness cannot be relied upon: (1992-2) 40 B.L.J.R. 779 (D.B.).

Where except the oral testimony of Food Inspector there was no documentary evidence such as postal receipt, acknowledgment, receipt of sending memorandum and specimen of seal not produced, *held*, conviction could not be sustained: 1979 W.L.N. (U.C.) 389 (Raj.).

Trust property mortgaged with Life Insurance Corporation and loan raised for repairs of the property—Evidence of inspector who inspected the condition of the property—His evidence is primary evidence within S. 60 in so far as it refers to a fact which could be seen, and he says that he saw it but it is hearsay evidence in so far as he says that the object of the loan was to meet the expenses for repairs and additional constructions: (1968-69) 73 Cal.W.N. 877: A.I.R. 1970 Cal. 292.

A body corporate, being incapable of making an oath or affirmation, is incompetent to depose as a witness despite its being a juridical person; it is not invested with any of the sense organs to see, hear or perceive a thing: 1991 Cr.L.J. 828: (1991) 1 Cal.L.T. (H.C.) 198: (1989-90) 94 Cal.W.N. 723: (1990) 1 Cal.L.J. 153 (D.B.).

Policy matters of company leading to retrenchment can be proved through the manager—Resolution of Board of Directors need not be produced: (1969) 2 S.C.R. 976: (1969) 3 Um.N.P. 144: A.I.R. 1970 S.C. 1334.

In many cases the Directors of the companies may feel inclined to make incorrect statements in the balance-sheet for ulterior purposes. While that is no reason to suspect every statement made in a balance-sheet, the balance-sheet does not by itself prove any fact mentioned therein and the law requires that such an important fact as the utilisation of a portion of the reserve as working capital has to be proved by evidence given on affidavit or otherwise and after giving an opportunity to the opposite party to contest the correctness of such evidence by cross-examination: A.I.R. 1960 S.C. 1006: (1960) 2 S.C.R. 906.

Balance-sheet and Profit and Loss Account of company—Evidentiary value—Admissibility in proceedings before Industrial Tribunal—Burden of proof as to correctness of statement therein: (1960-61) 65 Cal.W.N. 1029: A.I.R. 1962 Cal. 375.

Certificates, Reports of Experts—Value of—Admission in evidence: A.I.R. 1967 Andh. Pra. 338.

If the co-sharers pay their share of the land revenue to the lambardar, and sit silent, under the belief, that no untoward happening in respect of the village share would take place, their inaction cannot be blamed. Therefore, where a co-sharer, over and above his share of land revenue, advanced some extra amount to the lambardar, and the latter did not pay to the Government in consequence of which the whole village share was auctioned and purchased by the lambardar himself through his nephew for an amount little more than the money advanced. *Held*, that the circumstances definitely led to one conclusion that it was a deliberate device of the lambardar to get the property wrongfully and the fraud was proved. A suit to set aside such a revenue sale was not barred by S. 149 of the C.P.L. and

CHAPTER V

OF DOCUMENTARY EVIDENCE

61. Proof of contents of documents.—The contents of documents may be proved either by primary or by secondary evidence.

Revenue Act, but it fell within the ambit of the same: 1958 M.P.C. 494: 1958 M.P.L.J. 648: A.I.R. 1959 Madh. Pra. 11.

Kabuliat—Evidentiary value—Kabuliat can be used as corroborative evidence of oral lease for less than a year: 1962 All.L.J. 773: 1962 All.W.R. (H.C.) 646: A.I.R. 1962 All. 604.

Where a Special Officer appointed by the Court in proceedings under S. 144(2), Cr.P. Code, did not record the witnesses' statements in deposition form, *held*, such statements could not be taken as substantive evidence being hit by rule of hearsay: 1989 Cr.L.J. (N.O.C.) 39 (Cal.).

Map prepared for suit purposes—Admissibility and value of: A.I.R. 1958 Ker. 358.

To measure up the work of the contract and to take such part of the work of the contract as shall be unexecuted out of his hands, and to give it to another contractor to complete in which case any expenses which may be incurred in excess of the sum which would have been paid to the original contractor if the whole work had been executed by him (of the amount of which excess the certificate in writing of the Executive Engineer shall be final and conclusive) shall be borne and paid by the original contractor and may be deducted from any money due to him by Government under the contract or otherwise or from his security deposit or the proceeds of sale thereof, or a sufficient part thereof. Per *Majority.—Held* that there was an agreement for the execution of work between the Executive Engineer and the Patna Flooring Company. Any work which was given in exercise of the powers under Cl. (2)(*c*) had also to comply with the provisions of Art. 299 of the Constitution. A contract entered into with the Government in contravention of S. 175(3) of the Government of India Act, 1935, or Art. 299 of the Constitution was wide and unenforceable. The decision in Chatturbhuj's case (A.I.R. 1954 S.C. 236) could not be extended to cover a case where the Government had in fact not ratified the contract. The Legislature had not chosen to use the word 'agreement' but had used the word 'contract' in S. 7(*d*). Therefore, a mere agreement entered into in contravention of Art. 299 of the Constitution and in fact ratified could not be called a 'contract' within S. 7(*d*) of the Representation of the People Act. The fact that the plaint in the suit by the respondent against the Government for money the respondent was trying to make out that there was a direct contract entered into between the P.W.D. and the respondent and the fact that the plaint did not allege any subsequent non-acceptance or refusal to ratify by the Government would not estop the respondent from proving in this case that on the materials on record it was clear that the Government had not ratified the contract with the respondent. The written statement filed by the Government in the money suit could not be used to destroy the inference which clearly arose from other documents in this case. Per *Hidayatuallah and Shah, JJ. contra*—There was a contract directly between the respondent and the State of Bihar relating to the execution of work, and the contract was made in the course of the respondent's trade or business. The admissions made by the respondent in his notice and the plaint in suit were sought to be explained by him on the plea that he had signed the plaint and the verification without reading the plaint of the suit as the plaint was required to be filed in great hurry. A similar explanation was also given in respect of the contents of the notice. This Explanation which was invented with a view to get out of the inconvenient admissions could not be accepted: (1966) 1 S.C.A. 532: A.I.R. 1966 S.C. 580.

Where in a prosecution for murder alleged to have been committed in a passenger bus, though the observation report prepared by the Investigating Officer revealed that the floor of the bus in question appeared to have been washed, but he had not spoken so in his evidence, *held*, said observation report should be proved like any other document as per the provisions of S. 60: 1995 Cr.L.J. 3100 (Andh. Pra.) (D.B.).

Proof of contents of documents. *See* Evidence Act, 1872, S. 47: A.I.R. 1968 Bom. 112.

Section 61—Notes.

See A.I.R. 1953 Pat. 310: 54 Cr.L.J. 1660. A combined reading of Ss. 61 and 62 show that the contents of a document must primarily be proved by production of the document itself for inspection of the Court; the truth of its contents, however, has to be proved by the

author of the document. [A.I.R. 1918 Cal. 988, Dissent. from]: A.I.R. 1983 Bom. 1: 1983 Mah.L.J. 339.

Documents relied upon must be placed on the Court's record; they have to be legally proved; they do not prove themselves; an authority acting thereupon without their being proved by witnesses, *held*, commits a grave procedural infirmity: A.I.R. 1989 Pat. 66: 1988 B.L.J.R. 698: 1988 B.L.J. 1069: 1989 B.B.C.J. (H.C.) 787.

It is only when a witness states that the contents of a document were written in his presence by a person then it can be said that said witness had proved writing of that person: 1982 Cr.L.R. 39 (Mah.).

Proof of execution of a document is no proof of the truth of its contents; the truth of the facts stated in the document, if denied, has to be proved by admissible evidence; under S. 61, the contents of documents are to be proved either by primary or secondary evidence and under S. 62 "primary evidence means the document itself produced for the inspection of the Court". Even on such proof the Court is not bound to accept the contents, unless it is satisfied about their truth. [A.I.R. 1981 S.C. 2085, Rel. on]: A.I.R. 1983 Ker. 81 (D.B.).

Where execution of the deed of rectification in respect of an earlier sale deed was proved but it was not exhibited on the ground that its contents were not proved, *held*, the document stood proved as soon as its execution was proved; the proof of contents was wholly irrelevant; proof of contents may be necessary in a given case but its proof and evidentiary value are two distinct and different factors: (1994) 1 Bom.C.R. 211 (D.B.).

Where documents filed by a party are on the Court's record but not proved, *held*, they can be looked into without further proof at the instance of the other party: A.I.R. 1984 Del. 20.

The law is clear that documents admitted without being proved and without objection by the party affected cannot be discarded; the entire contents of such documents would become admissible; mode of proof, a matter of mere procedure, can be waived, and may not be allowed to be objected to later on; but statutorily inadmissible evidence cannot be rendered admissible by consent: (1978) 46 Cut.L.T. 287.

Once a document is marked on admission, contents thereof are also treated to be admitted but not its truth. Truth of correctness is to be ascertained from the evidence: A.I.R. 1993 Ori. 103.

It is elementary that documents, inducted in a suit as proof, have to be proved under the Act so that their contents can be taken as evidence; the Court is not obliged to look into the contents of documents merely marked by consent unless they are formally proved; the Act permits judicial notice of only certain documents and of no other document: (1982) 95 Mad.L.W. 297. *See* also (1986) 1 M.L.J. 207.

The principles of law laid down in (1982) 95 Mad.L.W. 297 are not wholly erroneous but require modification in the light of the earlier Division Bench judgments in (1974) 2 M.L.J. 535 and (1974) 2 M.L.J. 260, the correct position being that "permitting a document to be marked by consent only means that the party consenting is willing to waive his right to have the document in question proved"; the single Judge in (1982) 95 Mad.L.W. 297, however, took the erroneous view that formal proof is still required even if the document was marked by consent; marking by consent, however, certainly does not mean that every statement made therein is correct: A.I.R. 1986 Mad. 341: 1986 T.L.N.J. 1: (1986) 1 M.L.J. 283: (1986) 99 Mad.L.W. 561 (D.B.).

When the documents had been marked without objection, it is not open to the parties to object to their admissibility. Once the documents are properly admitted the contents of those documents are also admitted in evidence though those contents may not be conclusive evidence: (1975) 41 Cut.L.T. 869.

Where the certified copies under S. 57 of the Registration Act, of the sale-deeds were tendered and exhibited in evidence without objection, *held*, it amounted to the admission of the requisite circumstances and conditions for secondary evidence; no objection could be taken for the first time in appeal: A.I.R. 1990 Raj. 90.

Where the Counsel for the opposite party did not object to exhibition of a document while he was cross-examining the plaintiff's witness, *held*, it amounted to neither an admission of the document nor its contents; the Counsel could show that the document was not genuine so as to prove the defence: A.I.R. 1973 Bom. 40: (1973) 75 Bom.L.R. 318: I.L.R. (1973) Bom. 1197.

C.P.Code (1908), S. 75 and O. 26, R. 1—Contents of document—Proof—Evidence of attesting witness—Non-production on the ground that he was leper—Not proper—Leper held could be examined on commission: A.I.R. 1963 Ori. 29.

Recitals as to legal necessity in documents—Recitals are not by themselves proof of facts asserted—If the deeds are challenged at or near the time of execution, when independent evidence is available, the recitals are no proof of facts asserted: (1966) 8 Ori.J.D. 94.

Proof of contents of documents. *See* Evidence Act, 1872, S. 47: A.I.R. 1968 Bom. 112.

The fact that the man producing a document used the same to settle disputes between the villagers, and that before him the document was in the possession of his father, does not make the document a true copy of the original (chitta): 49 Cal.L.J. 546: A.I.R. 1929 Cal. 459.

Proof of document—Document produced from proper custody and drawn upon stamped paper purchased in name of alleged executor—*Held*, document was properly proved: (1967) 69 Punj.L.R. 578.

Balance-sheets relating to accounts do not prove themselves and the facts mentioned therein have to be proved by evidence given on affidavit or otherwise and after giving an opportunity to the opposite party to contest the correctness of such evidence by cross-examination: I.L.R. (1963) 2 Punj. 28.

Where impugned document showed that there was an account between the parties and in view of the account certain amount had become due, *held*, such a document could not be considered to be a promissory note even though there was an amount ascertained which was payable to the person named and there was promise to pay; it would not fall within S. 4 of the Negotiable Instruments Act, 1881; it would only amount to an agreement or acknowledgment of the amount due found on account stated; it would be admissible even if not stamped: A.I.R. 1995 Raj. 189.

Proceedings before Special Deputy Commissioner/Special Tehsildar appointed under Mysore (Personal & Miscellaneous) Inams Abolition Act, 1955 are not judicial proceedings and provisions of Evidence Act do not apply to the vouchers produced by the Inamdars before those authorities in support of their claim as to income from the Inams for determination of compensation: A.I.R. 1971 S.C. 1363: 1971 U.J. (S.C.) 564.

Factum of mortgage or passing of consideration is not 'contents of a document' within the meaning of S. 61.

Proving of the factum of a mortgage is not the same thing as proving the terms of the mortgage nor is proving the consideration for a mortgage the same thing as proving the terms of the mortgage: 1958 Raj.L.W. 457: I.L.R. (1958) 8 Raj. 459.

In a suit based on mortgage bond, the plaintiff filed day book and ledger but did not prove them though they were marked, nor were they put to the defendants in their cross-examination, *held*, mere marking of an exhibit does not dispense with its proof; thus, the said documents could not be used against the defendants: A.I.R. 1971 S.C. 1865: 1971 U.J. (S.C.) 644.

Since offences under S. 277 and under the later part of S. 506 of the Indian Penal Code are not compoundable, a compromise recorded to compound such offences in a criminal case is void *ab initio* under S. 23 of the Indian Contract Act; the compromise is inadmissible as well as incapable of being acted upon by the Court: A.I.R. 1979 All. 71.

Where the certificate issued by the Director of the Central Food Laboratory in a prosecution under the Food Adulteration Act, 1954 was not exhibited, *held*, it could not be used to enter conviction: 1989 Cr.L.J. 53 (Andh. Pra.).

If truth of the facts stated in a document is in issue, mere proof of its execution would not furnish evidence of their truth which would have to be proved by admissible evidence, *i.e.*, by the evidence of those persons who can vouchsafe for the truth of the facts in issue. But once the receipt of the cable and letter of the Managing Director was admitted by the other party and in the correspondence between them it made no overt or covert reference to the arbitration agreement and did not even reply to the letter and cable to controvert the averments made therein, *held*, it unmistakably established the truth of the averments in the cable and letter: A.I.R. 1981 S.C. 2085: (1981) 1 S.C.C. 80: (1981) 1 S.C.R. 899.

An entry in the Municipal Death Register containing several corrections, erasures and overwritings exhibited without objection only means that its formal proof was not insisted upon; but it does not mean that the opposite side cannot question its genuineness or credibility or contents; it only means that the other party cannot contend that the document has not been admitted in evidence, but it can certainly impeach the document and its contents in all other possible manners: A.I.R. 1978 Ori. 125: (1977) 2 Cut.W.R. 779: (1977) 44 Cut.L.T. 597.

Where the claim of being in exclusive possession of a property was based on entries in the revenue records but none of the witnesses had accepted the responsibility of testifying to the correctness of the account books of the joint family and no other important documents were produced in support of the

account books, *held*, the account books were liable to be rejected: A.I.R. 1989 S.C. 1269: (1989) 2 S.C.C. 630: (1989-2) 30 Guj.L.R. 1051.

In a motor accident claim case, the Tribunal cannot disbelieve a witness on the ground that being at a distance of about 225 feet from the place of accident, inferred by the Tribunal from the spot Inspector report prepared by the Magistrate which was neither produced nor proved before the Tribunal, and was, therefore, no evidence, *held*, the Tribunal acted erroneously; besides, evidence in criminal case cannot be used to discard the testimony of a witness recorded before the Tribunal itself: A.I.R. 1984 Madh. Pra. 173 (D.B.).

Where a sale agreement in its recitals conveys title to the vendee with absolute rights of alienation but without consideration, *held*, the document amounted to a sale deed even if it provided for execution of a regular sale deed; being unstamped and unregistered, it is not admissible. [A.I.R. 1961 Andh. Pra. 424, Foll.]: (1984) 2 An.W.R. 105: (1984) 1 An.L.T. 158.

Where a deed could not be construed either as recording a prior partition or a family settlement but was found to be a deed of partition, *held*, it required to be registered; being unregistered, it was inadmissible. [A.I.R. 1961 Ori. 41 and A.I.R. 1976 S.C. 807, Disting.]: A.I.R. 1986 Ori. 173 (D.B.).

Where a witness, an S.D.O., in support of his evidence, relied upon a complaint handed over to him by one 'A' but 'A', after seeing the same in the Court stated that it did not bear his signature and also deposed that there were two other persons with same name as his, *held*, as neither the contents of said complaint were proved nor maker thereof had been examined, it was inadmissible in evidence: A.I.R. 1986 S.C. 3: 1985 (Supp.) S.C.C. 611.

Where persons were detained under the T.N. Prevention of Dangerous Activities of Boot-leggers, Drug Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders and Slum Grabbers Act, 1982 on the basis of an occurrence which took place on 25-11-1991 at 3 P.M. but they alleged that they had in fact been arrested much earlier on that day and telegrams about their arrest had been sent to various authorities, and they impeached their detention solely on the ground that the detaining authority did not consider the telegrams, *held*, a telegram by itself is not an authentic document; it is like an unsigned/anonymous communication; unless it is confirmed by a subsequent signed application, representation or affidavit, its contents have no authenticity and is irrelevant for assessing the value of other authentic documents on the record; the detaining authority could not take the telegrams into consideration in the absence of any subsequent communication confirming the same: A.I.R. 1993 S.C. 2633: 1993 Cr.L.J. 3677: (1993) 2 Crimes 1189.

Where two boys arrested and interrogated by Army authorities found to be innocent were released after two days but did not reach home were sought to be produced in the Court by *habeas corpus* petitions moved by their mothers and the Army authorities by affidavit in opposition of the Brigade Major and other documents, not challenged by the petitioners, supported their plea of release which was assailed by the petitioners as fabricated documents of counterfeit release after the boys had been done to death by the Army, but the single Judge on the findings that the boys were in fact released, as claimed, dismissed the petitions—*Held*, on appeal, the findings of the single Judge were based on documentary evidence and non-return of the boys to their homes did not negative their release; strict provisions of S. 61 could not be applied to the facts and circumstances of the case; appeal dismissed: 1989 Cr.L.J. 1912 (Gau.) (D.B.).

Where the medical evidence reckoned the age of the prosecutrix approximately between 16 to 18 years of age and the Doctor in cross-examination admitted that it could be 19 years, her School leaving certificate was produced but it was not proved and the birth entry admittedly made in the Gram Panchayat was neither produced nor proved, and there was also difference in the date of her birth given by her parents, *held*, it could not be said that the prosecution has established the age of the prosecutrix as less than 18 years: 1979 Bom.C.R. 664.

Mutation in landlord's rent-roll—Proof of. *See* A.I.R. 1958 S.C. 521.

Where what was introduced in evidence by the plaintiff, albeit with no objection from the opposite side, was an exercise book, without page numbers, containing some slips of papers and none of the entries therein was proved by any witness, *held*, they do not constitute evidence under S. 34; non-objection by the opposite party does not take away the Court's right to question or scrutinise its evidentiary value; not having been proved as required under S. 61 by primary or secondary evidence, the documents must be brushed aside as mere scraps of paper not kept in the regular course of business. [A.I.R. 1967 S.C. 1058, Rel. on]: A.I.R. 1995 Gau. 23.

62. Primary evidence.—Primary evidence means the document itself produced for the inspection of the Court.

Explanation 1.—Where a document is executed in several parts, each part is primary evidence of the document;

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.

Illustration

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

Section 62—Notes.

The original, even in case of a public document, is its best evidence and always admissible; S. 62 and S. 64 which characterise the originals as primary evidence and admissible as such make no distinction between public and private documents: A.I.R. 1973 Bom. 14: (1972) 74 Bom.L.R. 505: 1972 Mah.L.J. 816.

A combined reading of Ss. 61 and 62 show that the contents of a document must primarily be proved by production of the document itself for inspection of the Court; the truth of its contents, however, has to be proved by the author of the document. [A.I.R. 1918 Cal. 988, Dissent. from]: A.I.R. 1983 Bom. 1: 1983 Mah.L.J. 339.

Proof of execution of a document is no proof of the truth of its contents; the truth of the facts stated in the document, if denied, has to be proved by admissible evidence; under S. 61, the contents of documents are to be proved either by primary or secondary evidence and under S. 62 "primary evidence means the document itself produced for the inspection of the Court". Even on such proof the Court is not bound to accept the contents, unless it is satisfied about their truth. [A.I.R. 1981 S.C. 2085, Rel. on]: A.I.R. 1983 Ker. 81 (D.B.).

Documents are required to be proved by primary evidence; it is only under certain circumstances when the original is not available that the secondary evidence may be admitted: 1982 Raj.L.W. 284 (D.B.).

Where the question for consideration was as to whether the command certificate or the oral evidence that a witness was on patrol duty is the primary evidence, *held*, the statement of that witness that he was on duty was the primary evidence and the command certificate was merely a piece of corroborating evidence: (1975) 41 Cut.L.T. 167.

One specimen of a newspaper is not a copy of another specimen of the same newspaper of the same date. There is no relation between them of copy and original. They are all counterpart originals each being primary evidence of the contents of the rest: A.I.R. 1930 Lah. 371 Award prepared in quadruplicate—Each signed by arbitrators—Each is original award A.I.R. 1959 Ori. 113. To bring document under Expl. II to S. 62, the whole document, together with the signature thereto, if any, must be made by one uniform process. Where a letter together with several copies are prepared by one process, namely, typing on a typewriter and one of them alone is afterwards signed separately, but the rest were only initialled, it cannot be said that the signature on the one and the initials on the rest have been made by one uniform process. The copies, therefore cannot be held to be primary evidence of the letter: A.I.R. 1937 Mad. 807: (1937) 2 M.L.J. 381. An agreement to pay rent for house property does not require to be attested and can therefore, be proved under S. 62 by the production of the document itself from proper custody. It is only when a document is required by law to be attested that it shall not be used as evidence in view of S. 68 until one attesting witness at least has been called for the purpose of proving its execution: 194 R.D. 117 (2).

Carbon copy of a document is primary o original document: 1982 Jab.L.J. 738. *See* als (1988-2) 94 Punj.L.R. 536, cited under S. 6 Note 10, *infra*.

A carbon copy of a search list with certai ink writings on it, is not admissible unde

S. 62. When a mere glance at the document would show that even apart from the ink writings the whole of it could not have been made by one uniform process, it would not satisfy the requirements of S. 62 and other sections of Evidence Act: 1958 Cr.L.J. 1178: A.I.R. 1958 Cal. 517.

Carbon copies of permits, written in hand, were being issued on behalf of the Central Government by Government officers, as a general practice, to licensees for transport of tobacco and were being accepted and used by them. They were evidence of duty having been paid on the tobacco covered by them. The counterfoils (corresponding to each foil) were being written and maintained. The carbon copy of the permit in question which was in fact utilised for committing an offence, was good and the impressions were very clear, especially as regards the signatures.

Held, (*i*) that the corbon copy of the permit was admissible as primary evidence of what it contained for comparison of handwriting and the pencil copy need not be called to be filed as original. It was not secondary evidence, (*ii*) even if it were secondary evidence, it would be admissible in evidence, under S. 63(*c*) where the original pencil counterfoil was lost or the party offering evidence of its contents could not, for any other reason not arising out of his own default or neglect, produce it in reasonable time: 1962 An.L.T. 57: (1963) 2 Cr.L.J. 546.

Where a will typed in duplicate by use of carbon paper and both of them were executed by the testator and attested by the witnesses simultaneously, *held*, each was the original and constituted primary evidence. [A.I.R. 1937 Mad. 807 and A.I.R. 1958 Cal. 517, Disting.]: A.I.R. 1983 All. 90: (1982) 8 All.L.R. 685.

Where a power of attorney was executed by Deputy General Manager of the plaintiff-Bank in favour of Senior Branch Manager and it was authenticated by Public notary and photostat copy of power of attorney was marked as exhibit while the original was produced in the Court, *held*, photostat copy of power of attorney was admissible in evidence to prove that said Branch Manager was duly and validly authorised to sign the plaint on behalf of the plaintiff-Bank: A.I.R. 1994 All. 381.

Where the original agreement in a suit for specific performance, produced by the plaintiff, was proved by its scribe and attesting witnesses, and a copy of the agreement contained in the scribe's register was also produced by him at the plaintiff's instance; the scribe, not a petition writer, maintained no regular register of petitions scribed by him nor did he depose that he had prepared the copy from, or had compared with, the original; the copy, not being certified, is not admissible; besides, the primary evidence having been let in, its secondary evidence is inadmissible; the copy even if prepared by the plaintiff's witness at the plaintiff's instance is not worthy of any credence: 1982 Raj.L.W. 284 (D.B.).

Existence of document admitted—By such admission secondary evidence furnished by certified copy assumes the character of primary evidence: (1966-67) 71 Cal.W.N. 362.

A tape embodying the recording of a statement, *held*, is primary and direct evidence admissible as to what was said and picked up by the tape-recorder: A.I.R. 1971 S.C. 1162: 1970 U.J. (S.C.) 604: (1971) 1 S.C.R. 339.

Where the original of a deed of dissolution said to be in the custody of a party was not produced by that party which objected to its admissibility for want of stamps, *held*, the other party was competent to prove the same by its copy; though the party could not prove the copy as secondary evidence, it could certainly prove it as primary evidence: 1982 Rev.L.R. 3: (1982) 84 Punj.L.R. 18.

Where a deed of dissolution of partnership was drawn in several parts but each part was signed by all the partners though only one of the parts bore the requisite stamp and every partner was handed over one part for retaining it as evidence of dissolution, *held*, each of the copies is primary evidence under S. 62, *Explanation* 1; unstamped copy admitted on payment of the requisite stamp duty and penalty: A.I.R. 1976 Mad. 147: (1976) 89 Mad.L.W. 30: (1976) 1 M.L.J. 135.

Where petitioner applied for grant of probate/letter of administration under the provisions of Ss. 276/278 of the Indian Succession Act, 1925 and did not file the original will with the petition but instead he filed a certified copy from Sub-Registrar's office, *held*, certified copy from the Sub-Registrar's office had to be treated on an equal footing with the original because of the provisions of S. 62: A.I.R. 1992 Del. 134: (1992) 46 Del.L.T. 263.

A document which is not a promissory note but a receipt of consideration with an agreement to pay the amount within the stipulated time, *held*, permission to lead secondary evidence cannot be refused merely on the ground of the inadmissibility of the primary evidence on account of provisions of S. 35 of the Stamp Act, 1899 because a document which is not a bill of exchange or promissory

note, even if insufficiently stamped can be admitted in evidence on payment of penal stamp duty as per the provisions of S. 35 of the Stamp Act: A.I.R. 1994 Raj. 1.

The copy of a document retained by the Sub-Registrar on registration of the document is that of the original document which alone is the original; even though the copy retained by the Sub-Registrar also bears the executant's signatures obtained by the Sub-Registrar, it nevertheless remains a copy; thus, certified copies issued by the Sub-Registrar after comparing it with the copy of the document retained by him, does not become primary evidence; it remains secondary evidence even if admitted in evidence: 1982 M.P.L.J. (N.O.C.) 42.

Where cyclostyled Rules, being Government orders, approved by the Ministry of Defence, were circulated to various departments by a cyclostyled copy of the covering letter, bearing cyclostyled signatures of the Director General, *held*, it cannot be said to be a primary evidence of public documents; it may amount to secondary evidence under S. 63(2) as a copy made from the original by mechanical processes which in themselves ensure their accuracy but before such secondary evidence is admitted in evidence, the contents of the original, the primary evidence, must be proved: A.I.R. 1987 All. 83: 1986 All.W.C. 692: (1986) 12 All.L.R. 343.

Where the High Court in writ proceedings admitted the photostat copies of certified copies of the survey land registers into evidence and as no question of its genuineness was raised, the High Court left it undecided, *held*, the genuineness of documents, even if not raised, is an aspect which goes to the root of the matter; accordingly, the matter was directed to be decided after examining the original record and recording the finding as to genuineness of the documents: A.I.R. 1994 S.C. 591.

Photographs ought not to be admitted in evidence without production of their negatives and examining the photographer; otherwise, their evidentiary value is almost nil; they cannot be used even to contradict the eye-witnesses account and evidence of the Investigating Officer: (1990-2) 10 Guj.L.H. 372 (D.B.).; 1979 Bom.C.R. 110.

It is only when the person who takes a photograph and develops it into a negative himself comes into the box and deposes to both these facts, that a negative becomes admissible in evidence. As far as the enlarged print is concerned, the position is still worse, for no print or enlargement can be admitted in evidence without its negative being produced and proved in the manner already indicated above: A.I.R. 1976 Bom. 264: 1977 Mah.L.J. 68 (D.B.).

Plaintiff, reversioner already served, on widow and intending purchaser, printed notice warning them from entering into any such transaction—Suit challenging sale-deeds—Plaintiff tendering printed notice with plaint—Notice admitted after evidence of press owner—Plaintiff not relying on printed notice as evidence of any original sent to press—*Held*, as only the printed copies of same leaflet were sent to parties, the plaintiff was tendering primary evidence of contents of printed leaflets—Leaflet would be primary evidence of contents of any other leaflet and it could not be said that the notice was not duly proved: I.L.R. (1966) Guj. 900: (1967) 7 Guj.L.R. 993.

Claim for exemption in respect of sales to registered dealers—Exemption cannot be granted without production of declaration forms—Loss of declaration forms—Secondary evidence to substantiate transaction is not permissible—Taxing authority cannot grant exemption on such secondary evidence—Counterfoil of declaration forms have no reference to counterparts dealt with in S. 62 of Evidence Act: (1962) 13 S.T.C. 138 (Cal.).

Cross complaint by accused to Police—Uncertified copy produced through defence witness—Accused not himself giving evidence in Court—Admissibility—Duty of Court: (1963) 1 Cr.L.J. 355 (Guj.).

Prosecution for offences under Ss. 467 and 471, I.P.Code—Prosecution relying on evidence of handwriting expert about enlarged photographs of disputed signature—Accused making request at trial stage itself for enlarged photographs—If to be allowed. *See* (1982) 23 Guj.L.R. 116: 1982 Cr.L.J. 763: (1981) 1 Guj.L.H. 373.

Where the prosecutrix was examined by a Lady Doctor who issued the medical certificate but as being on long leave, she was not available for giving evidence and the Court, finding that her presence could not be procured without undue delay, allowed the prosecution to prove the certificate through another Doctor, her associate for about two years, who deposed that the certificate's carbon copy was prepared by the Lady Doctor by one process and bore her signature, *held*, the carbon copy was primary evidence under *Explanation* 2 to S. 62, and clearly admissible: A.I.R. 1989 S.C. 702: 1989 Cr.L.J. 841: 1989 All.W.C. 392: (1989) 1 S.C.C. 432: (1989) 1 Crimes 384.

63. Secondary evidence.—Secondary evidence means and includes—

(1) certified copies given under the provisions hereinafter contained;

(2) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations

(*a*) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(*b*) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(*c*) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(*d*) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

Section 63—Synopsis.

1. Scope and applicability.
2. Objection to mode of proof.
3. Certified copies—Clause (1).
4. Copies made from original by mechanical process—Clause (2).
5. Admissibility of tape-recorded statement.
6. Photographic copies.
7. Copies made from or compared with original—Clause (3).
8. Newspaper report.
9. Copy of a copy.
10. Counterparts of documents—Clause (4).
11. Oral accounts of contents of document—Clause (5).
12. Illustrative cases.

---

1. Scope and applicability.—S. 68 mentions five kinds of secondary evidence: Cls. (1), (2) and (3) refer to copies of documents; Cl. (4) to counterparts of documents and Cl. (5) to oral accounts of the documents' contents; though correctness of certified copies referred to in Cl. (1) is presumed under S. 79, the correctness of the copies referred to in other clauses must be proved by proper evidence. A certified copy of a registered sale deed may be admitted as secondary evidence in the absence of its original but if it is not a certified but an ordinary copy, *held*, that would be no secondary evidence in the absence of the proof of the contents of the original deed; the appellate Court has not only the right but also the duty to exclude it from consideration: A.I.R. 1990 S.C. 396.

Documents are required to be proved by primary evidence; it is only under certain circumstances when the original is not available that the secondary evidence may be admitted: 1982 Raj.L.W. 284 (D.B.).

The question whether secondary evidence was in any case rightly admitted depends largely on the discretion of the Judge of first instance and his conclusion should not be overruled by the Court of appeal except in a very clear case of miscarriage: I.L.R. 55 Bom. 103: A.I.R. 1931 Bom. 105. *See* also 1945 All.W.N. (Rev.) 124: 1945 R.D. 264.

It lies within the jurisdiction of the trial Court to permit or disallow any party to lead secondary evidence; even if the trial Court commits any errors of law, the High Court cannot interfere in exercise of its extraordinary jurisdiction under Art. 227 of the Constitution of India: A.I.R. 1983 Raj. 167: 1983 W.L.N. 49: 1983 Raj.L.W. 334.

S. 65 of the Evidence Act deals merely with the foundation that has to be laid for the reception of secondary evidence. One of the circumstances under which the section allows the secondary evidence to be given of the existence, condition or contents of a document is when the original has been destroyed or lost. But to admit the secondary evidence, however, it is not sufficient to show merely that the original document is lost. The secondary evidence itself must be of the nature described in S. 63. A 'true copy' of a document will not be admissible under S. 63 unless it is shown that it had been made from or compared with the original. Further there must be a sufficient proof of the search for the original to render secondary evidence admissible. It must be established that the party has exhausted all resources and means in search of the document which were available to him. Though this is a question of discretion left to the trial Court and an appellate Court would not ordinarily interfere with the exercise of such discretion, the appellate Court would certainly interfere if it finds that the trial Court has accepted the loss of the document as a fact without taking into consideration the prerequisite conditions that are required by the Evidence Act: A.I.R. 1968 Cal. 532.

'Copy' means the document prepared from the original which is an accurate or true copy of the original; mere notes jotted down from the original is not a copy or a copy compared with the original for it can never be an accurate, true and full reproduction of the original: (1992) 2 Karn.L.J. 635.

S. 63 is exhaustive of the meaning of 'secondary evidence'. An 'abstract translation' which does not purport to be a 'copy' or even a full and complete translation of the document, but is merely a summary of its terms, is inadmissible: (1937) 39 Punj.L.R. 602: A.I.R. 1937 Lah. 370.

The expression 'means and includes' in S. 63 makes it quite clear that the five clauses of S. 63 referring to secondary evidence are exhaustive. Obvisouly drafts of award from which award is faired out do not come under any of the Cls. (1), (2), (4) and (5) of the section. They do not also come under Cl. (3) of the section. The drafts are not the copies from the original. Nonetheless they could be admissible as secondary evidence, if there be evidence to show that they were compared with the original, that is to say the drafts can be called secondary evidence only when they are shown to be accurate copies of the original awards. A piece of written paper cannot be admitted as secondary evidence of the contents of a document simply by calling it a draft. The drafts can be admitted in evidence only if it is shown by the evidence on the record that they were compared with the original and the contents are the same. Such evidence held wanting in this particular case. In view of the fact that we have our own codified Evidence Act, the admissibility or otherwise of any evidence has to be determined with reference to the provisions of that Act and not with reference to any law of England. The English precedents cannot be relied upon: 1969 B.L.J.R. 1096: 1969 Pat.L.J.R. 82: A.I.R. 1969 Pat. 218.

Where the notice to the defendant was sought to be proved in Court by its draft prepared by the plaintiff's lawyer and was objected to by the defendant for not being a compared copy of the original, *held*, the objection could not be sustained; the scope of S. 63 is not restricted to its five clauses; it applies even to those cases which do not strictly fall within any of the enumerated clauses [A.I.R. 1922 Mad. 334 and A.I.R. 1969 Pat. 218, Dissented]; the term 'secondary evidence' in the section also includes a fair copy prepared from the draft of a notice; the Court must, however, be satisfied that the document sought to be introduced as secondary evidence is a faithful and accurate reproduction or draft of the final document: A.I.R. 1986 All. 303: 1985 All.W.C. 852.

Where a copy or contents by oral account of a document is admitted on secondary evidence, *held*, the execution of the original need not be proved; but if the original itself is sought to be tendered, it must be duly proved; the rule for public documents cannot be any different. [A.I.R. 1951 All. 816, Dissent. from; A.I.R. 1947 Cal. 318, Rel. on]: A.I.R. 1973 Bom. 14: (1972) 74 Bom.L.R. 505: 1972 Mah.L.J. 816.

Presumption under S. 90—When open: A.I.R. 1968 All. 363.

Under S. 63, secondary evidence of the endorsement on railway receipt can be furnished by some person who had himself made it or seen being made: (1958) 2 An.W.R. 393: A.I.R. 1959 Andh. Pra. 192.

Where the sale deed relied upon by the plaintiff was in the defendant's custody which

the defendant failed to produce on the ground that it was not with him and the plaintiff sought to prove it by secondary evidence, *held*, the plaintiff's request was based on S. 65(*a*), and (*c*) or either; the secondary evidence to prove it could be of 'any' kind under S. 65 and of the kind specified in S. 63; the deed could, thus, be proved by the copy of the sale deed annexed with the plaint; neither S. 63 nor S. 65(*f*) would stand in the way. [A.I.R. 1969 S.C. 253, Rel. on]: A.I.R. 1975 Guj. 73: (1975) 16 Guj.L.R. 61.

In case of a document which is not a promissory note but a receipt of consideration with an agreement to pay the amount within the stipulated time, *held*, permission to lead secondary evidence cannot be refused merely on the ground of the inadmissibility of the primary evidence on account of provisions of S. 35 of the Stamp Act, 1899 because a document which is not a bill of exchange or promissory note, even if insufficiently stamped, can be admitted in evidence on payment of penal stamp duty as per the provisions of S. 35 of the Stamp Act: A.I.R. 1994 Raj. 1.

Copy of objected document bearing signature of agent of candidate—Proof: A.I.R. 1959 All. 264.

Where the original enquiry proceedings were not produced before the Industrial Tribunal which declined to admit its secondary evidence as no convincing evidence was produced about the search to find the original having been unsuccessful, *held*, the Tribunal had correctly rejected the secondary evidence as inadmissible as requirements of S. 63 and S. 65(3) had not been fulfilled. [A.I.R. 1968 Cal. 532, Foll.]: (1990) 2 C.L.R. 191 (Karn.).

The standard of proof required in the reconstruction of a lost Will by parol evidence does not differ from that in other cases. The standard of proof in such a case is the ordinary standard of proof in civil cases, namely, a reasonable balance of probabilities. Of course, as in the case of pedigree, the Courts must be cautious in admitting such evidence: (1953) 1 All E.R. 764.

Where a will had been adjudged to be true and genuine in the earlier proceedings for the grant of a succession certificate, *held*, that would operate as *res judicata* in subsequent proceedings; it is not necessary to prove the will in subsequent proceedings: (1991-2) 108 Mad.L.W. 480: (1992) 1 Hindu L.R. 386.

Where official witnesses had produced, and deposed on the basis of, the original official documents which were also kept on the Court's record; if the depositions were impeached, the Court could always refer to the records and ascertain the truth or otherwise of the depositions; *held*, there was, thus, no necessity to call for certified copies of the official records: 1987 Rev.L.R. 324.

Loss of hundi—Proof of—*See* S. 45-A, Negotiable Instruments Act—(1966-67) 71 Cal.W.N. 51.

2. Objection to mode of proof.—The party by its own conduct may waive the objection about the production of secondary evidence by not raising the relevant contention at the time when the secondary evidence of the original is sought to be tendered before the trial Court. Thus, where no objection was taken to the production of secondary evidence in trial Court, *held*, waiver of objection may be inferred: A.I.R. 1984 Guj. 69: (1984) 4 Guj.L.H. 831(D.B.).

Objection as to mode of proof—When should be raised: A.I.R. 1958 Raj. 110.

Certified copies of documents—Objection to admissibility must be taken at the earliest point of time when the documents are tendered in evidence in the trial Court—Objections are not permissible to be raised at a subsequent stage or in appeal: 33 Cut.L.T. 710: A.I.R. 1967 Ori. 129; 1981 Raj.L.W. 217.

When secondary evidence, namely, a certified copy of a registered document, is allowed to be marked for one party without objection at the trial, *held*, no objection thereafter either in the same Court or appeal can be raised by the other party that the requisite conditions for adducing secondary evidence had then not been made out; besides, though ordinarily copies of copies are not to be treated as secondary evidence unless they have been again compared with the originals, this principle is not extended to the copies prepared from the duplicate copy of the registered document retained by the Sub-Registrar and granted by him as certified copies: A.I.R. 1991 Andh. Pra. 31: (1990) 3 An.L.T. 305: (1990) 2 An.W.R. 411 (F.B.).

Where at the time when a certified copy of deed of cancellation was received in evidence no objection was raised, but later on, an application was filed objecting to the reception of secondary evidence of the document, *held*, the

application could not be entertained: (1974) 40 Cut.L.T. 1214.

Where the claimant in a motor accident claim case did not impeach the genuineness of the printed copy of the insurance policy, the original whereof was not filed by the truck owner, *held*, the claimant cannot afterwards object to the admissibility of the printed copy of the policy in evidence: A.I.R. 1994 Him. Pra. 21 (D.B.).

3. Certified copies—Clause (1).—Certified copy of document can be admitted without any formal proof: 1970 All.W.R. (H.C.) 69.

The Court before which an original document is produced and marked in the case is entitled to issue a certified copy of the same and such certified copy, having regard to the provisions contained in S. 63 of the Evidence Act, is admissible in evidence: A.I.R. 1993 Karn. 29: (1992) 2 Karn.L.J. 536 (D.B.).

Certified copy of judgment cannot be discarded on the ground that as the records were destroyed in fire, the original file was not available: 1985 All.W.C. 57 (Rev.).

For admissibility of certified copy of a decree, *see* (1985) 33 B.L.J.R. 701: 1985 Pat.L.J.R. 1124.

Though a certified copy is as good as the original, mere registration of the original is no proof of its execution; there must be some proof of the execution and genuineness of the document which means that signature of the executant must be proved to be in his handwriting: A.I.R. 1979 Gau. 68.

Where the production of a certified copy of a document is otherwise justified by the law, the fact that the witness called in to prove the due execution of the original by the executant had not as a matter of fact seen the original, does not affect the legal proof of the document produced which is admissible under S. 63(1): 1943 All.L.W. 116.

Under the law, original deed has to be produced by the party, who wants to rely on the same. If its loss has been established that party can be permitted to lead secondary evidence of its contents. The secondary evidence of a registered deed is its certified copy. The production of the secondary evidence of a registered deed however does not absolve the person concerned from proving its due execution. The mortgage deed is a document required by law to be attested and, therefore, by virtue of the provisions of S. 68 of the Evidence Act, one of the attesting witnesses, has to be called for the purpose of proving its execution, where the same is specifically denied by the party.

In the instant case, even if the respondent were allowed to lead secondary evidence, he should have produced certified copies of the mortgage deeds. But instead of doing that, the respondent produced a witness whose evidence was recorded without any objection by the petitioner. What could at best be said therefrom was that the secondary evidence of the mortgage deeds had been produced and the petitioner was precluded from objecting to certified copies of the mortgage deeds coming on the record later on. But it could not be said that it relieved the respondent from proving the execution of the mortgage deeds: 1965 Cur.L.J. 523 (Punj.).

Existence of document admitted—By such admission secondary evidence furnished by certified copy assumes the character of primary evidence: (1912-13) 17 Cal.W.N. 362.

Where in a land acquisition reference for enhancement of compensation, the Court below took the view that the copies of those sale deeds (exemplars) of which the vendors or vendees had not been examined as witness in Court were inadmissible in evidence, *held*, in view of S. 51-A of the Land Acquisition Act, 1894, as inserted by the Land Acquisition (Amendment) Act, 1984, certified copies of the sale deeds filed by the parties were admissible in evidence: A.I.R. 1994 All. 66.

A statement recorded by the Police Officer in the course of investigation being not a public document, its certified copy cannot go in as secondary evidence: A.I.R. 1984 Guj. 69: (1984) 4 Guj.L.H. 831 (D.B.).

The copy of a document retained by the Sub-Registrar on registration of the document is that of the original document which alone is the original; even though the copy retained by the Sub-Registrar also bears the executant's signatures obtained by the Sub-Registrar, it nevertheless remains a copy; thus, certified copies issued by a Sub-Registrar after comparing it with the copy of the document retained by him, does not become primary evidence; it remains secondary evidence even if admitted in evidence: 1982 M.P.L.J. (N.O.C.) 42. *See* also (1989) 1 An.L.T. 217.

Where the certified copy of the sale deed evidencing amicable partition and supplied by the Sub-Registrar's office bearing the seal and signature of the Sub-Registrar was exhibited, *held*, the copy is admissible for proving the contents of the original, particularly when there is conflict of oral testimony: A.I.R. 1994 Gau. 64.

The certificate issued by the Registrar is to some extent an evidence of the execution of the document and the admission of signature before the Registrar by the executant can form an evidence of the execution of the document. The execution of the Will can also be proved by approved circumstantial evidence: A.I.R. 1970 Punj. 182.

It is well settled that the propounder of a will is required to prove not only its due execution and genuineness but also eliminate the suspicious circumstances, if any, surrounding the will; a will executed in suspicious circumstances, thus, cannot be allowed to be proved by secondary evidence, that is, by its certified copy: 1988 Rajdhani L.R. 387: A.I.R. 1989 N.O.C. 47 (Del.).

Ss. 63, 65, Cls. (*c*), (*e*) and (*f*), 74, 76—Secondary evidence—Deed of assignment of land—Original deed lost—Certified copy—Admissibility—Registration Act, 1908, Ss. 17(1)(*b*), 57, 60: (1960-61) 65 Cal.W.N. 881.

Certified copy of deed—When admissible: A.I.R. 1969 Mys. 103.

Copy—Meaning—Arbitration Act, 1940, S. 14(2)—'Signed copy of award'—Meaning—When a document is an accurate or true and full reproduction of the original it would be a copy—Signing means writing one's name on some document or paper—So long as there is signature of arbitrator or umpire on copy of award filed in Court and it shows that the person signing authenticated accuracy or correctness of copy, the document would be signed copy of award and it would be immaterial whether arbitrator or umpire puts down words 'certified to be true copy' above his signature: A.I.R. 1967 S.C. 526.

4. Copies made from original by mechanical process—Clause (2).—Ss. 63 and 65(*e*) and (*f*) read together permit certified copies and copies made from the original by mechanical process to be tendered as secondary evidence; photocopies thereof prepared by a mechanical process in itself ensure the original's accuracy. Thus, where photostat copies of judicial record of a foreign Court are certified by a public officer having custody of that record as contemplated by S. 76, *held*, it will not be *per se* inadmissible; but if it is not further certified by a representative of the Indian Government in the foreign country, it will not be admissible: (1991-2) 108 Mad.L.W. 646: (1991) 2 Crimes 855: (1991) 3 S.C.C. 451.

Where the photostat copies taken in the office of the Tahsildar with the permission of the Tahsildar was produced and the Tahsildar appearing as witness accepted that it contained his signatures, *held*, in such circumstances, photostat copy could be accepted in evidence: A.I.R. 1976 Ori. 236.

Whenever a xerox copy is sought to be adduced, the Court is duty bound to be much more cautious than in case of copy made by other mechanical processes, *i.e.*, photo copy or carbon copy: (1990) 2 An.L.T. 171.

A xerox copy obtained from a certified copy, *held*, is not admissible as secondary evidence when not compared with the original: (1992) 1 Cal.H.N. 60: (1991-92) 96 Cal.W.N. 529.

Photostat copy is not admissible when original was not produced and there was no evidence of any person who deposed having seen the original document that the photostat copy was made from the original: (1982-83) 87 Cal.W.N. 211.

Where the High Court in writ proceedings admitted the photostat copies of certified copies of the survey land registers into evidence and as no question of its genuineness was raised, the High Court left it undecided, *held*, the genuineness of documents, even if not raised, is an aspect which goes to the root of the matter; accordingly, the matter was directed to be decided after examining the original record and recording the finding as to genuineness of the documents: A.I.R. 1994 S.C. 591.

Where cyclostyled Rules, being Government orders, approved by the Ministry of Defence, were circulated to various departments by a cyclostyled copy of the covering letter, bearing cyclostyled signatures of the Director General, *held*, it cannot be said to be a primary evidence of public documents; it may amount to secondary evidence under S. 63(2) as a copy made from the original by mechanical processes which in themselves ensure its accuracy but before such secondary

evidence is admitted in evidence, the contents of the original, the primary evidence, must be proved: A.I.R. 1987 All. 83: 1986 All.W.C. 692: (1986) 12 All.L.R. 343.

A carbon copy of a signature may be a piece of secondary evidence within the meaning of S. 63(2) of the Evidence Act, being a copy made by a mechanical process which ensure its correctness. But in order that it may be given in evidence, it is essential that the procedure laid down in the Act should be strictly complied with. Copies made on carbon paper ordinarily used in this country cannot generally be relied upon for purposes of comparison, because the impression made upon such carbon paper is generally irregular and blotched: 89 Cal.L.J. 204: A.I.R. 1953 Cal. 456.

Copy (not carbon) of document is not secondary evidence of document and is not admissible as such: A.I.R. 1956 Bom. 115.

Unsigned copies of the letters allegedly written by the accused, not shown to have been made from the original by mechanical process, *held*, cannot be admitted as secondary evidence: (1976) 1 Karn.L.J. 178.

5. Admissibility of tape-recorded statement.—If a statement is relevant an accurate tape-record of the statement is also relevant and admissible. The time and place and accuracy of the recording must be proved by a competent witness and the voices must be properly identified. One of the features of magnetic tape-recording is the ability to erase and re-use the recording medium. Because of this facility of erasure and re-use, the evidence must be received with caution. The Court must be satisfied beyond reasonable doubt that the record has not been tampered with: (1967) 3 S.C.R. 720: (1967) 2 S.C.W.R. 934: A.I.R. 1968 S.C. 147.

The conditions for admissibility of a tape-recorded statement are as follows: (*1*) The speaker's voice must be duly identified by the person who tape recorded or by others who recognise his voice; if the voice is denied by the purported speaker, very strict proof is required to determine whether or not it was really his voice; (*2*) the accuracy of the tape recorded statement has to be proved by the maker of the record by satisfactory evidence, direct or circumstantial; (*3*) every possibility of tampering with or erasure must be ruled out; (*4*) the statement must be relevant according to the rules of evidence; (*5*) the recorded cassette must be carefully sealed and kept in safe or official custody; (*6*) the speaker's voice should be clearly audible, and not lost or distorted by other sounds or disturbances: A.I.R. 1986 S.C. 3: 1985 (Supp.) S.C.C. 611.

A tape-recorded conversation can be used only as corroborative evidence if deposed to by any party to the conversation; if there is no evidence of such conversation, *held*, the tape-recorded conversation is indeed no proper and admissible evidence; even otherwise, the tape-recorded conversation, on facts, was of no assistance to the party relying upon it: A.I.R. 1982 S.C. 1043: (1982) 2 S.C.C. 258: 1982 U.J. (S.C.) 394; 1988 B.B.C.J. (H.C.) 434.

Before a Court may accept evidence of a tape-record, it must first carefully consider and decide about its genuineness; usually, tape-recording is done without the knowledge and consent of the person concerned; very often he is trapped unknowingly; it is born of trickery or trapping or cunningness. Ventriloquism is not very uncommon; the Court must carefully guard itself against all possible tampering and look for independent corroboration and intrinsic evidence: A.I.R. 1976 Cal. 99.

Evidence—Admissibility—Tape-recording—Not inadmissible merely on ground of possibility of their being tampered with: (1964) 4 S.C.R. 733: (1965) 1 S.C.A. 259: A.I.R. 1964 S.C. 72.

A tape-recorded conversation is, no doubt, comparable to a photograph; it is admissible under S. 8 provided the recorded conversation is relevant, the voice has been identified and the accuracy of conversation is proved by eliminating possibility of erasing the recorded tape. But where in a divorce proceeding under the Hindu Marriage Act, 1955 for the wife's mental disorder, the husband produced a tape-recorded conversation wherein the wife had admitted about her ailment, but there was not even a remote reference to this recorded conversation in the petition and the husband had nowhere explained either in the petition or in his statement, the circumstances and the manner in which this conversation had been recorded and none except himself had proved that the recorded female voice was that of the wife nor was her voice compared by recording it in the Court nor the husband could tell the durations of or different intervening intervals between the

recording of the conversation, *held*, the tape could not be used as evidence; the wife's statement therein could neither be used as her admission of her mental ailment nor for shaking her veracity during her cross-examination in terms of S. 145. [A.I.R. 1968 S.C. 147, Foll.]: A.I.R. 1985 P.&H. 128: (1985) 1 Hindu L.R. 378: 1985 Marriage L.J. 42.

Where (*1*) the voices on the tape at a number of places were not very clear and were intermingled with tremendous noises; (*2*) a good part of the statement on the tape had been denied and no other witness had identified the voice; (*3*) there were erasures here and there in the tape; (*4*) the possibility of tampering with the tape, a fatal defect, could not be ruled out; (*5*) the transcript was prepared without excluding the possibility of the tape being tampered; (*6*) the purported speakers had denied the identity of their voices; and (*7*) the statements had been recorded in a most haphazard and unsystematic manner and without following any logical or scientific method, *held*, the tape-recorded statements were wholly inadmissible; at any rate, they had no probative value; it is extremely unsafe to rely on such tape-recorded statements: A.I.R. 1986 S.C. 3: 1985 (Supp.) S.C.C. 611.

Where the time, place and accuracy of a tape-recorded telephonic conversation, was not proved by a competent witness, *held*, the trial Court had rightly concluded that the tape-recording was not proved according to law: A.I.R. 1983 Cal. 343: (1981-82) 86 Cal.W.N. 759: (1982) 2 Cal.L.J. 74: (1982) 2 Ren.C.R. 164 (D.B.).

Where there was no dispute about the identity of the speakers, their voices were clearly audible, accuracy of the statements was also proved and the possibility of tampering the tapes was also ruled out as they were carefully sealed and placed in the custody of the judicial officer, *held*, the tape recorded statement was admissible. [A.I.R. 1986 S.C. 3, Foll.]: A.I.R. 1993 Mad. 59.

Where a recorded cassette was produced in evidence, without explaining as to how did it came to be recorded, why was it preserved, and how did the party come to know about it, *held*, it is not safe to rely on the version contained in the cassette: A.I.R. 1994 S.C. 1733.

6. Photographic copies.—The accuracy of photographic copies particularly of external objects, as shown in the photograph, is to be established on oath, to the satisfaction of the Court, either by the photographer or someone who can speak to their accuracy: A.I.R. 1968 Goa 132.

Before a photograph can be admitted in evidence, it is necessary that the person who took the photograph should be examined and such a person should produce the negative and no positive print or enlargement can be admitted in evidence without the negative being produced in the first instance: 1979 Bom.C.R. 110: (1980) 2 Mah.L.R. 242.

Whether a photograph is a correct reproduction of the original depends on many factors such as the correctness of the lens, the state of the weather, the skill of the operator, the colour of the impression, the purity of the chemical's accuracy of forming the angle at which the original was inclined to the sensitive plate, the possible fraud of the operator, etc. Whether a photograph is a correct reproduction (cheque in this case) is also before the Court, the magnified photographic copies of it can be safely received in evidence even without examining the photographer who has taken it as the accuracy of the copies can be readily tested by comparison with the original if necessary. *Held*, further, that as shown in Illus. (*a*) to S. 63, the negatives, and the photographic prints were secondary evidence of the cheque which was the original and the primary evidence: A.I.R. 1956 Cal. 399.

7. Copies made from or compared with original—Clause (3).—S. 63(3) prescribes two alternative modes of admitting true copies of documents: (*1*) it may be a copy made from the original; (*2*) it must be a copy compared with the original; if either of the two requirements are satisfied, it would be a proper and valid secondary evidence; law does not require that the copies must be proved to have been made from as well as compared with the original: A.I.R. 1989 Pat. 96.

Copies made from the original even though not compared with the original, as also copies which are compared with the original are deemed to be secondary evidence. Copy of a document will not ordinarily be admissible in evidence, but if such a copy be compared with the original and evidence is adduced to prove the same such a copy will be admissible in evidence. If it is proved further that copies had been made from the original without any proof that they had been compared with the

original,' they will be accepted as secondary evidence. The evidentiary value of particular papers or documents proved in either of the two ways would depend upon the circumstances and on the facts proved: (1953-54) 58 Cal.W.N. 533.

An uncertified copy of a deposition can be used as secondary evidence only if it can be regarded as a copy made from or compared with the original. Where the man who is alleged to have made the copy is dead and so also the man who compared it with the original, and their signatures only have been proved by a clerk who was acquainted with their handwriting, it cannot be accepted as evidence as it is not sufficiently proved that it was made from or compared with the original: (1940-41) 45 Cal.W.N. 654: A.I.R. 1941 Cal. 506. *See* also A.I.R. 1950 All. 696, noted under S. 67, *infra*.

It is not necessary to prove a copy, that the scribe of the copy should be produced. What is required to be proved is that the document produced is a true copy of the original. Any one who has heard the original and the copy read out to him may swear that the contents of the two were identical. This would be a statement which would be admissible in evidence and would prove the document produced was a true copy of the original: 1951 All.L.J. 746: A.I.R. 1952 All. 48.

Where a Notary certified the document as a true photocopy of the original and one of the attesting witnesses was also examined, *held*, it was not necessary to examine the Notary as witness; it is taken that he had compared the photocopy with the original; his attestation is taken as conclusive: A.I.R. 1992 P.&H. 145: 1991 Punj.L.J. 785: (1992-1) 101 Punj.L.R. 54.

A copy must be proved to be correct copy by the evidence of some one who can swear to its being a true copy. Where copies of accounts are transcribed from copies of the original document, but they are not compared with the original, they cannot be treated to be secondary evidence of the original: (1958) 28 Comp. Cas. 132 (Punj.). Proof of copy being correct copy is not proof of the original (*i.e.*,) of its execution, genuineness, etc.: 23 W.R. 208.

A handwritten copy of the original issued as true copy under the signature of the concerned officer, *held*, is not admissible as secondary evidence as it was no where stated thereon that it was a copy made from the original by mechanical process or was compared with such a copy: A.I.R. 1984 Guj. 69: (1984) 4 Guj.L.H. 831 (D.B.).

Where in respect to a hand written copy of the Adoption Yadi, no evidence was adduced which would show as to who made that copy, in whose handwriting it is, from what it was made, or whether it was compared with the original, *held*, such a copy was inadmissible in evidence: A.I.R. 1976 Bom. 264: 1977 Mah.L.J. 68 (D.B.).

Where the original agreement in a suit for specific performance, produced by the plaintiff, was proved by its scribe and attesting witnesses, and a copy of the agreement contained in the scribe's register was also produced by him at the plaintiff's instance; the scribe, not a petition writer, maintained no regular register of petitions scribed by him nor did he depose that he had prepared the copy from, or had compared with, the original, the copy, not being certified, is not admissible; besides, the primary evidence having been let in, its secondary evidence is inadmissible; the copy even if prepared by the plaintiff's witness at the plaintiff's instance is not worthy of any credence: 1982 Raj.L.W. 284.

Prosecution under S. 409, Penal Code—Accounts audited by auditor—Prosecution desiring to file loose sheets of accounts to be used by auditor at the time of his examination in Court—*Held*, documents would be admissible under S. 63(3) or S. 159 or S. 160, Evidence Act: I.L.R. (1965) Cut. 426: 1966 Cr.L.J. 1042: A.I.R. 1966 Ori. 189.

Secondary evidence—Absence of evidence of comparison with original—Objection on—When to be taken—Copies admitted in appeal without objection—Objection in second appeal—Incompetent: 17 Pat.L.T. 709: A.I.R. 1936 Pat. 600. *See* also (1940-41) 45 Cal.W.N. 654: A.I.R. 1941 Cal. 506.

A record printed in the High Court is not a copy made from or compared with the original but only copy of copy and in the absence of evidence that the printed copy had been compared with the original it could not be treated as secondary evidence of the original under S. 63(3). The record cannot, therefore, be treated as secondary evidence except by consent: A.I.R. 1958 Andh. Pra. 22.

A printed copy of the deposition of a party in English, which deposition came up to the

Madras High Court in 1900 on appeal, is admissible in evidence, as it is the practice of the Madras High Court since 1900 after Government Press took up the printing of the High Court papers, that before giving the final order for striking off, it would be compared with the original: 115 I.C. 147: A.I.R. 1929 Mad. 187.

Copy of original letter addressed by Government to Commissioner prepared privately by party at the time of inspection of relevant file is not secondary evidence of original letter: A.I.R. 1970 Manipur 7.

8. Newspaper report.—(*See* also S. 81). A news item without any further proof of what had actually happened through witnesses is of no value. It is at best a second-hand secondary evidence. It is well known that reporters collect information and pass it on to the editor who edits the news item and then publishes it. In this process the truth might get perverted or garbled. Such news items cannot be said to prove themselves although they may be taken into account with other evidence if the other evidence is forcible. A fact has first to be alleged and proved and then newspaper reports can be taken in support of it but not independently: A.I.R. 1969 S.C. 1201.

A report of a speech made in the newspaper is not admissible in evidence to prove the speeches. The party must produce the persons who had made the speeches or the persons in whose presence such speeches were made or the reporter of the newspaper in whose presence the speeches were made and who had sent the report to be published in the paper: I.L.R. (1959) 9 Raj. 524: A.I.R. 1959 Raj. 280.

Newspaper report—Value of—It cannot be treated as substantive evidence—It is no evidence of facts stated therein unless the correspondent who made the report is examined: I.L.R. (1960) Mys. 1307: A.I.R. 1961 Mys. 106.

Secondary evidence of a document which has not been proved to have been written by accused or even existed, cannot be admitted. A copy of a newspaper, publishing a defamatory letter, cannot be used as secondary evidence to prove a letter which has not been found or even proved to have existed: 10 I.C. 832: 8 All.L.J. 302.

Where neither the maker of the report on which the publication was based was examined nor any evidence to prove contents of the reports was adduced nor the original script of the advertisement was produced or its receipt was established at the trial, *held*, the facts contained in the published reports were inadmissible; besides, newspapers, at the best secondary evidence of their contents, are not admissible in evidence without proper proof of the truth of their contents: A.I.R. 1994 S.C. 1733.

Where defence sought to rely upon a news item published in newspaper that the murder in question was committed by some unknown person but neither the name of the correspondent who sent the news item nor the information on the basis of which the news item was published was brought on the record, *held*, in the absence of any such item, no reliance could be placed on such news item: 1994 Cr.L.J. 3695 (P.&H.) (D.B.).

9. Copy of a copy.—*See* A.I.R. 1924 Nag. 375; 20 Mad.L.W. 719: A.I.R. 1925 Mad. 257. Copy of a copy is not evidence: I.L.R. 7 All. 738. But it may be admitted in evidence by consent of parties: A.I.R. 1928 Mad. 1255.

A copy of a copy, in the absence of proof of comparison with the original, is not good secondary evidence of the original, in the absence of consent: A.I.R. 1939 Mad. 40: (1938) 2 M.L.J. 883.

A genuine copy of the original, can be looked into as secondary evidence under Ss. 63 and 65 but not a copy of a copy: A.I.R. 1969 Tripura 26.

When a copy is prepared from another copy, it does not come within the meaning of secondary evidence in S. 63, Evidence Act unless it is compared with the original. The solenama, not being a public document, S. 76 has no application to it and so no inference is possible from the description of the certifying officer as one authorised under S. 76 as to his having compared the copy with the original: A.I.R. 1957 Cal. 59.

A copy of a copy is admissible in evidence if it has been compared with the original or a copy of the original taken out by means of a mechanical process: A.I.R. 1950 Assam 17.

Where the document is a copy of copy and the person who made that copy is not produced, the document is inadmissible in evidence: 1957 Raj.L.W. 31: A.I.R. 1957 Raj. 89.

Where the record of the Sub-Registrar Office was destroyed during riots and the plaintiff, unable to produce a certified copy of the sale deed registered there, produced a copy prepared from a certified copy presented in an earlier suit, *held*, the copy is admissible in evidence; S. 65 safeguards the interest of persons unable to produce either the original document or its secondary evidence as per

S. 63; under S. 65(*a*), (*c*) and (*d*) any secondary evidence is admissible irrespective of the provisions of S. 63 or S. 65(*f*). [A.I.R. 1969 S.C. 253, Foll.]: A.I.R. 1975 Guj. 73: (1975) 16 Guj.L.R. 61.

10. Counterparts of documents—Clause (4).—As per Aiyah's Law Lexicon, a 'counterpart' means a 'duplicate'; when a deed is drawn in two or more identical forms, the part signed by the grantor is the original, others are counterparts; the Lexicon further defines a copy as a document which is 'an accurate and full reproduction' of the original; thus, a duplicate satisfies all the requirements of a copy: A.I.R. 1976 Mad. 147: (1976) 89 Mad.L.W. 30: (1976) 1 M.L.J. 135.

In the case of agreements executed in duplicate it is only when each of the instruments is duly signed by the party to be bound by it, and delivered to the other, that the documents are termed counterparts, and it is only then that each is evidence against the party executing it and those in privity with the executing party and each is secondary evidence of the other: A.I.R. 1958 Pat. 133.

Counterfoils of original receipts are admissible only on proof of loss of originals: (1937) 39 Punj.L.R. 602: A.I.R. 1937 Lah. 370.

Where the lease to begin with was for open land on which the tenant set up and ran a flour mill without using the land for any other purpose and rent receipts clearly showed the lease to be annual, *held*, the counter foil of rent receipts produced by the landlord showing it to be a monthly tenancy, the same being admissions by the landlord in his own favour, were inadmissible: A.I.R. 1982 S.C. 127: (1982) 1 S.C.C. 27: 1982 U.J. (S.C.) 23: (1982) 1 S.C.R. 1197.

Carbon copies of the gate passes, prepared at one and the same time and which also contained the signatures of the party, *held*, are counterparts of the original documents and in the nature of primary evidence and not secondary evidence; they can be adduced without complying with the provisions of S. 66: (1988-2) 94 Punj.L.R. 536. *See* also 1982 Jab.L.J. 738.

11. Oral accounts of contents of documents—Clause (5).—*See* 22 All.L.J. 864: A.I.R. 1924 All. 792. The statements of the witnesses who have not themselves read the document are not secondary evidence of the contents of the document within the meaning of S. 63 of the Evidence Act. Oral evidence of the contents of the document must be given by some person who has seen those contents, that is to say, who has read the documents: A.I.R. 1951 Ajmer 21; A.I.R. 1952 Raj. 91: I.L.R. (1951) Raj. 166; A.I.R. 1958 Pat. 133.

The word 'seen' means 'intelligently seen or read' by the person giving oral account of the contents of the document: 1971 Rev.L.R. 357.

S. 63(5) implies that the person who orally proves the contents of a document, who had seen the document, proves only the contents; proof of the contents is no proof of their truth. [A.I.R. 1918 Cal. 988, Dissent. from]: A.I.R. 1983 Bom. 1: 1983 Mah.L.J. 339.

A person unable to read a document cannot give secondary evidence of its contents, even though the contents of the document might have been read over to him: A.I.R. 1963 Ori. 29.

Evidence that witness saw the document and heard it read out if admissible. *See* 54 I.A. 61: I.L.R. 5 Rang. 18: 52 M.L.J. 376 (P.C.).

Under the section, the evidence of the contents of a document must be given by a person who had seen those contents, *i.e.*, who had read the document. The evidence of a person not knowing the language of the document is inadmissible: 12 R.D. 500: 112 I.C. 310.

Suit for redemption—Denial of mortgage and possession of the document by defendant—Two witnesses deposing that they had seen and read the document and then giving evidence of the contents—*Held*, that the suit was rightly decreed: 1953 Raj.L.W. 230.

Survey and Settlement Report which was based on a *jamabandi*, the original of which was not produced and which itself was not exhibited in evidence, cannot be treated as secondary evidence of the contents of the *jamabandi* statement under Cl. (5), S. 63 or under any other section. [A.I.R. 1928 Pat. 284, Reversed]: 59 M.L.J. 731: A.I.R. 1930 P.C. 45 (P.C.). *See* also (1992) 2 Karn.L.J. 635.

12. Illustrative cases.—Where the original document as well as their photostat copies were lost for which a Police report was also lodged but the trial Court disallowed the secondary evidence, *held*, the trial Court fell in error; the report of loss of both the original and photostat having been made, in the special circumstances of the case, proof by secondary evidence ought to be allowed: (1987-1) 91 Punj.L.R. 428. *See* also I.L.R. (1987) Karn. 3580 [Endorsement regarding loss of money lender's licence, whether secondary evidence to prove existence of valid licence].

Contents of original will be proved by attesting witnesses—Original destroyed with

64. Proof of documents by primary evidence.—Documents must be proved by primary evidence except in the cases hereinafter mentioned.

record in previous suit—It is good secondary evidence: I.L.R. (1954) Nag. 558: A.I.R. 1954 Nag. 357.

Where the original of a deed of dissolution said to be in the custody of a party was not produced by that party which objected to its admissibility for want of stamps, *held*, the other party was competent to prove the same by its copy; though the party could not prove the copy as secondary evidence, it could certainly prove it as primary evidence: 1982 Rev.L.R. 3: (1982) 84 Punj.L.R. 18.

Value to be attached to unsigned record of meeting of the departmental promotion committee. *See* 1985 Lab.I.C. 975 (Madh. Pra.).

An order granting maintenance under S. 125 of the Cr.P.Code cannot prove marriage nor does it operate as *res judicata* in a civil suit between the same parties; but, undoubtedly, it is a piece of evidence supporting the claim of marriage made therein: 1984 Hindu L.R. 761 (Del.).

An extract in electoral rolls cannot prove that a person is lawfully wedded husband of a lady: 1979 Bom.C.R. 110.

What could go into evidence as secondary evidence is the relevant entry from the Birth Register maintained in the Church or, at least, its true copy and not a certificate purportedly prepared on the basis of that entry: A.I.R. 1989 Cal. 120: (1988-89) 93 Cal.W.N. 102: (1989) 1 Hindu L.R. 228 (D.B.).

Where the lease deed said to have been executed and in the custody of the attorneys was not proved to be so and there was no proof of the existence of its original, *held*, it could not be proved by secondary evidence: A.I.R. 1973 Bom. 66: (1972) 74 Bom.L.R. 589: 1972 Mah.L.J. 896 (D.B.).

Where a certified copy of a judgment of the Supreme Court of New York, authenticated by the Indian Consulate there, could not be produced for insufficiency of time and its fax copy was instead produced in the Court, *held*, the fax copy was admissible. [(1991) 3 S.C.C. 451, Rel. on]: (1993) 2 Ker.L.J. 565 (D.B.).

Copy of the medical claim bill—Admissibility of. *See* (1978) 19 Guj.L.R. 990.

Rent notes—Proof of—Original rent notes not forthcoming—Secondary evidence—Calling in register of petition-writer who had written them—Entries in such register—Even if admissible as secondary evidence, execution of rent notes by party sought to be bound by them has to be proved—Party entitled to produce and producing secondary evidence of document, not relieved from duty of proving its execution: 1965 Cur.L.J. 523 (Punj.).

Section 64—Notes.

It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court. Ss. 60, 64 and 91 of the Indian Evidence Act, 1872 are based on this rule: 1995 Cr.L.J. 76 (Ori.).

Under S. 64, a document must be proved by primary evidence which means the document itself produced for the Court's inspection; an exception to this rule is found in S. 65(*e*) which says that if the original is a public document under S. 74, secondary evidence may be given of its existence, condition or contents; however, it is necessary for the party producing the secondary evidence to prove that the document is one of those mentioned under S. 65; whether it is the original document itself or secondary evidence of a certified copy, its execution and attestation shall have to be proved as required under Ss. 67, 68 and 69; the consent of a party for marking the document only relieves the other party of his obligation to prove that the original is a public document within the meaning of S. 74; the consent does not dispense with either the proof of its contents or their truth: (1974) 2 M.L.J. 260: (1974) 87 Mad.L.W. 777 (D.B.).

The original, even in case of a public document, is its best evidence and always admissible; S. 62 and S. 64 which characterise the originals as primary evidence and admissible as such make no distinction between public and private documents. [A.I.R. 1951 All. 816, Dissent. from; A.I.R. 1947 Cal. 318, Rel. on]: AI.R. 1973 Bom. 14: (1972) 74 Bom.L.R. 505: 1972 Mah.L.J. 816.

Documents must be proved by primary evidence except in the cases enumerated in S. 65. Primary evidence means the document itself produced for the inspection of the Court. According to S. 67 of the Evidence Act, if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting: I.L.R. (1963) Andh. Pra. 754. *See* also (1976) 78 Punj.L.R. 21.

The rule in S. 65 of the Evidence Act excluding secondary evidence is not so rigid as to be enforced even if no objection has been taken at the trial by the party against whom the secondary evidence has been offered. When a party has waived proof of circumstances justifying the giving of secondary evidence, and the secondary evidence is allowed, he cannot raise the objection to its admissibility in appeal. The question of a document is a question of procedure and can be waived. But a question of relevancy of document is a question of law and can be raised at the appellate stage as well. Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before it is marked as exhibit and admitted: (1963) 2 An.L.T. 442: A.I.R. 1964 Andh. Pra. 53: (1963) 2 An.W.R. 307.

The primary evidence of a document is the document produced for inspection of the Court; its secondary evidence means and includes certified copies given under S. 76; under S. 64, documents must be proved by primary evidence, except in cases mentioned in S. 65. Under S. 65(*e*) only a certified copy of the public document and no other kind of secondary evidence is admissible to prove the original. [A.I.R. 1952 Nag. 57, Rel. on]: (1971) 1 Cut.W.R. 29.

The general principle is that if the original document exists and is available, it must be produced because it is the best evidence. However, if the original is lost, destroyed, detained by the opponent or third person who does not produce it after notice, or is physically irremovable, secondary evidence is admissible. Thus, where the plaintiff had stated in his examination-in-chief and cross-examination that on a particular day he had lost the original of which the certified copy was produced which was in the bag left behind by him in the bus, *held*, in view of this evidence of plaintiff, the requirements of S. 65 must be held to have been satisfied; the certified copy was properly admitted in evidence: A.I.R. 1986 Ori. 66.

The effect of Ss. 64 and 65 is that where a person, or his representative in interest, against whom a document is sought to be proved has admitted in writing the existence, condition or contents of the original document, such admission is admissible. The question as to the contents of a will is really one of title. Where many years have passed since the testator's death, the safer guide is the conduct, influenced by the will, of the parties dealing with the property immediately or shortly after death: (1977) 1 Kam.L.J. 218 (D.B.). *See* also (1972) 1 Mys.L.J. 79.

Object and principle. *See* (1957) 1 An.W.R. 15: A.I.R. 1957 Andh. Pra. 595. Where certain documents have been marked as exhibits in a case without objection but the contents thereof have not been put to the person connected with them either in their examination-in-chief or cross-examination, it is not possible to make use of the statements made therein for the purpose of drawing inferences one way or the other: A.I.R. 1957 Manipur 9.

When a document is cited on the side of a party, definite proof of its genuineness has to be given. Merely because the document is written on a very antique paper in Mahajani ink, does not show that the document is old. For the paper may be old and not the writing. Where the erasures on such a document coincide with the date of the document which was mentioned at no less than 4 places, the document is suspicious: 1958 M.P.L.J. 198: 1958 Jab.L.J. 289: 1958 M.P.C. 317: A.I.R. 1958 Madh. Pra. 246.

Original document filed before Sub-Registrar—Registration refused—Suit under S. 77—Original document filed but part of document subsequently missing from record—Court will admit secondary evidence and after reconstructing document will order registration: 1963 Jab.L.J. 415: A.I.R. 1963 Madh. Pra. 234.

When truth of the contents itself is in issue, the proof of document, *viz.*, proving the genuineness and contents by producing the same is not sufficient to prove the truth of the contents of the documents unless the writer of the document is examined: (1988) 1 An.L.T. 915.

Mere proof of handwriting expert and execution of document would not furnish evidence of truth of facts or contents of documents; truth or otherwise of facts or contents would have to be proved by admissible evidence, *i.e.*, evidence of those persons who can vouchsafe for true facts in issue: 1990 Cr.L.J. (N.O.C.) 120 (Del.) (D.B.).

Where the executant of a sale deed was not examined but his signatures thereon were proved, *held*, in view of (1966) 68 Bom.L.R. 228 (D.B.) confirming A.I.R. 1954 Bom. 305, the contents of the deed could not be said to have been proved; (1968) 70 Bom.L.R. 683, taking a contrary view despite noticing the two authorities is, thus, only a personal view of the single Judge and not binding: A.I.R. 1982 Bom. 387: (1982) 1 Bom.C.R. 819: 1982 Mah.L.J. 840.

Where the scribe, not a petition writer, required to maintain regular register of the petitions scribed—had proved due execution of the agreement of sale wherein there was no clause that the possession of the part of land to be delivered thereunder to the vendee would be redeemed to the vendor if the vendee defaulted in executing the sale deed and he also testified that he had also maintained a copy of the deed in his register though nowhere does he say that it was prepared from or compared with the original and the copy contained no such clause as appears in the original, *held*, primary evidence having been let in, its secondary evidence is inadmissible, particularly when it was not prepared or compared with the original: A.I.R. 1980 Raj. 212: 1980 W.L.N. 411 (D.B.).

It is not invariable rule of law that where neither the vendor nor the vendee are examined, the transaction cannot be proved at all: (1973) 2 Mys.L.J. (S.N.) 253.

When the author of a document is alive, *held*, its contents may best be proved by him; a mere formal proof of his signature on the document would have little probative value: A.I.R. 1977 N.O.C. 352 (All.).

Where persons conversant with handwriting and signatures on certain person's personal letters tendered and exhibited during trial were not examined to prove the letters' authorship, *held*, the letters could not be taken as having been written by their purported writers: A.I.R. 1976 P.&H. 24: 1975 Rev.L.R. 567.

Mere marking of an exhibit does not dispense with the proof of document. Thus, where no witness was examined in proof of a document whose certified copy had been produced and exhibited, *held*, no reliance could be placed on it. [A.I.R. 1971 S.C. 1865, Foll.]: A.I.R. 1980 Gau. 55 (D.B.).

Proving an 'entry' from the original register of a petition writer by examining him, *held*, does not amount to proving the rent-note by secondary evidence; it is primary evidence: (1993-1) 103 Punj.L.R. 165.

The truth of the contents of the birth certificate cannot be proved by a clerk who only proves the handwriting in the certificate. The person issuing the certificate must be examined. If that is not done and the original register too is not produced and the author of the entry is not proved, the certificate cannot be relied upon: (1975) 2 S.C.C. 564.

Where official witnesses had produced, and deposed on the basis of, the original official documents which were also kept on the Court's record, if the depositions were impeached, the Court could always refer to the records and ascertain the truth or otherwise of the depositions; *held*, there was, thus, no necessity to call for certified copies of the official records: 1987 Rev.L.R. 324.

Where no explanation was given for non-examination of the Doctor holding post mortem, *held*, post mortem report was not admissible, particularly when it was a carbon copy and not original report: 1989 Cr.L.J. (N.O.C.) 107 (Pat.) (D.B.).

Use of copy of accident mahazar by the Motor Accidents Claims Tribunal without examining mahazardars, *held*, is not illegal as S. 64 is not strictly applicable to such Tribunals: I.L.R. (1973) Karn. 339. *See* also (1975) 1 Karn.L.J. 170; (1974) 2 Karn.L.J. 484.

Where Police reports of the speeches and proceedings of an election meeting prepared by a Police official in the discharge of his public duties were admitted and exhibited in evidence without objection from the other party, *held*, having once been properly admitted and exhibited in evidence, the contents of the reports also stand admitted; however, the contents cannot be said to be conclusively proved: A.I.R. 1972 S.C. 608: (1972) 1 S.C.C. 9: (1972) 2 S.C.R. 646: 1972 U.J. (S.C.) 332.

Where the propounder of an unregistered will raised no objection to the admission of the registered deed of its revocation by the testatrix, *held*, as laid down by A.I.R. 1972 S.C. 608, it does not lie in his mouth to say that the revocation deed was not executed by the testatrix; however, its contents are not conclusive evidence: A.I.R. 1992 Cal. 341 (D.B.).

The principles of law laid down in (1982) 95 Mad.L.W. 297 (cited under S. 61, *supra*) are not wholly erroneous but require modification in the light of the earlier Division Bench judgments in (1974) 2 M.L.J. 535 and (1974) 2 M.L.J. 260, the correct position being that "permitting a document to be marked by consent only means that the party consenting is willing to waive his right to have the document in question proved"; the single Judge in (1982) 95 Mad.L.W. 297, however, took the erroneous view that formal proof is still required even if the document was marked by consent; marking by consent, however, certainly does not mean that every statement made therein is correct: A.I.R. 1986 Mad. 341: 1986 T.L.N.J. 1: (1986) 1 M.L.J. 283: (1986) 99 Mad.L.W. 561 (D.B.).

When documents are exhibited without objection from a party, that party cannot object to their admission in evidence; however, it can impeach the document and its contents in all other possible manner. Thus, where an entry in the Municipal Death Register, with several corrections, erasures and overwritings, was allowed to be exhibited without objection, *held*, that only meant its formal proof; the other party could certainly impeach its genuineness or credibility: A.I.R. 1978 Ori. 125: 44 Cut.L.T. 597: (1977) 2 Cut.W.R. 779.

Where a document is admitted in evidence without objection from the other party, *held*, it is not open to that party to object to the document's admission for the first time during final arguments. [A.I.R. 1972 S.C. 608, Foll.]: A.I.R. 1984 Cal. 297.

Where a document was exhibited without objection, *held*, its admissibility in evidence could not be challenged subsequently: A.I.R. 1984 N.O.C. 116 (Ori.).

An objection regarding the mode of proof of a document can be raised at the time of its exhibition; once the document is exhibited without any objection, the same cannot be raised for the first time in appeal. [A.I.R. 1943 P.C. 83; A.I.R. 1958 Punj. 116 and A.I.R. 1972 S.C. 608, Rel. on]: A.I.R. 1982 P.&H. 282: (1982) 84 Punj.L.R. 237.

Once a document is properly admitted the contents of the documents would stand admitted in evidence and if no objection has been raised with regard to its mode of proof at the stage of tendering in evidence such a document, no such objection could be allowed to be raised at any later stage of the case or in appeal. [(1994) 2 Chand.Cr.C. 300 (Del.); (1994) 4 A.D. (Del.) 50; (1994) 3 A.D. (Del.) 626; (1994) 3 A.D. (Del.) 1495, Overruled; 1975 Cr.L.J. 778 (S.C.), Foll.; 1970 Cr.L.J. 1266 (S.C.), Disting.]: 1995 Cr.L.J. 1623 (Del.) (D.B.).

After the document is admitted in evidence upon formal proof being dispensed with and without any objection, *held*, no objection can be taken at the appellate stage: A.I.R. 1986 Cal. 23: (1986) 2 Hindu L.R. 86: (1985) 2 Cal.H.N. 357: (1985-86) 90 Cal.W.N. 95 (D.B.); A.I.R. 1973 Cal. 325 (D.B.).

Document admitted and acted upon by two Courts—Plea as to insufficiency of proof cannot be allowed to be taken in second appeal: A.I.R. 1967 All. 481.

Objection to admissibility of document—Time for—Document marked as exhibit under S. 90, Evidence Act—Failure to raise objections as to its admissibility—Effect. *See* A.I.R. 1958 Ori. 26.

Where objection to the admissibility of a document relates to the mode of its proof, it has to be taken at the earliest stage of hearing so that the party concerned may adduce its stricter formal proof; but if the objection to its admissibility is itself under the law, it may be raised even at the appellate stage. [(1942-43) 47 Cal.W.N. 607 (P.C.), Rel. on]: A.I.R. 1972 Cal. 190: (1971-72) 76 Cal.W.N. 217 (D.B.).

When no objection was taken at the time secondary evidence was adduced and was exhibited and admitted in evidence in the trial Court, *held*, the Courts below should not have excluded it from consideration. [A.I.R. 1960 Raj. 92, Rel. on]: A.I.R. 1971 Raj. 203: 1971 Raj.L.W. 319.

When a particular document is admitted in evidence without objection by the opposite party, the contents of such document though may not be conclusive evidence are also admitted: A.I.R. 1975 Cal. 98 (D.B.).

When the report of Senior Scientific Officer of the Central Forensic Science Laboratory was tendered and admitted in evidence without objection as to its inadmissibility or mode of proof, *held*, the accused could not be allowed to challenge its admissibility in appeal: 1995 Cr.L.J. 2599 (Del.).

Where in a suit for recovery of price of the goods sold, the plaintiff had specifically alleged that test certificates had been supplied by the plaintiff to the defendant alongwith the supply of the goods and the defendants, in his written statement, admitted their receipt without alleging that the contents thereof were not correct, *held*, the defendant was not entitled to raise the objection that these test certificates were not correct and insist on proof of the correctness of the contents of those documents: A.I.R. 1971 Cal. 357.

Where the fact to be proved by the complainant Food Inspector was his holding the post at the relevant time and instead of the Gazette notification or a certified copy thereof, he had filed the copy attested by himself to be true, duly exhibited without objection as proof of the notification, *held*, his appointment stood proved: A.I.R. 1971 Ker. 193: 1971 Ker.L.J. 177: 1971 Ker.L.T. 19 (F.B.).

Where the defendants produced a certified copy of a registered will which was 80 years

old and the plaintiffs neither asked the defendants to produce the original will nor they objected to its admissibility, *held*, in second appeal, no objection regarding admissibility or due execution and attestation of the will could be taken. [A.I.R. 1968 All. 363, Disting.]: A.I.R. 1980 N.O.C. 7 (All.).

It is well known that the science of photography is so advanced that photographs can be easily manipulated and it is difficult to decipher the manipulation in the photographs produced in particular when their negatives were not produced on the record; photographs whose negatives have not been produced are not admissible in evidence, when author thereof had not been examined: (1990) 1 Hindu L.R. 113 (P.&H.).

Photographs ought not to be admitted in evidence without production of their negatives and examining the photographer; otherwise, their evidentiary value is almost nil; they cannot be used even to contradict the eye-witnesses account and evidence of the Investigating Officer: (1990-2) 10 Guj.L.H. 372 (D.B.).

When an agreement of sale was not pleaded in the written statement nor the existence of its original was proved, *held*, the Court's permission to prove it by secondary evidence of its photostat copy could not be permitted; the trial Court erred in allowing secondary evidence subject to the party adducing proof of the agreement's execution and its loss was wholly unjustified: (1989-1) 95 Punj.L.R. 418.

Suit on promissory note—Execution denied by defendant—Plaintiff not adducing any evidence—Total lack of legal evidence regarding execution cannot be remedied by any impression formed by Court about demeanour of defendant or about the comparison of admitted signature of defendant with disputed signature on the note: (1960) 1 Ker.L.R. 604: 1960 Ker.L.T. 775.

Non-production of best evidence—Party claiming that houses were impressed with character of joint family property as their purchase alleged from sale-proceeds of land belonging to joint family—Party not producing sale-deed of land nor producing extracts from land records to show existence of land but offering oral evidence—Non production of document suggests for adverse inference and oral evidence cannot be accepted: I.L.R. (1965) 1 All. 483: A.I.R. 1966 All. 570.

Registration Act, 1908, S. 49—Unregistered deed of lease—Evidentiary value—Deed is inadmissible to prove the lease, but admissible for the collateral purpose of proving the nature of the defendant's possession (whether as a tenant or as a licensee or as a trespasser) and the amount of rent: A.I.R. 1966 All. 515.

Ineffective registration of sale-deed—Contract not void—Document can be admitted in evidence for collateral purpose of showing nature and character of rights of parties under deed: 1965 B.L.J.R. 575.

Where it was contended by the claimants that the deceased had relinquished her rights to land in 1952 and documents embodying her statement before the Panchayat, her application for sanction of mutation and the Patwari's report which were found by the Court below as inadmissible for want of proof and on the ground, *inter alia*, that no title could be acquired by unregistered documents; findings of the Courts below affirmed: A.I.R. 1977 P.&H. 103: (1977) 79 Punj.L.R. 191: 1977 Rev.L.R. 179.

The Evidence Act does not purport to deal with the admissibility of documents in evidence which require to be stamped under the provisions of the Stamp Act. [A.I.R. 1927 Rang. 109 and A.I.R. 1937 Mad. 431, Overruled]: A.I.R. 1971 S.C. 1070: (1971) 1 S.C.C. 545: (1972) 85 Mad.L.W. (S.N.) 26.

Secondary evidence—True copy—Admissibility—Absence of proof as to diligent search for lost document—Effect: A.I.R. 1968 Cal. 532.

Secondary evidence—Certified copies of documents—Admissibility: A.I.R. 1967 Ori. 129.

Admission of execution of document during examination of accused under S. 342, Cr.P.Code, 1898—No substitute for primary proof: 1969 Cr.L.J. 1089: A.I.R. 1969 All. 423.

Merely because the signatures of the senders of certain letters have duly proved and there is no evidence or circumstances to show that the senders had put their signatures on blank papers which have been subsequently filled up, it cannot be said that the letters must be held to have been proved. But where in addition to that it is also proved that the recitals in those letters are consistent with the contents of other documents admitted in evidence, the letters must be deemed to have been proved and genuine.

That a letter bears the signatures of the sender may be a strong piece of evidence in favour of the person who contends it is genuine, and in the majority of the cases very slight evidence may be necessary to prove that the letter was signed after it was written. It does not, however, follow from this that the mere proof of signature *ipso facto* prove the contents of the document. It would equally not be correct to say that execution of a document cannot in any case be proved except by direct evidence. It may be proved by one of the modes provided in Ss. 45 and 47 and also by internal evidence afforded by its contents. The mode of proof by the contents may be of considerable value where the disputed document purports to be a link in a chain of correspondence, some links in which are proved to the satisfaction of the Court: I.L.R. (1968) Cut. 718: 34 Cut.L.T. 993: A.I.R. 1968 Ori. 217.

Where the plaintiff annexed photocopies of the sale and mortgage deeds to the plaint with no mention about their originals having been lost and despite the defendant's insistence for production of their originals and the plaintiff having been granted five opportunities over a year and a half, the originals were not produced and the plaintiff by his vague application bereft of any particulars as to the place or time or the circumstances of the loss of originals, and unsupported by affidavit, sought leave to adduce secondary evidence, *held*, the trial Court clearly erred in permitting the plaintiff to adduce secondary evidence: (1993) 1 Rev.L.R. 278 (P.&H.).

Where the Doctors testified as to the wife having had recurring attacks of epilepsy at the time of the marriage but the medical records on which their opinion was based was not produced, *held*, no value could be attached to their testimony; it cannot be taken as 'best evidence' required under S. 64; this rule is probably older than its reasons, one of which is that the Court may acquire knowledge of full contents of documents or record on the basis whereof the Court might come to conclusion different from that of the witnesses: (1985-1) 87 Punj.L.R. 334: 1985 Cur.L.J. 171.

Where purchaser of a property filed four ejectment suits and only in one suit he filed original sale deed and in other suits he filed copies thereof, *held*, it could not be argued that he should have placed original document in each suit: 1977 Kash.L.J. 57: 1977 Ren.C.J. 636.

Where the certificate issued by the Director of the Central Food Laboratory in a prosecution under the Food Adulteration Act, 1954 was not exhibited, *held*, it could not be used to enter conviction: 1989 Cr.L.J. (N.O.C.) 53: (1988) 1 An.L.T. 1003.

Where the claim as to infliction of penalty of recovering costs was passed by the Government and not by the Chief Engineer and the original order was not produced before the Court, *held*, the claim was not proved for lack of evidence: 1982 Lab.I.C. 1271 (P.&H.).

Where some of the executants of a registered deed had admitted its execution but in respect of other executants the Courts below found that the propounder of the documents had not proved its execution by its other purported co-executants, *held*, it cannot be said that the document was not genuine: A.I.R. 1971 Mad. 280: (1970) 1 M.L.J. 486.

Where the landlord pleaded the monthly rate of rent from the rented property was Rs. 400 and the same was shown as such in the landlord's Income-tax assessment orders, *held*, in the absence of any materials placed on record by the tenant showing that the landlord had some other property as well, such rate of rent stands established: A.I.R. 1977 Ori. 76: I.L.R. (1977) Cut. 263.

Where the five accused entered into a criminal conspiracy for hushing up the theft or criminal breach of trust resulting in shortage of Government cash by making it up from a sister Department by use of false assurance to return the money and threats of dire consequences, and by destruction of the report about the missing money whereafter the Head Clerk of the sister Department, being in bad health and apprehending that the money would not be returned, gave a petition to the Director setting out the entire facts, *held*, the petition was inadmissible; no reliance could be placed on it: A.I.R. 1989 S.C. 1205: 1989 Cr.L.J. 1135: (1989) 2 Crimes 124.

A minor girl having disappeared, the relations suspected one of the accused of complicity in kidnapping her and intercepted the letter from him to his wife. As the letter confirmed their suspicion, the letter was handed over to the Police. At the trial of the accused it was read in evidence. *Held*, however valuable the letter might have been for the purposes of investigation and for tracing the girl and some of the miscreants it was not legally proved and, therefore, the Sessions Judge was not justified in reading it in evidence: 1957 Cr.L.J. 688: 1957 Raj.L.W. 345.

65. Cases in which secondary evidence relating to documents may be given.—Secondary evidence may be given of the existence, condition or contents of a document in the following cases:—

(*a*) when the original is shown or appears to be in the possession or power—

of the person against whom the document is sought to be proved, or

of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it,

and when, after the notice mentioned in section 66, such person does not produce it;

(*b*) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(*c*) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

Section 65—Synopsis.

1. Scope and applicability of section.
2. Unstamped/understamped document.
3. Unregistered deed which is required to be compulsorily registered.
4. Clause (*a*).
5. Notice to produce.
6. Clause (*b*).
7. Clause (*c*).
8. Clause (*e*).
9. Clause (*f*).
10. Clause (*g*).
11. Illustrative cases.
12. Objection as to admissibility of document—When may be taken.

---

1. Scope and applicability of section.—S. 65 appears to be complementary to S. 63: (1977) 1 Kam.L.J. 218 (D.B.).

An attempt by a party to a proceeding, to comply with the provisions of Evidence Act, so as to enable him to adduce secondary evidence in a case, cannot possibly amount to compelling a person to give evidence against himself: 1971 All.L.J. 1389: 1971 All.W.R. 815.

A combined reading of Ss. 65 and 66 of the Evidence Act and S. 57(5) of the Registration Act leaves no doubt that once it is established that the original title deeds are lost or destroyed or are being deliberately withheld by the party against whom they are sought to be used, secondary evidence in respect of those title deeds can be tendered and if the secondary evidence happens to be certified copies of registered documents entered in book No. 1, the contents thereof can be read in evidence by virtue of sub-S. (5) of S. 57 of the Registration Act. [A.I.R. 1956 S.C. 305 and (1969) 3 S.C.C. 367, Foll.]: A.I.R. 1978 Guj. 193: (1978) 19 Guj.L.R. 412.

The terms and conditions and date of a mortgage embodied in a duly registered deed can be proved only by the original or, under certain circumstances, by its secondary evidence under S. 65; it is mandatory under S. 65 that where certified copy can be secured, it would be the only form of admissible evidence; mere difficulty in securing it cannot absolve the party from adducing proper evidence: 1973 R.L.R. 319.

Original documents not proved in any manner—Their copies are not admissible in evidence: A.I.R. 1955 Raj. 179: 1955 Raj.L.W. 434.

It is only when the existence of the original document (will in this case) is proved that the production of secondary evidence thereof can be allowed: (1989-1) 95 Punj.L.R. 55; (1990) 1 Raj.L.W. 133.

In order to enable a party to produce secondary evidence, it is necesssary for the party to prove existence and execution of the original document. Thus, where the trial Court found that the document seemed to be not genuine and, thus, the very existence of the same was itself doubtful, *held*, it rightly declined the prayer to lead secondary evidence: (1993-2) 104 Punj.L.R. 452.

(*d*) when the original is of such a nature as not to be easily moveable;

(*e*) when the original is a public document within the meaning of section 74;

(*f*) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in [1][India], to be given in evidence;

(*g*) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (*a*), (*c*) and (*d*), any secondary evidence of the contents of the documents is admissible.

In case (*b*), the written admission is admissible.

In case (*e*) or (*f*), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (*g*), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

---

1. Substituted by Act 3 of 1951, S. 3 and Sch., for "the States".

When a certified copy is allowed to be produced as secondary evidence, the Court should not admit it unless execution of the original is proved or admitted by the other party; a certified copy raises no presumption of its original being genuine: A.I.R. 1987 Ori. 138: (1986) 2 Ori.L.R. 410 (D.B.).

Where there was no satisfactory evidence to prove the execution of the original sale deed as the evidence of the only attesting witness was found to be not acceptable, *held*, even if the secondary evidence in the shape of certified copy of the original was adduced, execution of the original was not proved. [In view of A.I.R. 1973 Bom. 242, the decision in A.I.R. 1946 Bom. 193 must be treated as overruled]: A.I.R. 1984 Bom. 19.

Secondary evidence should not be allowed unless the circumstances show a sufficient justification under the Evidence Act, for reception of secondary in lieu of primary evidence: A.I.R. 1939 Pat. 468.

S. 65 is designed only for the protection of persons who, in spite of their best efforts, are unable, from circumstances beyond their control to place before the Court primary evidence of a document as required by law. It is not intended to be utilised for the benefit of persons who deliberately, or with sinister or ulterior motives, refuse to produce in Court a document which is in their possession, power or control: A.I.R. 1949 All. 677.

Secondary evidence—Foundation must be first laid for its reception: A.I.R. 1954 S.C. 606.

Where the original document has not been filed, and no case for proving the original by the secondary evidence of its copy has been made out, the copy must be disregarded: A.I.R. 1952 Bilaspur 13. The law is well settled that if the original document is inadmissible in evidence owing to its being unstamped or unregistered, secondary evidence is inadmissible S. 65 of the Evidence Act presupposes that but for one or more of the barriers to its production stated in the section, the document would have been capable of proving its contents under S. 64 read with S. 62. It would, therefore, be absurd to hold that secondary evidence may be given to establish a fact, proof whereof by primary evidence is forbidden. Under no circumstances can secondary evidence be admitted as a substitute for inadmissible primary evidence: I.L.R. (1951) Raj. 69: A.I.R. 1951 Raj. 66; 1956 Raj.L.W. 558; A.I.R. 1958 Raj. 72. *See* also A.I.R. 1951 Kutch 23, *infra*.

Where a party has taken all the necessary steps for the production of an original document but the document is not produced by the person in whose possession it is, he being alleged to be in collusion with the opposite party, the former is entitled to offer secondary evidence as to the contents of the documents in question: 22 Pat.L.T. 200.

S. 65 cannot be invoked where a party being in possession of the document does not produce it, as in a case where the document not having been produced at all the relevant periods, is sought to be ushered in at the stage of the arguments in the High Court, producing it from his own possession: 1958 An.L.T. 440: A.I.R. 1958 Andh. Pra. 418.

Where the sale deed relied upon by the plaintiff was in the defendant's custody which the defendant failed to produce on the ground that it was not with him and the plaintiff sought to prove it by secondary evidence, *held*, the plaintiff's request was based on S. 65(*a*) and (*c*) or either; the secondary evidence to prove it could be of 'any' kind under S. 65 and of the kind specified in S. 63; the deed could, thus, be proved by the copy of the sale deed annexed with the plaint; neither S. 63 nor S. 65(*f*) would stand in the way. [A.I.R. 1969 S.C. 253, Rel. on]: A.I.R. 1975 Guj. 73: (1975) 16 Guj.L.R. 61.

Under S. 65 secondary evidence is admissible only of the existence or the contents of a document which is lost, but the execution of the document must be proved by primary evidence as required by S. 67. S. 67 merely says that if a document is alleged to be signed by a person, the signature of that person must be proved. It does not say that the signature must be proved by a person who actually saw that person affecting his signature. S. 47 describes the various methods of proving the handwriting of a person and if these two sections are read together, the reasonable inference is that the signature of a person on a document may be proved either by examining the person in whose presence the signature was affixed, or else by examining another person who is acquainted with the handwriting of the executant of the document and is able to prove his signature by his opinion. *See* A.I.R. 1966 All. 515; A.I.R. 1958 Ori. 207.

Original books of account worm eaten and in tottering condition—Even so, secondary evidence is not admissible under the section: A.I.R. 1962 All. 111.

Where the original document has either been lost or is being deliberately withhled by the person in whose custody it was kept, secondary evidence in the nature of oral evidence as to the contents of original can be admitted in evidence: (1962) 64 Punj.L.R. 203: A.I.R. 1962 Punj. 293.

Where trial Court rejected petitioner's application moved under S. 65, Evidence Act for the production of secondary evidence in respect of certain documents whose production was not granted under O. 11 R. 14, C.P.Code observing that the documents mentioned in the application moved under O. 11, R. 14, C.P.Code did not find mention in the application moved under S. 65, Evidence Act, *held*, it could not be said that the trial Court had acted with material irregularity or illegality in the exercise of its jurisdiction in rejecting the defendant-petitioner's application for permission to produce secondary evidence: A.I.R. 1995 Raj. 138.

Original will in Bengali, executed before 1821 A.D. not traceable—Foundation for introduction of secondary evidence laid—Original or copy filed in Court of Wards Office by widow of testator in about 1836—Office causing translation of will to be made—Translation not of the entire will—Name of translator not appearing on translation—Certified copy of translation signed by officer not knowing language of will, as true and correct translation. *Held*, that even though the certified copy could be treated as secondary evidence of the original, it could not be relied upon as a reliable translation of the original on which the Court would act. *Held*, further that as the document attached to the application of the widow to the Court of Wards might not have been the original but a copy, this translation would be the translation of a copy. It could not be placed on any better footing than a copy of a copy and would not be admissible in evidence even as secondary evidence of the original will: A.I.R. 1961 All. 206.

Witness summoned by registered post to produce original sale deed in her possession—Witness refusing summons—Certified copy of sale deed is admissible—C.P.Code (1908), O. 5, R. 20-A: I.L.R. (1961) Cut. 635.

Copy of affidavit—Admissibility: A.I.R. 1966 Him. Pra. 52.

Secondary evidence is given to prove the existence, condition or contents of a document and nothing more beyond that: 1964 B.L.J.R. 339: A.I.R. 1964 Pat. 45.

Where a document on the basis of which a suit is laid has been lost or is not in the possession of the plaintiff, the various clauses of S. 65 of the Evidence Act would come into play. But even where those conditions do not apply, if the condition or the contents of the original have been admitted, in writing by the person against whom it is proved or by his representative-in-interest, secondary evidence could be given about the contents of the document and the admission of the person against whom it is proved can itself be relied upon for holding that the facts so admitted have been proved. The admission has to be accepted or rejected as a whole, but that applies only to the contents of the document itself and not to

matters which are not contained in that document though it might relate to or be connected with the document which is said to have been lost.

There is no rule of law that if a plaintiff, who has a document in his possession, does not produce it, the suit has necessarily to be dismissed. The provision regarding the consequence of non-production by the plaintiff of a document in his possession as required under O. 7, R. 14, is provided in O. 7, R. 18: (1969) 1 M.L.J. 237: (1969) 82 Mad.L.W. 151.

A contract-note bore the signature of executant only on the original and not on the carbon copy. Signatures on the original is enough. Whether it would appear on the carbon copy would depend upon the manner in which the original and copies are arranged at the time of taking the signature. If the original note is written out and thereafter removing the carbon the original is given for signature there would be no impression of carbon. From the absence of signature on the carbon copy it cannot necessarily follow that the executant's signature had been taken later on: 1968 M.P.L.J. 438.

Original not produced at any time—The foundation laid for establishment of right to give secondary evidence—Copies of original not admissible in evidence: A.I.R. 1966 S.C. 1457.

In order to enable the plaintiff to tender the certified copy as secondary evidence, it is enough for the plaintiff to prove that the original is not in his possession and so far as he is concerned it is lost: A.I.R. 1960 Cal. 494.

If the sale deeds which were the primary evidence of the interest sold and were said to be registered documents, were not available for any reasons, certified copies thereof could be adduced as secondary evidence, but the reception of other evidence must always be of a very weak character in place of registered documents evidencing those transactions: 1959 S.C.A. 173: A.I.R. 1958 S.C. 706.

S. 45-F is in addition to provisions contained in Evidence Act and Bankers Books Evidence Act: A.I.R. 1957 Cal. 9.

The rule laid down in S. 65 of the Evidence Act that certified copy is the only secondary evidence admissible when the original is a public document, has no application where the original has been lost or destroyed: 1963 M.P.L.J.(Notes) 79.

Registration Act, 1908, S. 57—Will registered—Original in possession of persons interested to deny execution—Certified copy of will is evidence of will—Succession Act, 1925, S. 63: I.L.R. (1962) 2 Punj. 915: A.I.R. 1963 Punj. 208.

A statement of a witness abstracted in a judgement is not even secondary evidence of the statement and cannot be made use of in lieu of the original statement itself: I.L.R. 53 Mad. 952: 60 M.L.J. 14.

It is doubtful whether a copy of a list attached to a plaint obtained from some record in the Revenue Court is admissible in evidence: 7 O.W.N. 1079: A.I.R. 1931 Oudh 136.

Reconstruction of records—Records destroyed by fire—It is bounden duty of Court to reconstruct record with all despatch and expedition and no application need be presented in that behalf—Art. 181 is not attracted: 1968 Kash.L.J. 101.

Suit to recover mortgage-money—Original mortgage-deed not filed—Maintainability of suit. *See* C.P.Code, 1908, O. 7, R. 14: A.I.R. 1959 Ori. 126.

Probate—Grant of—Conclusive evidence against all—Final judgment or order—If probate—Secondary evidence, if admissible. *See* Evidence Act, 1872, S. 41: A.I.R. 1959 Cal. 795.

2. Unstamped/understamped document.—Secondary evidence by way of oral evidence with regard to a document either unstamped or insufficiently stamped is not admissible in view of the bar of S. 35 of Stamp Act, 1899 even though no objection could be taken under the Evidence Act with regard to the admissibility of such secondary evidence. [A.I.R. 1927 Rang. 109 and A.I.R. 1937 Mad. 431, Overruled]: A.I.R. 1971 S.C. 1070: (1972) 85 Mad.L.W. (S.N.) 26. If it is not so, the law of registration and the law of stamps would be made nugatory and un-enforceable, as clever litigants will always circumvent it by claiming that the document has been lost and proving its contents avoiding successfully the stamp duty as well as the registration charges. The law of secondary evidence was never enacted to make the law of registration and stamps nugatory but it is only an exception to the law of proving facts by primary evidence, and is part of law of Evidence only: I.L.R. (1979) 29 Raj. 457. No secondary evidence of a document can be given, if the original itself is not admissible. Thus, when a rent note was not duly stamped, *held*, no secondary evidence in respect thereof could be given: A.I.R. 1971 P.&H. 458. But where at the time the plaintiff was permitted to produce the secondary evidence in respect of the rent note, no objection of it being insufficiently stamped was raised, *held*, no interference with the trial Court's order was called for: 1978 W.L.N. (U.C.) 415 (Raj.).

A party is not entitled to rely upon secondary evidence to prove his right and title to property which was claimed to have been conveyed to him under an un-stamped sale deed: (1966) 2 An.W.R. 251: (1966) 2 An.L.T. 230.

Secondary evidence—Insufficiently stamped document not produced before Court—Secondary evidence as to contents of such document—Admissibility—Opposite party not objecting to admission of such secondary evidence—Effect: (1967) 2 An.W.R. 444.

Where the original document is understamped, even secondary evidence would be barred: Pak.L.R. (1950) Lah. 273: A.I.R. 1950 Lah. 154; (1979) 81 Punj.L.R. 409: 1979 Rev.L.R. 305.

Lost document, insufficiently stamped—Inadmissible in evidence, as no duty or penalty can be levied on a lost document. But proof of title by independent evidence is not barred: 4 Mys.L.J. 194. *See* also the undermentioned decision. An unstamped document was impounded from the plaintiff and on payment of penalty its execution was proved. Subsequently, the document was lost while it was in the custody of the Court. In second appeal the plaintiff applied for the permission to lead secondary evidence. On objection that the document being unstamped was unfit for receipt of secondary evidence. *Held* that S. 36, Stamp Act would come to the help of the plaintiff and the document after it had been admitted into evidence on payment of penalty could not be called into question at any subsequent stage of the same suit on the ground that it was not duly stamped: 1957 Raj.L.W. 603.

Secondary evidence cannot be given of the contents of a document which, if produced, would be inadmissible. Hence, a copy of a deed of partition executed and registered in British India, and duly stamped according to the law of British India but which also relates to properties in Mysore, cannot be admitted in evidence in the Courts in Mysore, the original not having been stamped duly according to the Mysore Stamp Law. The fact that, through no fault of his own, the party seeking its admission cannot produce it, does not render the copy admissible: 52 Mys.H.C.R. 122.

3. Unregistered deed which is required to be compulsorily registered.—Unregistered deed compulsorily registrable—Delivery in pursuance thereof—Non-production of the deed—Secondary evidence of contents admissible to ascertain the nature of possession—Proviso to S. 49, Registration Act applies: 1961 M.P.L.J. (Notes) 297.

Original document unregistered—Secondary evidence: (1969) 35 Cut.L.T. 927.

Secondary evidence of a compulsorily registrable but unregistered deed is not admissible in evidence: 101 I.C. 839: A.I.R. 1927 Nag. 214.

Once the primary evidence of an unregistered document is receivable for the collateral purpose of proving the nature of the possession and with what intention the possession was held then if the necessary conditions for adducing secondary evidence of such document exist, the secondary evidence of the document for the self-same purpose, namely, that of showing the nature and character of the possession and with what intention the possession was held can be adduced. [A.I.R. 1960 Raj. 1 (S.B.), Rel. on]: A.I.R. 1973 Raj. 294: 1973 Raj.L.W. 493: 1973 W.L.N. 207.

4. Clause (*a*).—For invoking S. 65 for admission of secondary evidence, the conditions prescribed therein have to be proved; when the original is shown or appears to be in possession or power of the person against whom it is sought to be proved or in possession of a person out of the Court's reach or not subject to its process or in possession of a person legally bound to produce but despite notice under S. 66 does not produce it, the secondary evidence could only then be admitted in evidence: (1985) 2 An.W.R. 160. *See* also (1990) 1 Karn.L.J. (S.N.) 17: I.L.R. (1988) Karn. 3347.

S. 65 clearly says that if the original appears to be in possession or power of the person against whom it is sought to be proved, its secondary evidence can be allowed to be given by the other party; it is not in all cases that the original should be shown to be in possession of the party against whom it is sought to be proved; if from the nature of the document itself it appears that it should be in that party's possession, its secondary evidence may well be allowed to be given: 1978 Rev.L.R. 401: (1979) 81 Punj.L.R. 45.

In order to avail the machinery under Ss. 65 and 66 it is necessary to establish that a document was executed, and that it is in the

possession or power of the person against whom the document is sought to be proved and that the said person despite notice under S. 66 failed to produce it: A.I.R. 1971 Mad. 471: (1971) 84 Mad.L.W. 452: (1971) 2 M.L.J. 128.

The condition precedent for the application of S. 89 is that the original document must have been called for and has not been produced after notice to produce it is given, and these conditions unequivocally suggest that the cases in which the statutory presumption under S. 89 can be raised are cases which fall under S. 65(*a*) and S. 66, Evidence Act. The principle underlying the provisions of S. 89 is sometimes described as the 'necessity' principle. If a party is in possession of a document, or it is shown that the document is in his power, and despite the notice given to him to produce that document he refuses to produce that document, law provides that the conduct of the party justifies an inference being drawn against him, and in that sense the principle of necessity is invoked and Courts are authorised to assume that the document which has not been produced must have been properly attested, stamped and executed in the manner required by law. While considering the presumption which arises under S. 89, it may be relevant to remember that once a presumption is drawn under S. 89, it cannot be easily rebutted by the production of the original document at a later stage: A.I.R. 1956 Bom. 65: I.L.R. (1955) Bom. 999; A.I.R. 1976 Bom. 38; (1978) 19 Guj.L.R. 412.

The certified copy of a document is not admissible under S. 90. But the same may be received in evidence under S. 65 when the person in custody of the original document has refused to produce the original: 1973 B.L.J.R. 406.

Effect of section. *See* I.L.R. 49 All. 78: 24 All.L.J. 964. Any secondary evidence is admissible here: 16 I.A. 625: I.L.R. 16 Cal. 753 (P.C.). 'Produce' means only procure the production or given it in evidence: A.I.R. 1930 All. 550.

Secondary evidence is necessary before any presumption under S. 90 can be made: A.I.R. 1930 All. 550. Oral evidence cannot be given to prove the contents of a letter which was neither produced nor called for: I.L.R. 26 Cal. 53. Secondary evidence in the shape of private copies of bills maintained by a party cannot be admissible in evidence when the party in whose possession the original bills were was never called upon to produce them: A.I.R. 1960 Pat. 139.

The copies of the letters from the accused to his co-conspirators which were intercepted and reported are admissible in evidence. It is not necessary that the prosecution should go through the formalities of making a formal application to his associates to produce the original letters: A.I.R. 1933 All. 498.

Where a lease deed is in the possession of the defendants and they failed to produce it though summoned twice to do so, secondary evidence of the same is admissible: 3 L.R. 3 A. 8 (Rev.).

Where in a suit against the Union of India, the copy of the notice under S. 80, C.P.Code, was sought to be produced by the plaintiff but it was objected on behalf of the defendant that a copy was not admissible. *Held*, S. 65 read with S. 66 of the Evidence Act permits the plaintiff to produce the copy of the notice without summoning the original. It was for the defendant to show by production of the original that the document did not amount to a notice according to S. 80, C.P.Code. Where the defendant failed to produce the original he could not have any grievance when its copy was produced by the plaintiff: I.L.R. (1958) 8 Raj. 855: 1959 Raj.L.W. 301: A.I.R. 1959 Raj. 231. Certified copy of a registered deed is sufficient proof when the original of that deed is in the possession of the opposite party: A.I.R. 1928 All. 394.

Where the original sale deeds are in the possession of the defendants as deposed to by the plaintiff and if the plaintiff's statement that the certified copies of the three sale deeds produced by him related to the suit houses has not been denied by the defendants, it would be a proper case in which notice as required under Cl. (*a*) of S. 65 may be dispensed with. In that case, the three certified copies would be admissible under Cl. (*a*) of S. 65: A.I.R. 1956 Bom. 555.

Where a mortgage deed is in possession of the mortgagee in a suit for redemption by the mortgagor it is for the mortgagee to produce that document and if he fails to do so, the plaintiff is well within his right to produce secondary evidence, not only about the existence of the mortgage deed, but also about its contents: 1956 Raj.L.W. 241: A.I.R. 1956 Raj. 126. *See* also (1979) 20 Guj.L.R. 390.

Original Mortgage deed filed in Pakistan Courts before Partition—Mortgagee migrating to India on partition—Suit on mortgage filed in India to enforce it against property in India—Mortgagee is entitled to produce secondary evidence of mortgage deed because original is in custody of person beyond the jurisdiction of the Court: I.L.R. (1964) 1 All. 553: A.I.R. 1964 All. 381.

Contract must show terms to transfer—Agreement to lease suppressed by plaintiff—Admission of oral evidence. *See* (1956) 2 M.L.J. 515: A.I.R. 1956 Mad. 693. Also when the original is filed in another Court and could not be got without delay: A.I.R. 1930 Cal. 479.

Where the original of a document cannot be admitted in evidence on the ground of privilege under S. 124 no secondary evidence of its contents can be given: A.I.R. 1937 Mad. 807: (1937) 2 M.L.J. 381.

Income-tax documents—Suit to recover business dues—Plaintiff claiming defendant to have transacted through intermediaries—Income-tax assessment order against a plaintiff's witness produced to show dealings by defendants through intermediary—Such order being a public document within the meaning of S. 74, its certified copy is admissible under S. 65 (*a*)—Yet it cannot be used as evidence against the defendant. *See* Evidence Act, 1872, S.74: 1967 Ker.L.J. 237.

Where a will is in the possession of a person describing himself a notaire in French territory and who states in the witness-box that he is under an obligation not to produce the will in any Court in the Indian Union and so would not produce the will.

Held.—Either the notaire is a person who can legally be compelled by the Court to produce the document or is a person who cannot be legally compelled to do so. If the person is not one who can be legally compelled to produce the original then he is not subject to the process of the Court in the matter of the production of the will and under the second clause of S. 65(*a*) of the Evidence Act secondary evidence in the form of the authenticated copy becomes admissible. If, on the other hand, he is a person legally bound to produce the original, he refuses to produce it notwithstanding notice, to do so then under the third clause of S. 65(*a*) secondary evidence becomes admissible: (1958) 71 Mad.L.W. 50(1): (1958) 1 M.L.J. 96: I.L.R. (1958) Mad. 415: A.I.R. 1958 Mad. 393.

Agreement reduced to writing in possession of opposite party—Such party knowing that it would be required to produce it but withholding it—Contents of agreement could be proved by oral evidence: I.L.R. (1962) 2 All. 475: 1963 All.L.J. 443: A.I.R. 1963 All. 313.

No order passed under O. 11, Rules 11, 12 and 13—C.P.Code—Striking out defence cannot be ordered under R. 21—Notice to produce documents given under O. 12, R. 8—Non-compliance with notice—Secondary evidence of documents can be given: A.I.R. 1962 Andh. Pra. 249.

Plaintiff's suit for declaration that subject-matter of suit is trust property—Plaintiff producing certified copy of trust deed and stating in evidence that he had seen the original deed of trust in possession of defendant—Nature of case showing that defendant must have known that he would be required to produce the document—*Held* that as there was thus an implied notice under proviso to S. 66(2) to defendant, S. 66(*a*) was satisfied and hence the production of the certified copy was sufficient proof of the deed itself: (1966-67) 71 Cal.W.N. 362.

When case falls under Cl. (*a*), any secondary evidence (a plain copy of the document) and not necessarily certified copy of document is admissible, though the case may also fall under Cl. (*f*): 1969 M.L.J. (Cr.) 209: A.I.R. 1969 S.C. 253.

Secondary evidence—Copy of original letter addressed by Government to Commissioner prepared privately by the party at time of inspection of relevant file is not secondary evidence of the original letter—Document is inadmissible in evidence and no reliance can be placed on it—If party is unable to produce in Court the original letter, it can only be proved by producing certified copy: A.I.R. 1970 Manipur 7.

Where the contract was reduced to writing, oral evidence to prove the terms of the contract, is not admissible. But in the case of an oral contract oral evidence to prove its terms is admissible: A.I.R. 1966 All. 595.

Discretion under R. 27 is not to be exercised arbitrarily—Admission of documents—Considerations—R. 27, does not alter rules governing admission of additional evidence—High School certificate and birth extract not produced before trial Court—First appellate Court admitting such documents

Explanation of party that such documents were not in his possession accepted by first appellate Court—Documents not proved—Admission of documents is wrong and is vitiated for want of proof—Duty of Court: 1966 All.W.R. (H.C.) 634.

Copy of award admissible when original in possession of party not subject to process of Court: A.I.R. 1917 Pat. 241: 42 I.C. 617.

Contents of document called for but not produced—Court bound to receive secondary evidence. *See* 49 I.C. 507.

Where the plaintiff relying upon a registered deed of settlement pleaded that the original had been destroyed by the defendants which was not specifically denied by them and since they were themselves relying upon a will executed by the settlor, *held*, it was to their interest that the original settlement deed did not see the light of the day; the plaintiff was entitled to rely upon and prove his case by the settlement deed's certified copy: A.I.R. 1982 Cal. 493.

Where the plaintiffs had clearly made a reference to the document in question in the plaint but the defendant denied existence of such a document, *held*, in such a case the question of calling for the document from them did not arise: A.I.R. 1974 Ori. 199: (1974) 40 Cut.L.T. 143.

Where the plaintiff based her claim on the basis of agreement to sell executed by the defendant in her favour, *held*, as in the normal course of events, such an agreement could not have been in possession of the defendant, and the plaintiff did not show how it came to be in the possession of the defendant and the defendant categorically denied the existence of such agreement, no fault could be found with the trial Court's order declining the plaintiff's application for leading secondary evidence: (1994-2) 107 Punj.L.R. 488.

Where a photocopy of the manuscript of a leaflet defaming an unsuccessful candidate said to have been issued by the successful candidate was sought to be proved as secondary evidence in an election petition but it was not shown under what circumstance the photocopy was prepared and who was then in possession of its original when the photocopy itself was not above suspicion, *held*, the photocopy could not be allowed to be proved as secondary evidence of the original: A.I.R. 1975 S.C. 1748: 1975 U.J.(S.C.) 601.

Where the landlord had specifically deposed that the exhibited document was a copy of the notice typed, signed and compared by his Counsel and the original thereof was also so typed, compared and sent to the tenant in his presence, *held*, the notice under S. 106 of the Transfer of Property Act clearly stood proved: 1973 All.W.R. 472: 1973 All.L.J. 635.

Where the person in whose possession allegedly the document was, had already died and was thus, not subject to the process of the Court, *held*, the trial Court was right in granting permission to lead secondary evidence by way of producing a photocopy of the partition deed subject to the proof of loss: (1991-1) 99 Punj.L.R. 15: (1991) 1 Rev.L.R. 354: 1991 Punj.L.J. 143.

Where though one of the defendants called to produce the original document, died and no document was produced, *held*, its secondary evidence could certainly be admitted: A.I.R. 1974 Ori. 199: (1974) 40 Cut.L.T. 143.

Where the original of a deed of dissolution said to be in the custody of a party was not produced by that party which objected to its admissibility for want of stamps, *held*, the other party was competent to prove the same by its copy; though the party could not prove the copy as secondary evidence, it could certainly prove it as primary evidence: 1982 Rev.L.R. 3: (1982) 84 Punj.L.R. 18.

When the preliminary fact that the original of the Adoption Yadi is in the possession of the plaintiff was not proved, *held*, its secondary evidence was not admissible under Cl. (*a*) of S. 65: A.I.R. 1976 Bom. 264: 1977 Mah.L.J. 68 (D.B.).

Where a party to a suit called upon the other party to produce the unregistered will which did not comply on the ground that the will was not in his but in the possession of another party who in his turn denied the very existence of the will, *held*, loss of the will having been thus proved, the party propounding the will was entitled to prove it by secondary evidence: (1992-1) 101 Punj.L.R. 490: (1992) 2 Hindu L.R. 145: (1992) 1 Rev.L.R. 300.

5. Notice to produce.—The only purpose of a notice under Ss. 65 and 66 is to give the party an opportunity by producing the original to secure, if he pleases, the best evidence of its contents. Secondary evidence is admissible when the party offering evidence of its contents cannot for any reason not arising from

his own default or neglect produce the original document in reasonable time and under S. 66 the Court has absolute power, when it thinks fit, to dispense with a notice under those sections: 63 I.A. 85: (1935-36) 40 Cal.W.N. 226: A.I.R. 1936 P.C. 15: 70 M.L.J. 206 (P.C.).

No notice to the opposite party to produce the document is required, if its secondary evidence is admissible under S. 65 other than under Cl. (*a*): (1980) 18 Del.L.T. (S.N.) 40.

To permit secondary evidence of documents mentioned in S. 65(*a*), *held*, it is incumbent on the party concerned to strictly comply with the requirements of S. 66 and duly require the parties in possession thereof by notice to produce the original documents: A.I.R. 1986 Cal. 430: (1986) 1 Cal.H.N. 58 (D.B.).

Reading Ss. 91 and 66 together, it appears that the law imposes an absolute prohibition against tendering of secondary evidence of the contents of the document referred to in S. 65(*a*) and thereby also prohibits the proof of the terms of the unregistered sale deed by any other mode except by proof of the document itself, when the said document is admitted to be in existence: A.I.R. 1973 Ori. 65.

Once notice of production of the document has been served upon a person in whose possession the document has been alleged and there is a refusal to produce the same; the requirement of law as laid down in S. 65(*a*) is fulfilled: (1990-2) 98 Punj.L.R. 545: 1990 Punj.L.J. 541: (1990) 2 Rev.L.R. 267.

S. 66 requires the giving of a notice to the party to the suit in whose possession or power the document is said to be. Thus, where it was not the case of the defendant, who sought to adduce a certified copy of the original document as secondary evidence, that the original document was in the possession of the plaintiff but his case was that it was with another person who had died, *held*, the defendant was not required by law under S. 66 to give notice to the plaintiff: A.I.R. 1977 All. 470.

Where a document of title which is in possession of a party is not produced by him after notice to produce the same, the party giving notice is entitled to give secondary evidence of the document: (1930) 32 Bom.L.R. 1435: A.I.R. 1931 Bom. 33; (1932) 34 Punj.L.R. 929: A.I.R. 1933 Lah. 945. *See* also 206 I.C. 126: A.I.R. 1943 Pat. 218.

Scope of—Deed of Wakf—Plaintiff mosque claiming possession of property as trustee—Defendant claiming the property as her own and knowledge of execution of wakfnama by her deceased husband denied—Defendant giving in evidence that she might be in possession of the deed though she was not sure of it—*Held*, that the case fell under S. 62(2) and no notice was required to be given and the certified copy of the deed was admissible in evidence: 16 Law Rep. 271: (1968) 2 Mys.L.J. 410: A.I.R. 1969 Mys. 103.

Where the defendant sought permission to adduce secondary evidence of a will in his favour as the person given the original will for mutation refused to return it, *held*, without issuing notice to that person under S. 66, the trial Court was not justified in permitting secondary evidence subject to the proof of loss of the original will; the loss of the original will has to be proved under S. 65(*a*) read with S. 66 before secondary evidence is permitted: (1990-2) 98 Punj.L.R. 228: 1990 Punj.L.J. 428: (1990) 2 Rev.L.R. 49.

See also Notes under S. 66, *infra*.

6. Clause (*b*).—The effect of Ss. 64 and 65 is that where a person, or his representative-in-interest, against whom a document is sought to be proved has admitted in writing the existence, condition or contents of the original document, such admission is admissible. The question as to the contents of a will is really one of title; where many years have passed since the testator's death, the safer guide is the conduct, influenced by the will, of the parties dealing with the property immediately or shortly after death: (1977) 1 Karn.L.J. 218 (D.B.).

Original admitted by opposite party in writing. *See* (1953-54) 58 Cal.W.N. 533, cited under S. 63, *supra*. Where in a suit for redemption, it is proved that in wajib-ul-arz predecessors in title of the defendants admitted in writing the existence, condition and also the contents of the original S. 65(*b*) applies: 148 I.C. 1172: A.I.R. 1934 All. 529.

In order to avail of the provision in S. 65 (*b*) the written admission of the contents of the document sought to be produced has to be the admission of the person against whom it is sought to be produced. A plaintiff who fails to produce the original document on which he has brought the suit and fails to prove the loss of the original cannot be permitted to produce secondary evidence on the basis of an admission of the defendant of the contents of the document: A.I.R. 1949 All. 677. A denial of

the execution of a bond though accompained by a statement of discharge of the debt cannot be regarded as an admission within the meaning of S. 65(*b*) so as to dispense with the production of the document. Pleading ignorance of the execution of the document for all intents and purposes amounts to a denial of the execution of a document. A plea of ignorance of the execution of a document accompanied by even an alternative plea of payment cannot amount to an admission of the execution of the document: 1958 An.L.T. 440: A.I.R. 1958 Andh. Pra. 418.

The statement contained in the debtor's application to the Debt Conciliation Board cannot be regarded as an admission within S. 65(*b*). It is a statement under S. 6, Debt Conciliation Act, the statement is not to be deemed a statement of the amount admittedly due but of the amount claimed. The debtor is in no sense promising to pay this amount; on the contrary he is applying to a Debt Conciliation Board with a view to having his liability cut down and it cannot be inferred that there is any promise to pay anything or any admission of liability for anything: A.I.R. 1941 Nag. 95: 1941 Nag.L.J. 134. Acknowledgment of debt in partition deed. *See* 1972 Mys.L.J. (S.N.) 286.

When in a suit based on an award, the terms whereof were set out in detail in the plaint and they were not denied in the written statement, but the defendant alleged his repudiation of the award and further alleged the award was neither stamped nor registered and the same was superseded by a further agreement. *Held*, if the award itself was inadmissible for want of stamp and registration, its secondary evidence is also not admissible. But since the terms of the award were not denied in the written statement, it must be held they were admitted (O.8, R.5, C.P.Code). The award need not be produced in evidence, and the question of admissibility did not arise in the appeal for decision. The terms of the award, in the said circumstances, were enforceable: A.I.R. 1951 Kutch 23.

Where admissibility of the sale deed's certified copy was not challenged by the plaintiffs as they were basing their claim on the same deed but gave the wrong date of its registration for ulterior motives, no objection is raised to the document being filed with application for placing it on record nor at the time when it was exhibited nor in the grounds of appeal, the executants having colluded with the plaintiffs could not be examined as witnesses, and execution of the deed has been admitted on oath by two of the parties to the suit, *held*, the secondary evidence by way of the certified copy was sufficient to prove the sale by, as well as the contents of, the sale deed: 1993 Mah.L.J. 523 (D.B.).

The defendant pleaded that the original was not lost but had been suppressed because it contained an endorsement of payment. *Held*, that as the pleading of the defendant amounted to an admission of execution of a document, the plaintiff could maintain the suit on its copy without proving the loss of the original: 11 All.L.J. 734: 20 I.C. 955; 11 All.L.J. 731: 21 I.C. 81.

Where in a case of a deported foreigner's surreptitious re-entry, his earlier deportation was proved by documentary evidence and the Counsel for the accused admitted the genuineness of the Police Officer's letters containing details of the earlier deportation, *held*, the contents of the letter stood admitted and proved. [1981 Cr.L.J. 379 (All.), Rel. on]: 1982 All.L.J. 703. *See* also (1989-1) 30 Guj.L.R. 122.

Where the defendants' predecessor-in-interest had admitted execution of the will, *held*, the defendants are bound by the will; the plaintiff having proved loss of the will is entitled to prove its contents by secondary evidence: (1993-1) 103 Punj.L.R. 206.

Where a copy or contents by oral account of a document is admitted on secondary evidence, *held*, the execution of the original need not be proved; but if the original itself is sought to be tendered, it must be duly proved; the rule for public documents cannot be any different. [A.I.R. 1951 All. 816, Dissent. from; A.I.R. 1947 Cal. 318, Rel. on]: A.I.R. 1973 Bom. 14: (1972) 74 Bom.L.R. 505: 1972 Mah.L.J. 816.

Admissibility of admission contained in an application presented in a proceeding under S. 145 Cr.P.Code, certified copy whereof was produced. *See* (1979) 81 Punj.L.R. 255.

7. Clause (*c*).—S. 65(*c*) consists of three parts, namely (*i*) where the original has been destroyed; (*ii*) where the original is lost; (*iii*) where the original cannot be produced within reasonable time for a reason not arising out of the party's own default or neglect; the three parts are in the alternative as is indicated by the use of the word 'or' in between 'destroyed' or 'lost' and between 'lost' and the 'third eventuality': (1992-1) 101 Punj.L.R. 378:

(1992) 1 Rev.L.R. 223: 1992 Punj.L.J. 74: (1992) 2 Hindu L.R. 204.

S. 65(*c*) consists of two clauses; the first is an independent clause dealing with the situation where the original, having been destroyed or lost, cannot be produced; the words 'not arising from his own default or neglect' do not qualify the first clause but it applies to the second clause where the party offering evidence is unable to produce the original within reasonable time or for any other reason. Thus, if the Court finds that the document has been lost or destroyed, it has to allow the party concerned to lead secondary evidence; and if it finds that the document cannot be produced in reasonable time for any other reason, then it has to take into consideration the conduct of that party: 1976 Rev.L.R. 81: (1976) 78 Punj.L.R. 239.

Law does not require that the loss of the original document should be proved in absolute terms before its proof by secondary evidence is permitted; secondary evidence permissible for having been lost or destroyed or not available within reasonable time for a reason not attributable to the party's own neglect or fault; while permitting proof by secondary evidence, the Court does not pronounce on the evidentiary value of the secondary evidence: (1993-1) 103 Punj.L.R. 171: 1993 Punj.L.J. 201.

A party seeking permission to produce secondary evidence regarding a document, is not required to prove the loss of document in absolute terms. Thus, where it was clear from the statement of the plaintiff and the petition writer in whose register the entry of the document had been made that plaintiff was not in a position to produce the document because the person in whose possession the document could be found, were either dead or had denied the execution of the document, *held*, the plaintiff was entitled to prove the entry in the register of the petition writer by way of secondary evidence: (1994-1) 106 Punj.L.R. 190.

If it is found that a document has been lost, secondary evidence may be given and whether proof is sufficient in a case is a question of fact: L.R. 4 A. 201 (Rev.).

The law requires proof of the existence of certain circumstances before secondary evidence by production of a certified copy of a document would be permissible, and when there is no attempt whatever to establish the necessary circumstances, secondary evidence cannot be admitted. In order to enable a party to offer secondary evidence of the contents of a document under the proviso to Cl. (*c*) of S. 65, it must be established that the document had actually been lost or destroyed, or shown to the satisfaction of the Court that the non-production of the document does not arise from his neglect or defaults: I.L.R. (1943) Kar. 420: A.I.R. 1944 Sind 61. For producing secondary evidence enquiry is necessary that the original document is lost: (1980) 2 M.P.W.N. 19.

Loss of a document can be proved by several modes including its having become untraceable. Thus, where the plaintiff never had custody of documents more than thirty years old and stated on oath that they were not at all traceable, *held*, the loss of documents was established; proving them by certified copies granted by the Sub-Registrar could be allowed as well by raising the presumption under S. 90: (1991-2) 100 Punj.L.R. 611: 1991 Punj.L.J. 473.

The general principle is that if the original document exists and is available, it is the best evidence and must be produced; but if the original is lost, destroyed, detained and not produced by the opponent or third person despite notice or is physically irremovable, its secondary evidence is admissible. Thus, where the plaintiff had testified that he had lost the original (of which the certified copy was produced) which was in his bag and was left behind by him in the bus, *held*, the requirements of S. 65 stood satisfied; the certified copy was properly admitted: A.I.R. 1986 Ori. 66.

Under Cl. (*c*) of S. 65 secondary evidence may be given when the party offering evidence cannot produce the original for reason not arising from his own default or neglect, in reasonable time. Thus, when the original document had been filed in a Court in Calcutta, *held*, it can be assumed that the same could not have been produced before the trial Court in Gauhati within a reasonable time: A.I.R. 1988 Gau. 1: (1988) 1 Gau.L.R. 76.

The satisfaction of the trial Court, regarding the loss of the original document, is paramount and it is not essential that a formal application seeking permission to produce secondary evidence must necessarily be filed. Thus, where the trial Court allowed the defendant to produce secondary evidence of the

will because in another previous suit the loss of the original will had already been established in the presence of the present plaintiff and in that case too leading of secondary evidence had been allowed, *held*, the trial Court's order could not be interfered with: 1984 Hindu L.R. 506 (P.&H.).

The statutory presumption under S. 90 is not applicable to the certified copies of the documents being 30 years old. The certified copy of the registered Kabuliyat may, however, be received as secondary evidence of the original documents under S. 65(*c*) when it was transpired from evidence that the original was lost and not traceable and that non-production of the original was not due to any default or neglect on the part of the party producing the certified copy: A.I.R. 1988 Cal. 68: (1986-87) 91 Cal.W.N. 958 (D.B.).

Where without making an averment that the original document was lost or destroyed or otherwise not available, only its photocopy was filed with the plaint and original was not produced even when issues were framed, and after several opportunities leave was sought to prove the document by secondary evidence without mentioning as to how the original document was lost and no affidavit in support was filed, *held*, in view of the plea being vague, the trial Court was justified in declining the request: (1988) 2 Rev.L.R. 69. *See* also (1990) 2 An.L.T. 171: (1990) 1 An.W.R. (N.R.C.) 13.

Loss of document— Evidence of person deposing to loss of document in his custody is sufficient to allow secondary evidence: (1979) 2 Ren.L.R. 231; 1979 Rajdhani L.R. 545 (Del.).

Loss of the original will is a material fact which has to be incorporated, under O. 6, R. 2 of the C.P.Code, in the written statement; it was all the more incumbent on the defendant if he desired to prove the will by secondary evidence to make out the case therefor in terms of S. 65(*c*); *held*, the trial Court rightly disallowed the defendant to prove the will by secondary evidence: 1993 Punj.L.J. 203.

To record a finding that the document is lost, to enable a party to produce a certified copy thereof, it must be established that a thorough search had been made in places where it was likely to be found and of persons likely to have possession of the same: A.I.R. 1966 Cal. 13; 1989 W.L.N. (U.C.) 437 (Raj.)

In order to admit secondary evidence in proof of a registered private deed of trust, it is important to bear in mind the nature of the document, the evidence about the search, the evidence about the enquiries made and the evidence about the loss of the original: A.I.R. 1975 Cal. 381.

In order to be allowed to produce secondary evidence of a document, the party must establish that it had made a thorough search of places and persons where or with whom the original document was likely to be found; where there was paucity of such evidence, *held*, the party could not be allowed to tender secondary evidence of the document. [A.I.R. 1959 Andh. Pra. 568; A.I.R. 1966 Cal. 13, Foll.]: A.I.R. 1986 Cal. 430: (1986) 1 Cal.H.N. 58 (D.B.).

A party seeking to produce and prove documents relevant to the points in issue is entitled to prove the existence and loss of their originals; on such proof, it is entitled to prove them by secondary evidence; even if the party entitled to do so was remiss at the initial stages and had also not relied upon the documents, *held*, it should not be deprived of the opportunity to prove them; the other party may well be compensated by costs. [(1988-2) 94 Punj.L.R. 173; (1989-1) 95 Punj.L.R. 55, Disting.]: (1993-1) 103 Punj.L.R. 630: (1993) 1 Rev.L.R. 315.

Every deed being the best evidence of its contents, its non-production will necessarily raise a suspicion in the mind of the Court and great care and circumspection would be needed in order to decide whether there has been really a *bona fide* loss. S. 65 permits the leading of a secondary evidence only where the original has been destroyed or lost. There must be a sufficient proof of the search for the original to render secondary evidence admissible. It must be established that the party has exhausted all the sources and means in the search of the document, which were available to him. Where the trial Court has come to the conclusion that the loss of the document has been established without taking into consideration the prerequisite conditions that are required by the Evidence Act, the appellate Court would certainly interfere with the discretion wrongly exercised by the lower Court: 1958 An.L.T. 440: A.I.R. 1958 Andh. Pra. 418, followed in (1959) 2 An.W.R. 357: A.I.R. 1959 Andh. Pra. 568.

Where before 1950, the rule or practice in Manipur was that the Sub-Registrar sent the document of transfer registered by him directly to the Revenue Officer, concerned, for the purpose of mutation, and the sale deed in

respect of which secondary evidence was sought to be given was similarly sent to the Revenue Officer, and a mutation case was started on the basis of that sale deed and the plaintiff who wanted to give secondary evidence not being in possession of the original sale deed, therefore, moved the trial Court, for obtaining the record of the mutation case connected with that sale but the record could not be traced; in these circumstances and when the plaintiff could not be expected to be in possession of the sale deed, there can be no doubt that it was established satisfactorily that the document was not forthcoming from the custody of the Revenue Court in which it was filed. It could be, therefore, safely presumed that it was lost and that secondary evidence be rightly admitted by the Courts: A.I.R. 1958 Manipur 16.

S. 65(*c*) is inapplicable to the case of previous convictions and secondary evidence could be admissible to prove previous convictions in cases where the records of the previous trials and convictions have been destroyed and are not available. But a mere conviction slip is not such secondary evidence: I.L.R. (1941) Kar. 308: A.I.R. 1941 Sind 173: 43 Cr.L.J. 12. On this clause *see* also I.L.R. 5 Pat. 777 referring to I.L.R. 6 Mad. 80; I.L.R. 27 Cal. 639 (P.C.); 24 Mad.L.W. 227; 105 I.C. 502; 8 Pat.L.T. 510: A.I.R. 1927 Pat. 61 (Original of public document destroyed—Secondary evidence admissible); A.I.R. 1926 Oudh 161 (Original telegram destroyed). *See* also 1937 R.D. 119; 14 I.A. 71; 8 W.R. (1864) 301 (Decree destroyed during mutiny); 22 W.R. 303; I.L.R. 5 Cal. 886; I.L.R. 7 Cal. 98; 6 C.L.R. 199 (Document destroyed by fire); 1937 R.D. 119; I.L.R. 11 Pat. 569: 138 I.C. 419: A.I.R. 1932 Pat. 157 (Record room burnt during mutiny).

Agreement to relinquish unregistered but enforceable under the doctrine of part performance—Secondary evidence of its contents may be given if it is lost: A.I.R. 1929 Rang. 181.

Loss of original of document produced merely as evidence should be proved: 122 I.C. 751.

Where the existence and loss of the originals has been satisfactorily established, secondary evidence of their contents becomes admissible under S. 65(*c*), Indian Evidence Act. Under the same section any secondary evidence of the contents of the originals would be admissible: A.I.R. 1957 All. 388: 1957 Cr.L.J. 695.

That clause of S. 65 which provides that in case of (*e*) or (*f*) a certified copy of the document but no other kind of secondary evidence is admissible seems to apply to a case in which a public document is still in existence on the public records and that provision appears to have been intended to protect the originals of public records from the danger to which they would be subject to constant production of such documents in Courts in evidence, and the said clause does not interfere with the general rule of evidence given in Cl. (*c*), *i.e.*, in cases where the original is destroyed or lost. Where the original depositions have been destroyed and are not available in the Court of the Magistrate, the party is entitled to produce the uncertified copies that have been issued to him: A.I.R. 1955 Mys. 139: I.L.R. (1955) Mys. 616.

Where the solicitor stated on oath from a witness-box that he was entrusted by his client, the plaintiff with two original Hundis, to raise action thereon, that a copy each of the two *hundis* was prepared under his supervision and compared by him with the originals, that the original *hundis* were lodged in the iron safe of his office but were missing after there were differences with his solicitor partner and that search was made for the missing documents in the iron safe and also elsewhere where they were most likely to be found.

Held, (*i*) that copies of *hundis* and their contents could be received as secondary evidence under S. 63(3) and 65(*c*); (*ii*) that it was however open to the Court to reject such evidence at a later stage of the trial if the evidence revealed that the two original *hundis* could not be said to have been lost or that the copies received in evidence had neither been made from nor compared with the originals; (*iii*) that S. 45-A of Negotiable Instruments Act, 1881 would not in terms apply to such a case. Not availing of S. 45-A would not necessarily mean that the Hundis were not lost. Surely a recalcitrant drawer refusing to give a duplicate bill may be compelled to do so by a suit. But that does not mean that in all cases there must be a prior suit to lay the foundation of a subsequent suit grounded on a lost bill; (*iv*) that the word 'lost' in S. 65(*c*) does not necessarily mean lost for ever. It only means that the thing lost could not be found out, when it is needed: (1966-67) 71 Cal.W.N. 51.

Presumption under S. 90—When open. *See* Evidence Act, 1872, S. 90: A.I.R. 1968 All. 363.

Where the reference to arbitration is admittedly in writing, it is for the party proving its contents, to produce the document itself in Court or to show that it has been lost, before claiming to give secondary evidence of those contents: I.L.R. (1963) 13 Raj. 1090: 1963 Raj.L.W. 632.

Where the plaintiffs mortgagees have not proved the loss of the original mortgage deed, they are not entitled to tender its certified copy, as the basis of their suit as secondary evidence under S. 65(*c*) of the Evidence Act: A.I.R. 1961 Pat. 300. *See* also (1981) 1 M.P.W.N. 93.

Cls. (*c*), (*e*) and (*f*)—Original order authorising an officer to do certain acts not traceable—Any kind of secondary evidence of such authorisation is admissible under Cl. (*c*)—Cl. (*e*) could only apply where the original is a public document in existence: 1964 All.W.R. (H.C.) 413: 1964 All.L.J. 788.

Where in a suit for recovery of possession of mortgaged land, the plaintiff mortgagee did not state in his plaint that he had lost the mortgage-deed but when appearing as a witness stated that he had filed the original mortgage-deed in some Court but he did not remember the date or the year when he filed and the Court or case in which he filed it, the plaintiff could not be said to have made out any case for producing secondary evidence under S. 65, and under S. 91 the certified copy of the mortgage-deed could not be looked into nor could oral evidence be considered in proof of the terms of the mortgage-deed: 1969 Cur.L.J. 271 (Punj.).

Where a suit is brought on certified copies of documents and the loss of the document is not proved the suit must be dismissed as no secondary evidence is admissible in the circumstances: 23 I.C. 886.

Mortgage deed executed in England comprising properties situate in India—Loss of deed before registration—Secondary evidence may be given: A.I.R. 1928 Pat. 134: I.L.R. 7 Pat. 99. Document lost—Copy of, bearing endorsement by deceased predecessor of party that it was a copy of original—Admissibility: 56 M.L.J. 730 (P.C.).

Where the tenant's plea was that he had sent the rent by money order but the landlord had refused to accept it and the tenant was allowed but took no steps to summon the record of money order and refusal from the Rent Controller's record, *held*, since the liability to obtain the original was attributable to the tenant's neglect or default, he could not be allowed to adduce secondary evidence: A.I.R. 1981 Cal. 334.

Where the plaintiff filed an application seeking permission to adduce secondary evidence in respect of the sale deed and the original power of attorney in his favour since same were lost by the Patwari Halqa to whom same were given for purposes of mutation, *held*, the trial Court was not justified in rejecting the said application without calling upon the plaintiff to adduce the evidence in support of alleged loss of documents: (1992) 2 Rev.L.R. 319 (P.&H.).

Where the original enquiry proceeding book was not produced before the Industrial Tribunal which declined to admit its secondary evidence as no convincing evidence was produced about the search to find the original was made but to no effect, *held*, the Tribunal had correctly rejected the secondary evidence as inadmissible as requirements of S. 63 and S. 65(*c*) had not been fulfilled. [A.I.R. 1968 Cal. 532, Foll.]: (1990) 2 C.L.R. 191 (Karn.).

Telegraph Rules, 1951, Rr. 164 and 166—Secondary evidence—Prosecution applying for permission to file copies of telegrams—Copies of telegrams are admissible in evidence after lapse of three months as presumption arises under the Telegraph Rules that originals are destroyed after three months—Magistrate refusing to permit as it would protract the proceedings—*Held*, the order of the Magistrate was bad: 1959 Raj.L.W. 537.

Where the defendants in a suit for specific performance had denied the receipt of telegrams purportedly sent to them by the plaintiff and the transmission of the telegrams by their certified copies and destruction of the original transcript was proved by official witnesses from the Telegraph Department, *held*, in the absence of the defendants' plea or proof of their not residing at the address given in the certified copies and the cause title of the suit, the Court could draw the presumption that the telegraphic messages as contained in the certified copies were received by them: A.I.R. 1988 Karn. 221: I.L.R. (1987) 1 Karn. 3568 (D.B.).

Where the Court's below found that there was sufficient evidence on record to establish that the sale deed having been lost, the

plaintiff was unable to produce it and was entitled to prove the deed by secondary evidence, *held*, being a finding of fact, it could not be assailed in second appeal on the basis of insufficiency of evidence. [A.I.R. 1959 Andh. Pra. 568, Disting.]: A.I.R. 1973 All. 99: 1972 All.L.J. 807.

Where the plaintiff in possession of the registered gift deed merely stated that he has lost the deed or it has become untraceable and alleges the same in the plaint and the application for leave to prove the deed by secondary evidence, *held*, it is sufficient to allow his application; merely because he had lodged no Police report or is unable to prove the theft is no ground to reject his request; loss can never be proved absolutely; evidence of the person in possession of the original that same was lost is sufficient: A.I.R. 1983 Him. Pra. 13: I.L.R. (1982) Him. Pra. 499. However, where it was not proved that the original gift deed, which was not thirty years old, had been lost or destroyed and no evidence was given to prove execution and attestation of a valid gift, *held*, secondary evidence in respect thereof could not be admitted: (1979) 2 M.P.W.N. 86.

Where the plaintiff alleged that the original document filed by him with the plaint had been replaced by a forged document in the Court record and sought leave to lead secondary evidence, *held*, tampering of documents which are on Court file deserves a serious notice by the Court; unless the trial Court had recorded a finding that the original document had been lost and replaced by a forged document, the trial Court could not permit production of secondary evidence: 1978 Raj.L.W. 411.

Where the original agreement was lost from the Court's custody as made out from its record, *held*, the opportunity afforded to the plaintiff, without formally proving the original's loss, to adduce secondary evidence was fully covered by S. 65(*c*): A.I.R. 1989 Pat. 96.

Where the document sent to the Sub-Registrar by the Court for ascertaining the value of the property was lost there, *held*, as the loss of document was not attributable to the plaintiff's default or negligence, its xerox copy available with him could be admitted as secondary evidence: (1992) 3 An.L.T. 575.

As to evidence of search before document can be considered to be lost, *see* I.L.R. 19 Cal. 438; 49 I.C. 1006. Document—Lost in Court—Secondary evidence admissible: 144 I.C. 812: A.I.R. 1933 Lah. 782.

Where the plaintiffs did not allege in the plaint that the original agreement to sell had been lost or destroyed or was not otherwise available and it was only after several opportunities to produce the evidence had been obtained by them that they sought permission to produce secondary evidence without stating as to when and under what circumstances the original agreement was lost, *held*, their prayer was rightly rejected: (1988-2) 94 Punj.L.R. 173: (1988) 2 Rev.L.R. 69.

Where the original dying declaration, testified by the Magistrate to have been given to the Head Constable who testified to have prepared a copy thereof and returned to the Magistrate, had been lost, *held*, the prosecution was entitled to give secondary evidence thereof which would consist the Magistrate's as also of the Head Constable's testimony that the copy prepared from the original was a true copy: A.I.R. 1979 S.C. 1567: 1979 Cr.L.J. 1081. But where the original dying declaration had been lost with no copy thereof having been made and nothing indicated that non-production of the dying declaration was deliberate or with an oblique purpose, *held*, no adverse inference could be drawn against the prosecution; mere plea that the dying declaration might have contained something different and favourable to the defence would not prove prejudice: 1984 All.W.C. (Supp.) 256.

Where the plaintiff annexed photocopies of the sale and mortgage deeds to the plaint with no mention about their originals having been lost and despite the defendant's insistence for production of their originals and the plaintiff having been granted five opportunities over a year and a half, the originals were not produced and the plaintiff by his vague application bereft of any particulars as to the place or time or the circumstances of the loss of originals, and unsupported by affidavit, sought leave to adduce secondary evidence, *held*, the trial Court clearly erred in permitting the plaintiff to adduce secondary evidence: (1993) 1 Rev.L.R. 278 (P.&H.).

Where due publicity to the substance of a notification under S. 4 of the Land Acquisition Act is required to be given in the concerned locality in the manner specified in the section and the original records thereof have been lost, *held*, it is open to the party relying on it to

prove the contents by secondary evidence under S. 65 which includes copies made from or compared with the original or the oral account thereof by a person who had seen it: A.I.R. 1974 Cal. 210.

Where there was no proof that the *sada hukumnama* had been lost by theft as alleged by the plaintiff, *held*, the secondary oral evidence of its contents given by the witnesses is rendered inadmissible; however, the evidence of the witnesses can certainly be used to prove that the settlement of suit land by the *mahanth* with the plaintiff was made in his presence provided that is based not on the contents of the *hukumnama* but on their personal knowledge: A.I.R. 1972 Pat. 186.

Where the Office Kanungo, as affirmed by the Tehsildar, stated that the original record was not traceable and, thus the plaintiff was unable to produce the original will within a reasonable time but not due to his own default or neglect, *held*, the permission to lead secondary evidence may be granted; grant of permission, however, will have no bearing on the evidentiary value of the evidence: (1992-1) 101 Punj.L.R. 378: (1992) 1 Rev.L.R. 223: (1992) 2 Hindu L.R. 204: 1992 Punj.L.J. 74.

Where what was exhibited was only a typed copy, bearing neither any signatures nor any official stamp and though within a rectangle thereon the words L.T.M. of the aggrieved party are written but there is no thumb-mark at all and there is nothing on record to indicate as to the whereabouts of certificate issued by the Civil Surgeon, Ahmedabad of which the exhibited document purports to be a copy, *held*, in the absence of any material to show that the original certificate was indeed issued and was not traceable, its exhibited copy was not admissible: (1987-2) 7 Guj.L.H. 239: (1987-2) 28 Guj.L.R. 1137.

The original copy of a registered document does not fall in the category of documents referred to in S. 65(*e*) and (*f*); its secondary evidence cannot be permitted unless the existence and loss of the original is pleaded and accounted for to the Court's satisfaction: 1980 Hindu L.R. 273 (P.&H.) (F.B.).

Where the original landlord had admitted in cross-examination that the rent note/licence deed was in his possession but later on he stated without oath that he had lost it, *held*, the loss of document was not proved, especially when the circumstances of the loss were not explained; its photocopy could not be allowed to be tendered as secondary evidence: (1988-2) 94 Punj.L.R. 521.

Where the record of the Sub-Registrar Office was destroyed during riots and the plaintiff, unable to produce a certified copy of the sale deed registered there, produced a copy prepared from a certified copy presented in an earlier suit, *held*, the copy is admissible in evidence; S. 65 safeguards the interest of persons unable to produce either the original document or its secondary evidence as per S. 63; under S. 65(*a*), (*c*) and (*d*) any secondary evidence is admissible irrespective of the provisions of S. 63 or S. 65(*f*). [A.I.R. 1969 S.C. 253, Foll.]: A.I.R. 1975 Guj. 73: (1975) 16 Guj.L.R. 61.

8. Clause (*e*).—*See* A.I.R. 1953 Pat. 310. The combined effect of Ss. 35, 65(*e*), 76, 77 and 79 is to enable the proof of public documents by the certified copies of the extracts therefrom: A.I.R. 1982 Ker. 232.

A person seeking to prove a public document is relieved of the obligation to produce its original; he may prove it by producing its certified copy; it merely proves what the document contains but nothing more. [A.I.R. 1918 Cal. 988, Dissent. from]: A.I.R. 1983 Bom. 1: 1983 Mah.L.J. 339.

The primary evidence of a document is the document produced for the inspection of the Court; its secondary evidence means and includes certified copies given under S. 76; under S. 64, documents must be proved by primary evidence except in cases mentioned in S. 65. Under S. 65(*e*) only a certified copy of the public document and no other kind of secondary evidence is admissible to prove the original. [A.I.R. 1952 Nag. 57, Rel. on]: (1971) 1 Cut.W.R. 29.

The Registrar's office certainly keeps a public record of the exchange deeds registered in that office. The certified copy of the exchange deed, therefore, is a secondary evidence of the public record kept in the Registrar's office. It is, therefore, admissible in evidence both under S. 65(*e*) or (*f*): (1991-1) 99 Punj.L.R. 129.

A will, even after registration, does not become a public document; it remains a private document; its certified copy from the office of Registrar is admissible only for proving the contents of the original, but is not sufficient to dispense with the production

and proof of the original document. Thus, a certified copy of the will cannot be produced to prove the document without proving loss of the original document: A.I.R. 1976 P.&H. 235: 1976 Rev.L.R. 93: (1976) 78 Punj.L.R. 21.

The plaint and written statement form part of record of the acts of the Judge who is a Judicial Officer and to the extent of its proving the factum of filing a particular suit against a particular person the said document constitutes a public document within the meaning of S. 74; they are admissible by producing the certified copies to the extent of showing the existence and the condition of such documents within the meaning of S. 65: (1987) 2 An.L.T. 597.

The certified copy of the plaint is a 'public document' and is, therefore, also admissible in evidence for the purpose of proving the contents thereof. [(1873) 10 Beng.L.R. (Appen.) 13, Foll.]: 1989 Cr.L.J. 1724: (1989-1) 9 Guj.L.H. 82.

The certified copy of the sale deed in respect of disputed land is a 'public document' and is, therefore, admissible for the purpose of proving the contents of the original document: 1989 Cr.L.J. 1724: (1989-1) 9 Guj.L.H. 82. Birth and death registers are public records within the meaning of S. 65 and, therefore, entries therein can be proved by filing certified copies thereof: 1979 Punj.L.J. 297: (1979) 81 Punj.L.R. 497: 1979 Rev.L.R. 378.

Where the Amin as a Local Commissioner was directed to ascertain whether there was any boundary mark on the suit land but he reported that the suit land was recorded in the plaintiff's name, *held*, the report, not being within the Commission's terms, was inadmissible and could not be taken into consideration; the revenue record being a public record could be admitted in evidence by a certified copy thereof, not by way of the Amin's report: A.I.R. 1981 Sikkim 59: 1979 Sikkim L.J. 24 (D.B.).

Where cyclostyled Rules, being Government orders, approved by the Ministry of Defence were circulated to various Departments by a cyclostyled copy of the covering letter, bearing cyclostyled signatures of the Director General, *held*, it cannot be said to be a primary evidence of public documents; it may amount to secondary evidence under S. 63(2) as a copy made from the original by mechanical processes which in themselves ensure its accuracy but before such secondary evidence is admitted in evidence, the contents of the original, the primary evidence, must be proved: A.I.R. 1987 All. 83: 1986 All.W.C. 692: (1986) 12 All.L.R. 343: 1987 All.C.J. 35.

A profit and loss statement and a statement showing the details of net income filed by an assessee in support of his return of income furnished under S. 22 of the Income-tax Act, are public documents with reference to S. 74 of the Evidence Act of which certified copies would be admissible under S. 65(*e*) of the Evidence Act. There is nothing in S. 54 of the Income-tax Act which prohibits a party from putting in evidence a certified copy of an income-tax return if that return is a public document: I.L.R. (1940) Mad. 450: A.I.R. 1940 Mad. 768: (1940) 2 M.L.J. 257 (F.B.).

Certified copies of income-tax returns relating to a firm and statement filed in support of them, being public documents in the custody of a public officer, may be presumed to be what they purport to be. It is unnecessary to prove the signatures of the particular partners on the originals: A.I.R. 1958 Andh. Pra. 200: (1957) 2 An.W.R. 499. But *see* (1939) 1 M.L.J. 791; I.L.R. (1940) Mad. 329: 50 Mad.L.W. 815: A.I.R. 1940 Mad. 161; I.L.R. (1939) 2 Cal. 394: A.I.R. 1940 Cal. 187: (1938-39) 43 Cal.W.N. 1169.

An Income-tax return as well as a statement filed in support of it is a public document within the meaning of S. 74 of the Evidence Act. Certified copies thereof would, therefore, be admissible under S. 65(*e*) of that Act and though a Court is prohibited from requiring a public servant to produce the documents mentioned in S. 54 of the Income-tax Act or to give evidence in support of them, it does not follow that the Court may not admit in evidence a document which falls within S. 54(1) of the Income-tax Act.

All that S. 54, Income-tax Act, means is that the income-tax authorities are to regard communications made to them for the purposes of the Income-tax Act as being confidential, the object being to enable people to feel that they can freely state the facts relating to their income, facts which may often involve confidential matters relating to their business, without fear of the matters being disclosed. If a document can be given in evidence, without requiring a public servant to produce it, there is nothing in the section to prevent that from being done.

Certified copies of a public document do not and need not contain any endorsement as to the person who obtained them. If such certified copies are filed they must be admitted in evidence under the Evidence Act, "to prove the existence, condition or contents of such documents without reference to the person who procure them": (1957) 2 An.W.R. 499: 1958 An.L.T. 135: (1958) 33 I.T.R. 116: A.I.R. 1958 Andh. Pra. 200.

An income-tax return is not a document or a public record of a private document within the meaning of S. 74 and so S. 65 does not apply: I.L.R. 56 Bom. 324: (1932) 34 Bom.L.R. 236: A.I.R. 1932 Bom. 291.

Under S. 65(*a*) secondary evidence of the contents of an income-tax return would not be admissible and the Income-tax Officer is subject to every process of the Court: A.I.R. 1939 Mad. 546: (1939) 1 M.L.J. 791. *See* also I.L.R. 56 Bom. 324.

Assessment order can be produced by an assessee or his representative-in-interest in evidence, and in such a case, the prohibition provided in S. 54 of Income-tax Act, 1922 does not apply. [A.I.R. 1963 Ori. 11, Affirmed]: A.I.R. 1971 S.C. 671: 1971 U.J. (S.C.) 159.

In view of S. 42 of the Bihar Agricultural Income-tax Act, party cannot insist upon the agricultural income-tax authorities giving the particulars of any statement of return or other documents relating to an assessment. All that the section lays down is that certain documents and certain facts would be confidential. Even supposing that an assessment order is included in the documents referred to in sub-S. (1) of S. 42 of the said Act, there is nothing in the section to prevent a person , who has already obtained a certified copy from putting it in evidence in any Court. The assessment orders are public documents within the meaning of S. 74 of the Evidence Act, as forming the acts, or records of the act of public officers. Under S. 65 of the Evidence Act therefore, certified copies of the assessment orders could certainly be put in evidence: A.I.R. 1959 Pat. 515.

Decree—'Public document'—Proof by certified copy—Presumption as to genuineness. *Held*, that the decree of the Calcutta High Court of 1942 was a public document, capable of being proved by a certified copy under S. 65(*e*) and a presumption as regards the genuineness of this certified copy did arise by virtue of the combined operations of Ss. 76, 77 and 79 and that S. 86 did not stand in the way. A public document within the meaning of S. 74 can be properly and adequately proved by the production of a certified copy thereof by virtue of Cl. (*e*) of S. 65. The principle of the rule is that even though the original of a public document is in existence and available, secondary evidence thereof in the shape of a certified copy of it would be admissible. The decree in question could, therefore, be proved by the production of a certified copy thereof and no other proof of it was at all called for.

The Calcutta High Court being a Court in India, the additional certificate as regards any judicial record thereof which might conceivably have been necessary under the pre-existing law to enable a presumption of genuineness to be raised about it in any Court in the United State of Rajasthan was no longer necessary and S. 86 as amended in 1951 could not stand in the way of a presumption being raised as to the genuineness of the decree in question: I.L.R. (1960) 10 Raj. 94.

Mutation in landlord's rent-roll—Proof of. *See* A.I.R. 1958 S.C. 521. Registered private receipt is not a public document: A.I.R. 1943 P.C. 83: (1943) 2 M.L.J. 51 (P.C.).

An order of a District Magistrate under R. 56 of the Defence of India Rules is a public document within the meaning of S. 74 of the Evidence Act, and hence the only manner in which such a document may be legally proved in by production of the original or by a certified copy of the original: I.L.R. 24 Pat. 143: A.I.R. 1945 Pat. 210.

Kerala Forest Act, 1961 (IV of 1962), Ss. 19, 27—Offence under S. 27—Proof of notification under S. 19 necessary—No judicial notice can be taken—Notification is a public document—Proof—Nature of: 1966 Ker.L.J. 76.

A compromise filed in recent suit may be proved by producing a certified copy as the compromise so filed is a part of public record: L.R. 1 All. 132 (Rev.). *See* also U.B.R. (1909) 4th Qr. Evi. 19 (Supplementary survey records); 1 P.R. 1914 (Cr.); 15 Cr.L.J. 344; 5 P.R. 1903 (Cr.). Certified copies of registered deeds: 103 I.C. 752: A.I.R. 1927 Lah. 817.

Memorandum of Association of a Company—Is a public document: A.I.R. 1967 Cal. 390.

Secondary evidence of returns filed with the Registrar of Joint Stock Companies is admissible as such returns constitute the public records of private documents within S. 74 (2): I.L.R. 45 Cal. 169: (1916-17) 21 Cal.W.N. 1161.

Order granting letters of administration with copy of will annexed, if public document—Certified copy, if admissible. *See* (1914-15) 19 Cal.W.N. 1063: 30 I.C. 690. Certified copy of probate in Australia—Secondary evidence. *See* 11 I.C. 261.

9. Clause (*f*).—Certified copy from office of Sub-Registrar of registered sale deed is as good as original sale-deed to prove consideration: (1969) 71 Punj.L.R. (Del.) 17.

A registered document is not a currency note which, if lost, the right to the property therein is also lost; under S. 65(*c*), secondary evidence of the contents of a document is admissible if the original is lost; under S. 65(*f*), secondary evidence is also admissible of the public records kept in a state of private document which is also a public record falling under S. 74; under S. 57 of the Registration Act, the Sub-Registrar is authorised to grant certified copies of the documents entered in its Book of registered documents; thus, a lost original sale deed can be proved by the certified copy granted by the Sub-Registrar: A.I.R. 1989 Ori. 27: (1988) 65 Cut.L.T. 586.

Registered deed of mortgage—Certified copy—Admissible as secondary evidence: I.L.R. (1961) Cut. 249: A.I.R. 1962 Ori. 40.

A certified copy of a robokari is admissible in evidence: (1917-18) 22 Cal.W.N. 742: 46 I.C. 689.

Certified copies of registered deeds: 103 I.C. 752: A.I.R. 1927 Lah. 817.

Where no attempt was made to establish any ground entitling a party to lead secondary evidence of what is not an original entry but an original document which must be in the custody of either the executant or some other person if proved to have been made over to the latter by the executant; such a document is not admissible in evidence by simply producing its certified copy from the registration office without taking steps for production of the original or laying foundation for leading secondary evidence. [(1966) 32 Cut.L.T. 343, Expl.]: (1970) 36 Cut.L.T. 1211 (D.B.).

Where in a suit for declaration of title and injunction, the plaintiff produced a certified copy of the will from the Court in which the original will had earlier been produced, *held*, when the certified copy was admitted in evidence and no objection was raised, non-production of the original will could not subsequently be urged as a ground to invalidate the will: A.I.R. 1994 Karn. 20.

'Adangal' which is one of the Revenue Accounts maintained by the Karnam, who is a public officer, is a public document within the meaning of S. 74 of the Evidence Act and the contents of that document can be proved by production of a certified copy of the same: (1971) 1 A.P.L.J. 13.

A notification which is issued by the Central Government or the State Government or by a Department of the Government is a public document and a certified copy of it may be produced in order to prove the existence, conditions or contents of that document under S. 65 of the Evidence Act. Under S. 78, such a copy has to be certified by the Head of the Department which issued the notification. It can also be taken into evidence if the Official Gazette in which the notification purported to have been printed by order of the Government has been produced for inspection of the Court: 1960 B.L.J.R. 12: 1960 Cr.L.J. 634: A.I.R. 1960 Pat. 213.

S. 57(5) of the Indian Registration Act provides that a certified copy of a document obtained from a Registrar's Office shall be admissible in evidence for the purpose of proving the contents of the original document. That means that the mere production of a certified copy without any further oral evidence to support it would be enough to show what the original document contained. But the law is that a certified copy of what has been copied in the books of registration is admissible to prove the contents of the original document only when a case is made out for the introduction of secondary evidence, that is by proof of the loss of the original or where original is withheld by a party in whose possession it is or is presumed to be. In the case of registration copies what is applicable is not S. 90 of the Indian Evidence Act but sub-S. (5) of S. 57 of the Indian Registration Act: (1953) 2 M.L.J. 717: A.I.R. 1954 Mad. 486.

Certified copy of registered document—If admissible in evidence—Proof of original: (1970) 36 Cut.L.T. 1211.

A certified copy of a registered copy is admissible to prove the contents of the original document only when conditions for the introduction of the secondary evidence are fulfilled: A.I.R. 1976 Raj. 40: 1976 Raj.L.W. 14: 1975 W.L.N. 931.

Where the applicant had produced certified copies of the registered document, she could be allowed to lead secondary evidence: (1991) 1 Rev.L.R. 195 (P.&H.).

Where a party admits the genuineness of the certified copy of a mortgage obtained from the Registering Officer, the combined effect of S. 57(5), Registration Act and S. 65, Evidence Act, is that the certified copy becomes admissible in evidence as secondary evidence under S. 65 of the Evidence Act and by reason of S. 57(5) of the Registration Act the said copy becomes admissible for the purpose of proving the contents of the original document itself. The certified copy is also admissible under S. 65(*e*) and (*f*) of the Evidence Act as the definition of a public document under S. 74 of the Evidence Act takes in public records kept in any state of private documents and the copy is the secondary evidence of the public record of the mortgage deed kept in the Registrar's Office: (1954) 2 M.L.J. (Andhra) 75.

Ss. 65 and 90—The presumption under S. 90 of the Indian Evidence Act may be drawn only with regard to the document actually produced before the Court and when the parties produced before the Court only a copy, the presumption cannot be applied that the original was duly executed by the person by whom it purported to have been executed. Under S. 60(2) of the Indian Registration Act when the parties to a document admitted their execution before the Sub-Registrar, the execution of the original document is proved. In the instant case, *held* that the conditions required by S. 65 of the Indian Evidence Act, are satisfied, and the secondary evidence, *i.e.*, the registration copy, can be admitted: (1967) 1 An.W.R. 176.

A Court may sometimes use for a subsidiary purpose a certified copy of a document though it might not have been duly proved. Where a case is of oath against oath and in such a case there was in existence some previously executed document, the Court would not be wrong in referring to a copy and drawing a conclusion which points to the correctness of the statement and version of one party as against the other: 1951 R.D. 20.

A deed of adoption is not a document which must be registered to be an effective document in law. Where such a document is duly registered but an entry is made in the wrong book, which mistake is obvious, the registration is not invalid and upon the loss of the original a certified copy of such an entry in the wrong book is admissible in evidence when the certified copy is otherwise *ex facie* regular bearing the certificate of the registering authority as being a true copy: A.I.R. 1960 Cal. 494.

To prove that *A* was adopted by *B* a certified copy of a will by *B*'s widow was put in evidence as it recited the fact of adoption. *Held* that it is necessary for a party to prove the original, that a copy of the will is not sufficient evidence of the fact of adoption recited in it and that the certified copy is secondary evidence under S. 65, of the existence, conditions and the contents of the deed but not of its execution which has to be proved under S. 68 of the Evidence Act: A.I.R. 1952 Madh. Bh. 146.

Proceedings under S. 145, Cr.P.Code, by party No. 1 against party No. 2—Party No. 1 producing certified copy of application filed by party No. 2 in other proceeding containing admission of party No. 2 that party No. 1 was in possession at relevant time—Certified copy, if admissible. *See* 1979 Chand L.R. (Cr.) 142 (Punj.).

The memorandum of association and the rules and regulations of a society could be proved by filing the certified copies of these documents: A.I.R. 1980 N.O.C. 13 (Del.).

Where certified copy containing endorsement of Registrar was produced in respect of a lost registered will and one of the attesting witnesses proved his own signature and those of the executant and other witnesses, *held*, will stood proved: A.I.R. 1977 N.O.C. 147: 1977 All.W.C. 189: I.L.R. (1977) All. 207.

It is well settled that the propounder of a will is required to prove not only its due execution and genuineness but also eliminate the suspicious circumstances, if any, surrounding the will; a will executed in suspicious circumstances, thus, cannot be allowed to be

proved by secondary evidence, that is, by its certified copy: 1988 Rajdhani L.R. 387: A.I.R. 1989 N.O.C. 47 (Del.).

Where certified copies issued by the Nagar Mahapalika Copying Department nowhere contained the name of a person and there were also some other papers on the Court record which the Court found to be not certified copies issued under S. 330 of the Municipalities Act but by a person named therein and without bearing a copying stamp folio or seal of the Municipal Board, *held*, the papers could not be said to be certified copies under S. 65; they are inadmissible under S. 65(*f*) read with the proviso: A.I.R. 1980 All. 361.

The cumulative effect of Ss. 57(5), 58(1) and 60 of the Indian Registration Act is that where secondary evidence is permissible, a certified copy of a registered document, a will in this case, granted by the Registering Authority shall constitute valid and legal evidence to prove the will. [A.I.R. 1952 Nag. 54, Rel. on]: 1992 M.P.L.J. 320.

Ss. 63 and 65(*e*) and (*f*) read together permit certified copies and copies made from the original by mechanical process to be tendered as secondary evidence; photocopies thereof prepared by a mechanical process in itself ensure the original's accuracy. Thus, where photostat copies of judicial record of a foreign Court certified by a public officer having custody of that record as contemplated by S. 76, *held*, it will not be *per se* inadmissible; but if it is not further certified by a representative of the Indian Government in the foreign country it will not be admissible: (1991-2) 108 Mad.L.W. 646 (S.C.).

10. Clause (*g*).—*See* I.L.R. 6 Mad. 8; I.L.R. 5 Cal. 568. Cl. (*g*) of S. 65 has nothing to do with documents which are not available to the Court. The very fact that Cl. (*g*) provides secondary evidence of the result because the documents cannot conveniently be examined in Court shows that the documents are there for the Court to examine if it so likes to do. But where no attempt was made to produce the original documents from which the original of Ex. D-2 was prepared, S. 65(*g*) cannot be used for the admission of Ex. D-2. Further S. 32(5) and (6) requires the production of original statements, and do not contemplate the production of some result deducted by somebody on examination of the statements admissible thereunder: I.L.R. (1955) Raj. 191: A.I.R. 1955 Raj. 45.

Land Acquisition proceeding—Computation of market value of acquired land on basis of sales during past five years—Sale deeds not numerous—Evidence of person who has prepared sales statement not admissible as secondary evidence of sale deeds: I.L.R. (1963) Madh. Pra. 887: 1964 Jab.L.J. 288: A.I.R. 1964 Madh. Pra. 196.

11. Illustrative cases.—Entries in Patwari's list made after inquiry and inspection of receipts are only secondary evidence and they are inadmissible unless the conditions laid down in this section are satisfied: 12 R.D. 398: 111 I.C. 843. As to value of lathandi papers as secondary evidence of certificate of sale, *see* 21 W.R. 333.

A mutation register is neither a primary nor secondary evidence of the terms or conditions of a contract of sale; as such it is not admissible, apart from proving the factum of sale, to prove any of the terms or conditions of the contract including the sale consideration. [1979 Rev.L.R. 107: (1979) 81 Punj.L.R. 27: 1979 Punj.L.J. 82, Overruled]: A.I.R. 1986 P.&H. 143: 1986 Rev.L.R. 42: (1986-1) 89 Punj.L.R. 109: 1985 Punj.L.J. 583: I.L.R. (1986) 1 P.&H. 90 (F.B.); 1989 Punj.L.J. 15.

As A.I.R. 1986 P.&H. 143 (F.B.) has rendered the certified copies of mutations as inadmissible in evidence for ascertaining the terms and conditions of the sale transactions without producing the certified copies of the sale deeds, *held*, application for allowing the additional evidence in order to produce the sale deeds, subject-matter of mutations, during pendency of appeal, was to be allowed, in view of aforesaid change of law by the Full Bench judgment: (1989) 1 Rev.L.R. 361.

S. 34 of the Punjab Land Revenue Act lays down the procedure for making entries in the mutation register and the orders to be passed by the Revenue Officer; it does not—and no other provision in the Act does—even remotely deal with the relevance or admissibility of any evidence; by no stretch of imagination can it be said that S. 34 of the said Act constitutes a special provision to override Ss. 65 and 91: A.I.R. 1986 P.&H. 143: 1986 Rev.L.R. 42: (1986-1) 89 Punj.L.R. 109: I.L.R. (1986) 1 P.&H. 90: 1985 Punj.L.J. 583 (F.B.).

U.P. Muslim Wakfs Act, (XVI of 1960), S. 55—Mutawalli of wakf property

appointing his son as mutawalli before his death—No provision in wakf deed as to appointment of mutawalli—Copy of document appointing son as mutawalli not proved according to law—Secondary evidence and true copy of original also not proved—Appointment of son as mutawalli could not be said to be valid: 1981 All.L.J. 614.

The mere fact that a document which is required by law to be attested was admitted in evidence without objection by the defendant does not absolve the plaintiff from establishing that it had been duly executed and attested: (1937-38) 42 Cal.W.N. 1055: A.I.R. 1938 Cal. 702.

In deciding the intention of the parties as to the time of passing of title, the document under which the properties were intended to be sold, if unambiguous, remains the sole criterion. If the terms are indecisive and ambiguous, then only the Courts will take into consideration other extraneous circumstances: A.I.R. 1992 Ori. 170.

Secondary evidence of a document should not be rejected on appeal merely on the ground that the loss of the original has not been satisfactorily proved: 15 I.C. 625.

Secondary evidence admitted without objection not to be excluded on appeal: 29 M.L.J. 307: (1914-15) 19 Cal.W.N. 929 (P.C.). *See* also 14 I.C. 539; (1930) 32 Punj.L.R. 696: A.I.R. 1931 Lah. 722; I.L.R. 14 Lah. 473: A.I.R. 1933 Lah. 601.

Where the plaintiff has suppressed the documents in his possession, he could not be permitted to establish their contents by secondary evidence: A.I.R. 1933 Mad. 451: 64 M.L.J. 676. *See* also A.I.R. 1937 Nag. 116: 169 I.C. 834.

In a motor accident claim case, copy of the insurance policy which was tendered in evidence by the statement of the Counsel at the stage of closing the case, *held*, is not admissible in evidence as conditions of S. 65 were not met with: (1987-1) 91 Punj.L.R. 618.

Where the original account books, not in current use, were available but not produced in the Court to prove the entries made therein but only copies of the entries were produced, *held*, secondary evidence was not admissible: A.I.R. 1972 All. 494.

Where purchaser of the property filed four ejectment suits and only in one suit he filed original sale deed and in other suits he filed copies thereof, *held*, it could not be argued that he should have placed original document in each suit: 1977 Kash.L.J. 57: 1977 Ren.C.J. 636.

Where secondary evidence of Baptism Register, to prove age, was held, to be not admissible. *See* (1975) 88 Mad.L.W. 34 (S.N.).

Where what purported to be a draft notice was filed by the plaintiff 15 months after filing the suit as secondary evidence of the notice sent by his Counsel to the other party without any explanation whatsoever, *held*, the trial Court rightly declined to admit it: A.I.R. 1972 Ker. 76: 1972 Ker.L.T. 328.

Where the draft of notice sent by the party's Counsel to the other party was not proved by its writer who was alive and could be examined but another clerk of the Counsel who merely stated that the notice sent was based on this draft and though he deposed that it was written by his fellow clerk but did not say that he was familiar with the handwriting of the fellow clerk, *held*, the draft could not be said to be a true copy of the notice sent to the other party: A.I.R. 1972 Ker. 76: 1972 Ker.L.T. 328.

Where in a land acquisition case, the multiple for determining the market value of the acquired land was worked out on an index of sale which was inadmissible under S. 65, *held*, it cannot be taken into consideration by the Court in a reference under S. 18 of the Land Acquisition Act; the reference proceedings being undoubtedly judicial in nature, the Court can base its decision only on admissible evidence. [A.I.R. 1969 Guj. 270; A.I.R. 1964 Madh. Pra. 196, Rel. on]: A.I.R. 1975 Madh. Pra. 57: 1974 M.P.L.J. 824: 1975 Jab.L.J. 595 (D.B.).

Where a certified copy of a judgment of the Supreme Court of New York, authenticated by the Indian Consulate there, could not be produced for insufficiency of time and its fax copy was instead produced in the Court, *held*, the fax copy was admissible. [(1991) 3 S.C.C. 451, Rel. on]: (1993) 2 Ker.L.J. 565 (D.B.).

12. Objection as to admissibility of document—When may be taken.—The discretion exercised by the trial Court in admitting secondary evidence on the ground that the original is lost should not ordinarily be interfered with in appeal. It is true that in a case where the admissibility of the document is not challenged, the erroneous omission in the trial

Court to object to the admission of the evidence would not make that evidence relevant; but this principle applies only where the evidence or document is *per se* irrelevant or inadmissible and no objection was taken to its admissibility. Where evidence is admitted in the trial Court without any objection to its reception and the evidence is admissible and relevant, then no objection will be allowed to be taken to its reception at any stage of the litigation on the ground of improper proof. But if the evidence is irrelevant or inadmissible, omission to take objection to its reception does not make it admissible and objection may be raised in appeal for the first time: (1945) 47 Bom.L.R. 962: A.I.R. 1946 Bom. 193.

It is well settled that once secondary evidence by way of certified copies of registered documents is admitted without objection and exhibited, *held*, it is not open to the opposite party to contend that proper procedure for their admission was not followed or no proper foundation for their admission was laid. [A.I.R. 1943 P.C. 83; A.I.R. 1964 Andh. Pra. 53; A.I.R. 1965 Ori. 113, Rel. on]: A.I.R. 1972 Ori. 200: 37 Cut.L.T. 848. *See* also (1979-2) 20 Guj.L.R. 390.

It is undoubtedly true that if a certified copy has been admitted into evidence without any objection having been raised by the other party that no case is made out for the introduction of the secondary evidence, the appellate Court would not permit its admissibility to be questioned before it on that ground. [A.I.R. 1963 Raj. 234 and 1969 Raj.L.W. 107, Rel. on]: A.I.R. 1976 Raj. 40: 1976 Raj.L.W. 14: 1975 W.L.N. 931; (1990) 1 Hindu L.R. 318: (1990) 1 D.M.C. 61: (1990) 1 Ker.L.J. 412.

Where the certified copies under S. 57 of the Registration Act, of the sales deeds were tendered and exhibited in evidence without objection, *held*, it amounted to the admission of the requisite circumstances and conditions for secondary evidence; no objection could be taken for the first time in appeal: A.I.R. 1990 Raj. 90.

Where at the time when a certified copy of deed of cancellation was received in evidence no objection was raised, but later on, an application was filed objecting to the reception of secondary evidence of the document, *held*, the application could not be entertained: (1974) 40 Cut.L.T. 1214.

An objection as to the admissibility of a document, *e.g.*, on the score of the document being a copy, should be taken when the witness who is produced to prove to its contents deposes about it. If such objection is not raised at an early stage of the case, it cannot be entertained later on in appeal: A.I.R. 1955 Him. Pra. 37.

An objection to the reception of secondary evidence under S. 65 of the Evidence Act on the ground of want of notice mentioned in S. 66 of the Act if not raised in the trial Court, cannot be permitted to be raised in the appellate Court: 1951 Nag.L.J. 523: A.I.R. 1952 Nag. 47; A.I.R. 1936 Rang. 277.

Where the defendant has waived proof of circumstances which justified the plaintiff in leading secondary evidence, it is not open to him in second appeal to raise a contention that the secondary evidence of the contents of the document was inadmissible: A.I.R. 1956 Bom. 196.

The objection that the trial Court should have first recorded a finding that the original deed did exist and was in possession of the defendant and only then permitted the plaintiff to produce secondary evidence as to the contents of the document, cannot be raised for the first time in second appeal: A.I.R. 1952 Him. Pra. 52.

It is not open to the Board to reject in second appeal secondary evidence of a deed which had been admitted in the lower Court without any objection and which had also been utilised by the Court in arriving at a decision: 1947 A.W.R. (Rev.) 128.

Where no objection was taken to the admissibility of a certified copy of a registered will granted by the Registering Authority as secondary evidence of the will till the stage of the second appeal and even there the existence of the will or its being a copy of the will was not disputed and the objecting party was also claiming under the same will, *held*, hypertechnical objections to the mode of proof of not being technically followed in the trial Court could not be allowed in the second appeal. [A.I.R. 1952 Nag. 54, Rel. on]: 1992 M.P.L.J. 320.

Where the defendants produced a certified copy of a registered will which was 80 years old and the plaintiffs neither asked the defendants to produce the original will nor they objected to its admissibility, *held*, in second appeal, no objection regarding admissibility

or due execution and attestation of the will could be taken. [A.I.R. 1968 All. 363, Disting.]: A.I.R. 1980 N.O.C. 7 (All.).

Secondary evidence admitted in High Court with consent of parties—Existence of original admitted by opposite party in one of his letters—Objection to admissibility not raised in memo. of appeal to Supreme Court—Objection cannot be raised for the first time in arguments before Supreme Court: 1954 S.C.R. 842: A.I.R. 1954 S.C. 139.

Objection about the admissibility or the mode of proof of a document should be raised at the trial. That kind of grievance at a later stage during the appeal brings inconvenience to the parties and frustrates the ends of justice on technical rule. Objections should not, therefore, be raised for the first time in appeal: 1964 B.L.J.R. 339: A.I.R. 1964 Pat. 45.

The rule in S. 65 of the Evidence Act excluding secondary evidence is not so rigid as to be enforced even if no objection was taken at the trial by the party against whom the secondary evidence was offered. When a party has waived proof of circumstances justifying the giving of secondary evidence, he cannot raise the objection in appeal. A document can be treated as duly admitted where its admission without being proved is not objected to by the party affected. Where the objection to be taken is not that the document is in itself inadmissible, but that the mode of proof put forward is irregular or insufficient it is essential that the objection should be taken at the trial before it is marked as exhibit and admitted. A party cannot lie by until the case comes in appeal. The question of proof of a document is a question of procedure and can be waived. On the other hand, questions of relevancy of documents are questions of law and can be raised at the appellate stage as well.

On the facts of the instant case, *held*, the documents should not have been rejected on the mere ground that they are certified copies and not the originals when, as a matter of fact, no such objection was ever taken in the trial Court or even in the Memorandum of Appeal: (1963) 2 An.W.R. 307: (1963) 2 An.L.T. 442: A.I.R. 1964 Andh. Pra. 53.

Secondary evidence of a document can always be given if the failure to produce the original document is supported by proper reasons. Where the defendant has waived proof of circumstances which justified the plaintiff in leading secondary evidence, it is not open to him in second appeal to raise a contention that the secondary evidence of the contents of the document was inadmissible: A.I.R. 1956 Bom. 196.

If secondary evidence is admitted without objection at the proper time, the parties are precluded from later on contending that the document has not been proved by its primary evidence; but if there is no secondary evidence as contemplated by S. 65, then the document cannot be said to have been proved; thus, if it was only an unverified copy, neither certified to be true by an official nor purported to have been compared with the original by anyone, *held*, it was no secondary evidence and thoroughly useless; the other party was not precluded from showing that it was not admissible as secondary evidence. [A.I.R. 1943 P.C. 83; A.I.R. 1946 Bom. 193, Disting.]: A.I.R. 1973 Raj. 263: 1973 W.L.N. 240: 1973 Raj.L.W. 473.

Where documents by way of secondary evidence were admitted and exhibited without objection, *held*, the Court cannot decline to consider them without any reason. [A.I.R. 1964 Andh. Pra. 53, Rel. on]: A.I.R. 1972 Ori. 203: (1971) 2 Cut.W.R. 202.

Where in a motor accident claim case, the owner of vehicle who himself gave the particulars of the insurance policy and did not raise any objection when a copy of the insurance policy was tendered and admitted in evidence, and who also failed to produce the original policy himself or making any effort in refuting the correctness of the copy, *held*, he could not raise the objection that the same could not be read in evidence in deciding the question regarding compensation: A.I.R. 1994 Him. Pra. 21.

Where a copy of the insurance policy was produced as secondary evidence without making out the case under S. 65 and was exhibited without its contents having been admitted by the other party or proved according to law, *held*, it was open to the appellate Court to exclude the copy from consideration. [A.I.R. 1935 Lah. 628; A.I.R. 1936 Rang. 277, held does not lay down good law in view of A.I.R. 1954 S.C. 606; A.I.R. 1988 S.C. 719, Disting.]: A.I.R. 1989 P.&H. 300: (1989-1) 95 Punj.L.R. 240 (D.B.).

66. Rules as to notice to produce.—Secondary evidence of the contents of the documents referred to in section 65, clause (*a*), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, [1][or to his attorney or pleader,] such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it—

(1) when the document to be proved is itself a notice;

(2) when, from the nature of the case, the adverse party must know that he will be required to produce it;

(3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(4) when the adverse party or his agent has the original in Court;

(5) when the adverse party or his agent has admitted the loss of the document;

(6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

---

1. Inserted by Act 18 of 1872, S. 6.

Section 66—Notes.

To permit secondary evidence of documents mentioned in S. 65(*a*), *held*, it is incumbent on the party concerned to strictly comply with the requirements of S. 66 and duly require the parties in possession thereof by notice to produce the original documents. [A.I.R. 1953 Cal. 456, Foll.]: A.I.R. 1986 Cal. 430: (1986) 1 Cal.H.N. 58 (D.B.).

In order to avail the machinery under Ss. 65 and 66 it is necessary to establish that a document was executed, and that it is in the possession or power of the person against whom the document is sought to be proved and that the said person despite notice under S. 66 failed to produce it: A.I.R. 1971 Mad. 471: (1971) 84 Mad.L.W. 452: (1971) 2 M.L.J. 128.

Once notice of production of the document has been served upon a person in whose possession the document has been alleged and there is a refusal to produce the same, the requirement of law as laid down in S. 65(*a*) is fulfilled: (1990-2) 98 Punj.L.R. 545: 1990 Punj.L.J. 541: (1990) 2 Rev.L.R. 267.

A combined reading of Ss. 65 and 66 of the Evidence Act and S. 57(5) of the Registration Act leaves no doubt that once it is established that the original title deeds are lost or destroyed or are being deliberately withheld by the party against whom they are sought to be used, secondary evidence in respect of those title deeds can be tendered and if the secondary evidence happens to be certified copies of registered documents entered in book No. 1, the contents thereof can be read in evidence by virtue of sub-S. (5) of S. 57 of the Registration Act. [A.I.R. 1956 Bom. 555, Foll.]: A.I.R. 1978 Guj. 193: (1978) 19 Guj.L.R. 412.

For invoking S. 65 for admission of secondary evidence, the conditions prescribed therein have to be proved; when the original is shown or appears to be in possession or power of the person against whom it is sought to be proved or in possession of a person out of the Court's reach or not subject to its process, or in the possession of a person legally bound to produce but despite notice under S. 66 does not produce it, the secondary evidence could only then be admitted in evidence: (1985) 2 An.W.R. 160.

S. 66 requires the giving of a notice to the party to the suit in whose possession or power the document is said to be. Thus, where it was not the case of the defendant, who sought to adduce a certified copy of the original document as secondary evidence, that the original document was in the possession of the plaintiff but his case was that it was with another

person who had died, *held*, the defendant was not required by law under S. 66 to give notice to the plaintiff. [A.I.R. 1923 P.C. 50; A.I.R. 1958 S.C. 448, Rel. on; A.I.R. 1964 Andh. Pra. 53, Disting.]: A.I.R. 1977 All. 470.

Reading Ss. 91 and 66 together, it appears that the law imposes an absolute prohibition against tendering of secondary evidence of the contents of the document referred to in S. 65(*a*) and thereby also prohibits the proof of the terms of the unregistered sale-deed by any other mode except by proof of the document itself, when the said document is admitted to be in existence: A.I.R. 1973 Ori. 65.

Secondary evidence of deeds of sale of houses adjacent to the suit house can be given in order to prove title only when the person in possession of those documents fails to produce them inspite of notice given to him. Where no such notice is given, secondary evidence in the form of copies of the original document should not be admitted: 11 L.L.J. 401. *See* also 123 I.C. 197 (Omission to give notice is a fatal objection to the admission of secondary evidence).

A registered general power-of-attorney is a public document under S. 74(2); its certified copy is *per se* admissible; it is not necessary to prove its existence by secondary evidence; no notice envisaged under S. 66 is, thus, necessary to be given to the party in whose possession or power the original power-of-attorney is: (1994-1) 106 Punj.L.R. 353.

Where a party has not been asked to produce the original of a document, it is not open to the other party to produce certified copies of the original and they would not be admissible: 1949 R.D. 22. As it is only when an original deed is either destroyed or cannot be found or the person in posesssion thereof does not file it after due notice that any other evidence of its contents could be given, where no notice to produce has been given to the party in possession of the document, it would be wrong to admit secondary evidence of it: 1950 Raj.L.W. 199: A.I.R. 1950 Raj. 47.

When what is sought to be proved by a party by production of the registers of the Sub-Registrar's Office is not any original entry or one prepared by the Sub-Registrar himself, but copies of documents, the original of which are in the custody of persons in whose favour they are executed, the documents cannot be admitted in evidence by simply producing the registers of the Registration Office without calling for the original documents: (1954-55) 59 Cal.W.N. 757: A.I.R. 1955 Cal. 398.

Where a *pardanashin* woman is living with her brother, service of summons on him instead of the woman herself would constitute such notice as is required by S. 66 and if that brother is expressly named in the summons as the person upon whom it might be served it is only a technical irregularity: 27 All.L.J. 1091: A.I.R. 1929 All. 680.

Plaintiff's suit for declaration that subject-matter of suit is trust property—Plaintiff producing certified copy of trust deed and stating in evidence that he had seen the original deed of trust in possession of defendant—Nature of case showing that defendant must have known that he would be required to produce the document—*Held*, that as there was thus an implied notice under proviso to S. 66(2) to defendant, S. 65(*a*) was satisfied and hence the production of the certified copy was sufficient proof of the deed itself: (1966-67) 71 Cal.W.N. 362.

Defendant asking plaintiff to produce account books maintained by father of plaintiff, for particular year—Defendant must first establish affirmatively that plaintiff's father maintained accounts in that year—In the absence of such proof no adverse inference can be drawn against plaintiff for their non-production: I.L.R. (1961) Cut. 635.

Where a party to a suit called upon the other party to produce the unregistered will which did not comply on the ground that the will was not in his but in the possession of another party who in his turn denied the very existence of the will, *held*, loss of the will having been thus proved, the party propounding the will was entitled to prove it by secondary evidence: (1992-1) 101 Punj.L.R. 490: (1992) 2 Hindu L.R. 145: (1992) 1 Rev.L.R. 300.

Where the defendant filed an application seeking permission to adduce secondary evidence of a will in his favour as the original will had been given to a person at the time of sanctioning the mutation and he had refused to give it back, *held*, without issuing notice to that person as required by S. 66, the trial Court was not justified in ordering that the evidence will be allowed subject to proof of the loss of original will; before this direction could be given the defendant must prove the loss of the

original will as contemplated under S. 65(*a*) read with S. 66: (1990-2) 98 Punj.L.R. 228: 1990 Punj.L.J. 428: (1990) 2 Rev.L.R. 49.

Carbon copies of the gate passes, prepared at one and the same time and which also contained the signatures of the party, *held*, are counterparts of the original documents and in the nature of primary evidence and not secondary evidence; they can be adduced without complying with the provisions of S. 66: (1988-2) 94 Punj.L.R. 536.

Where though one of the defendants called to produce original document died and no document was produced, *held*, secondary evidence could certainly be produced: A.I.R. 1974 Ori. 199: (1974) 40 Cut.L.T. 143.

A vehicle's owner, admittedly in possession of original insurance policy, *held*, cannot contend that the copy of the said policy should not be marked in evidence when the steps required to be taken by S. 66 were not taken: (1990) 2 Ker.L.J. 635: I.L.R. (1991) 1 Ker. 220.

Proviso.—No doubt notice to produce should have been given before giving secondary evidence of its contents, but such notice is not essential to render secondary evidence admissible in certain cases, *e.g.*, where the Court in its discretion thinks it fit to dispense with it: 163 I.C. 408(2): A.I.R. 1936 Rang. 277.

Where a document sought to be summoned is itself a notice sent by one party to the other and a copy of the notice is produced by the sender, under S. 66, it is not obligatory to summon production of the original notice. The non-summoning of the original notice would not make a copy of it inadmissible: (1950) 1 M.L.J. 314.

Where in suit for recovery of the price of the goods sold, the plaintiff produced only the carbon copies of the bills, which were objected to by the defendants as not admissible, *held*, as the original bills had been delivered to the defendants, same being in their custody could not be produced by the plaintiff and the defendant being in possession of the original vouchers were in the knowledge that they would be required to produce the same which they failed to do so and thus, no notice was required to be given in view of Cl. 2 of proviso to S. 66; plaintiffs were within their right to prove the supply of goods on credit by producing the carbon copies of the credit bills: (1991-2) 100 Punj.L.R. 476.

Where in a suit for redemption of mortgage, the defendant denied the alleged mortgage and there were circumstances to show that the transaction of mortgage was evidenced by a document, *held*, from the nature of the case, the defendants must have known that they would be required to produce the original mortgage deed which presumably was in their possession. In these circumstances, it would be idle and an useless formality for the plaintiffs to have given notice to the defendants for production of the original mortgage deed: A.I.R. 1971 Raj. 303: 1971 Raj.L.W. 319; A.I.R. 1994 N.O.C. 182 (Raj.).

Where the plaintiff-consignor had lodged a claim with the Railways for non-delivery of the goods, *held*, in a suit for recovery of the price, a copy of the said claim would be admissible under S. 66, proviso (2) without service of notice to produce the original claim on the Railways as the original claim was in possession of the Railways: A.I.R. 1983 Cal. 337.

It is doubtful if a *pro forma* defendant who is not interested in suit property or in the decision of the case is not an 'adverse part' within the meaning of proviso, Cl. (2): 118 I.C. 663: A.I.R. 1929 All. 680.

Certified copy of mortgage deed may, for proper reasons, be admitted without notice to produce the original: I.L.R. 6 Pat. 102: 97 I.C. 348: A.I.R. 1926 Pat. 512. *See* I.L.R. 9 Cal. 939; I.L.R. 2 Mad. 295.

Where the landlord denied execution of the lease agreement, *held*, no notice was required to be issued to him for producing lease agreement: (1981) 20 Del.L.T. 383.

Where a party alleges that no facts are adduced by the opposite party nor any facts proved which would justify the Court in admitting as secondary evidence a copy of an original document and it is found that the original document is in possession or control of the party taking the objection and he fails to produce it, proviso, Cl. (2), S. 66 applies and notice to the party to produce the original is not necessary as by the nature of the case the party must be held to be knowing that he would be required to produce it: 161 I.C. 406: A.I.R. 1936 Pat. 129.

Where the plaintiffs had clearly made a reference to the document in question in the plaint but the defendant denied existence of

67. Proof of signature and handwriting of person alleged to have signed or written document produced.—If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

---

such a document, *held*, in such a case the question of calling for the document from them did not arise: A.I.R. 1974 Ori. 199: (1974) 40 Cut.L.T. 143.

Once the plaintiff excuses himself from the production of the original documents on the plea that they are not traced or are lost, the question of giving notice for production does not arise. [A.I.R. 1956 Bom. 555, Foll.]: A.I.R. 1978 Guj. 193: (1978) 19 Guj.L.R. 412.

Section 67—Synopsis.

1. Scope and applicability.
2. By whom to be proved.
3. Proof of contents of document.
4. Execution of document—Proof of.
5. Mere admission of signature/thumb-impression—Whether amounts to admission of execution.
6. Certificate of registration—Whether in itself proof of due execution [*See* also S. 68, Note 11, *infra*].
7. Comparison by the Court [*See* also S. 73, *infra*].
8. Objection regarding mode of proof.
9. Miscellaneous.

---

1. Scope and applicability.—Handwriting may be proved by circumstantial evidence under S. 67 which prescribes no particular kind of proof: 12 Beng.L.R. App. 18; I.L.R. (1953) Hyd. 140: A.I.R. 1953 Hyd. 181; A.I.R. 1956 Madh. Bh. 86: 1956 Cr.L.J. 233 (The pieces of circumstantial evidence that go to prove its execution are: (1) the internal evidence contained in the document; and (2) oral evidence of witnesses to prove other circumstances). The execution or authorship of a document is a question of fact which may be proved like any other fact. I.L.R. 55 All. 1040: A.I.R. 1933 All. 690.

S. 67 of the Evidence Act does not lay down any particular kind of proof for proving that a particular writing or signature is in the hand of a particular person. The fact that a particular person has written a particular writing can be proved by the direct evidence of those persons who have seen him making the writing on the particular document irrespective of whether or not they can read what was written. A document can be executed not only by affixing one's signatures, but also by making a mark on it. When a document bearing a thumb mark of a person is proved it is not necessary that the person proving the affixation of the thumb mark should be able to identify the thumb mark. All that is required is that he should be able to identify the document on which he states that the thumb mark was affixed.

An illiterate person not being able to identify a document on which he has seen someone writing cannot ordinarily prove a writing or signature made by another person. But a person knowing the language in which a document is written can identify the document with certainty and when he has seen another person making a writing on it he can prove that writing without knowing the language in which the writing by that person was made: 1962 Raj.L.W. 687: I.L.R. (1963) 13 Raj. 84: A.I.R. 1963 Raj. 84.

The modes of proving a signature are as follows: (*i*) by calling a person who signed or wrote a document; (*ii*) by calling a person in whose presence the document was signed or written; (*iii*) by calling a handwriting expert; (*iv*) by calling a person acquainted with the handwriting of the person by whom the document is supposed to be signed or written; (*v*) by comparing in Court the disputed signature or writing with some admitted signature or writing; (*vi*) by proof of an admission by the person who is alleged to have signed or written the document that he signed or wrote it; (*vii*) by the statement of a deceased professional scribe, made in the ordinary course of business, that the signature on the document is that of a particular person; (*viii*) a signature is proved to have been made if it is shown to have been made at the request of a person by some other person, *e.g.*, by the scribe who signed on behalf of the executant; (*ix*) by other circumstantial evidence: A.I.R. 1957 Manipur 9; 1983 M.P.L.J. 355 relying on A.I.R. 1981 Madh. Pra. 69.

The signature and handwriting of one alleged to have signed or written a document is to be proved as laid down in S. 67 of the Evidence Act. There is no law requiring the scribe of the executant of a document to prove it: 1950 R.D. 147.

Under S. 67, the execution of a document must be proved by evidence that the signature purporting to be that of the executant is in his writing. But when a party admits the execution of a document it is not necessary to prove its execution in the manner prescribed by the Evidence Act: (1957) 2 An.W.R. 217.

A document does not prove itself, nor is an unproved signature proof of its having been written by the person whose signature it purports to bear: I.L.R. 37 Cal. 467: (1909-10) 14 Cal.W.N. 1114.

See 22 W.R. 390; 21 W.R. 429; I.L.R. 11 Bom. 690; 12 Beng.L.R. App. 18. *See* also A.I.R. 1958 Ori. 207, cited under S. 65, *supra*. The definition of 'sign' in the General Clauses Act, S. 3(52) has no application to term 'sign' as used in S. 67, Evidence Act: A.I.R. 1934 All. 390. Thumb marks are not exempt from the provisions of S. 67: 40 Mad.L.W. 277: A.I.R. 1934 Mad. 558.

S. 67 does not require that the proof of a signature or handwriting must only be by a literate person; it can be proved by direct evidence of those in whose presence the document was written or signed, whether or not the latter is illiterate or literate. A document executed by an illiterate person by affixing his thumb-mark can be, and is generally, proved by a witness who saw the executant putting his thumb-mark; and the witness need not say that he identified that thumb-mark because of its peculiar feature or his special knowledge for identifying fingerprints. [A.I.R. 1963 Raj. 84; 1965 All.L.J. 149, Rel. on; A.I.R. 1959 S.C. 443; A.I.R. 1968 S.C. 207 and A.I.R. 1928 All. 303, Dist.]: (1975) 1 Cut.W.R. 404.

The execution of a document cannot be said to be invalid merely because a person who knows how to sign his name executes a document by putting his thumb-impression: A.I.R. 1986 Ori. 173 (D.B.).

Ss. 47 and 67 deal only with the admissibility of a variety of opinion evidence on handwriting and the mode of its proof; they do not deal with the value of such evidence: A.I.R. 1977 Gau. 27.

Question whether particular letter was written by *A*—Conclusions based on mere comparison of handwriting must, at best, be indecisive; and yield to positive evidence: 1954 S.C.R. 919: I.L.R. 33 Pat. 313: A.I.R. 1954 S.C. 316; A.I.R. 1957 Manipur 9.

The language of S. 63 of the Indian Succession Act read with Ss. 67 and 68 of the Evidence Act make it obligatory that the purported handwriting and signatures of the executant on the document must be proved to have been written or made by the executant and if the document is required by law to be attested, it shall not be used in evidence unless at least one attesting witness is examined and proves execution of the document if he is alive, capable of giving evidence and is subject to the Court's process; however, if no attesting witness can be found, all that is required is to examine a witness who is able to prove the handwriting and signatures of the purported attesting witness. [A.I.R. 1930 Mad. 770: 125 I.C. 231; A.I.R. 1956 Bom. 641 and A.I.R. 1927 Mad. 662: 43 M.L.J. 216, Foll.]: (1992-1) 109 Mad.L.W. 311 (D.B.). *See* also A.I.R. 1977 Ker. 41: I.L.R. (1976) 2 Ker. 678 (D.B.).

It is well settled that the proof of a document's genuineness is the proof of its authorship to be proved like any other fact; such proof in India can be direct or circumstantial. Direct evidence may be of a person who had seen the document being written or signed or proof by one of the modes under Ss. 5 and 47; it may also be internal evidence, afforded by the document's contents. The language of S. 67 indicates that proof of signatures on a document cannot extend to its contents' genuineness when the document is written in the handwriting of someone else; signatures are proved by examining that person; handwriting, written wholly or partly by a person, is proved by examining that person; where signatures are proved but the contents' genuineness is in dispute, it is all the more necessary that its author or scribe is examined to enable the other party to cross-examine him: (1993-2) 112 Mad.L.W. 587 (D.B.).

The original of a public document is also required to be proved; otherwise there would be no check whatever, by scrutiny or examination, of its authenticity either by the Court or its officers; neither S. 67 nor S. 68 make any exception in favour of public documents: A.I.R. 1973 Bom. 14: (1972) 74 Bom.L.R. 505: 1972 Mah.L.J. 816.

Mode of proof of document which is required by law to be attested within meaning of S. 3, T.P. Act, 1882, is different from mode of proof of other kind of documents that are not so required to be attested: (1967) 33 Cut.L.T. 811.

2. By whom to be proved.—A witness can be a quite competent witness to prove one's handwriting if he has been in correspondence with that person although the witness who proves the handwriting may not have actually witnessed the writing: A.I.R. 1955 Pat. 404.

In order to prove the writing of a person, it is not necessary that the person must know the language in which the document has been written. If he has deposed that execution has been made in his presence and he had seen the executant putting his signature in his presence, the document stands proved. On the same reason, if a person is an illiterate and has seen somebody putting his signature on a document in his presence, he must be said to have proved that document: 1966 All.L.J. 149: 1965 All.W.R. (H.C.) 841.

Proof of document by examination of writer. *See* (1914-15) 19 Cal.W.N. 1148: 22 I.C. 654.

Author of letters relied on though alive not examined—Contents of those letters cannot be looked into: 1967 Ker.L.J. 399: 1967 Ker.L.T. 1122: 1967 M.L.J. (Cr.) 311.

The Registrar's endorsement that the document was signed by the executant after fully understanding it, *held*, cannot be a conclusive proof of its execution if circumstances of its execution are suspicious, *i.e.*, when the executant was an illiterate widow and was ignorant, inexperience and had to depend on others. [A.I.R. 1918 Oudh 120, Rel. on]: A.I.R. 1985 All. 160: 1985 All.C.J. 345.

Where attesting witnesses of a document written at the instance of its executor depose that the document had been read over to the executant who had thumb-marked it in their presence and the witnesses too had put their signatures thereon, *held*, the execution stands proved; it is necessary for them to identify the thumb-mark: (1986) 1 Bom.C.R. 50

Where the alleged executant of a deed (who was a marksman) denied execution and all the attesting witnesses are dead or for some other reason not available, proof of the handwriting of the attesting witness and of his identity is sufficient proof of execution. So where one attesting witness was dead and the other turned hostile, proof or admission of his handwriting is sufficient: A.I.R. 1930 Mad. 770: 125 I.C. 231. *See* also I.L.R. (1942) Nag. 661: A.I.R. 1942 Nag. 84; I.L.R. 57 Mad. 662: A.I.R. 1934 Mad. 365: 99 M.L.J. 712.

The truth of the contents of the birth certificate cannot be proved by a clerk who only proves the handwriting in the certificate. The person issuing the certificate must be examined. If that is not done and the original register too is not produced and the author of the entry is not proved, the certificate cannot be relied upon: (1975) 2 S.C.C. 564.

Where Secretary of the Trust sought the Trustees' instructions by a memo regarding unauthorised sub-letting of the Trust's property by its tenant and took it first to one Trustee who directed by endorsement on the memo that action by way of notice to the tenant be taken and signed below it and then he took it to other Trustees and all of them put their signatures below the endorsement, *held*, evidence of the Secretary, obviously acquainted with the facts, was sufficient to prove the memo as well as contents of the endorsement; it also proved the Secretary's authority to give to the tenant the notice to quit: A.I.R. 1976 Bom. 417: (1976) 78 Bom.L.R. 195.

3. Proof of contents of document.—*See* A.I.R. 1968 Ori. 217. The mere production of the original document for the Court's inspection is not *prima facie* proof of the content's truth; if it was otherwise, the requirement to prove the handwriting and signature upon the document would have been almost superfluous. [A.I.R. 1918 Cal. 988, Dissent. from]: A.I.R. 1983 Bom. 1: 1983 Mah.L.J. 339.

To prove contents of a document, *held*, the deposition of a witness acquainted with the handwriting and signature and who also asserted to be present when the document was signed, is acceptable: (1989) 1 Karn.L.J. 52 (D.B.).

Where the correctness of the contents of a document produced in Court is in issue, that should be proved by calling the executor of the document as a witness. It is not enough to merely prove the signature or the handwriting of the person who is the only person who can depose to the correctness of the contents of the document. This cannot be proved by a

witness who, though acquainted with the signature or handwriting of the person who signed or wrote that document, has no personal knowledge whatever about its contents: (1954) 56 Bom.L.R. 147: A.I.R. 1954 Bom. 305.

Where the executant of a sale deed was not examined but his signatures thereon were proved, *held*, in view of (1966) 68 Bom.L.R. 228 (D.B.) confirming A.I.R. 1954 Bom. 305, the contents of the deed could not be said to have been proved; (1968) 70 Bom.L.R. 68, taking a contrary view despite noticing the two authorities is, thus, only a personal view of the single Judge and not binding: A.I.R. 1982 Bom. 387: (1982) 1 Bom.C.R. 819: 1982 Mah.L.J. 840.

In the case of secondary evidence of contents of an original, in order to show that it is an exact copy of the original, it is necessary to prove that either it was prepared by a uniform process or it was compared with the original by some witness, who can give evidence to that effect. In such a case proof of signature of executant in the copy would not amount to proof of contents of the original: A.I.R. 1950 All. 696.

Proof of contents of document—Person with knowledge must be examined—Land acquisition—Higher rate claimed—Onus of proof on claimant: A.I.R. 1969 Guj. 270.

Where execution and attestation of a document (*Nikahnama*) is proved by proving the signatures or thumb-impressions of the executant and the attesting witnesses, it is not necessary to also prove the handwriting of the person writing it; such proof is sufficient to make its contents admissible; if that were not so, type written documents would have been rendered entirely inadmissible: A.I.R. 1982 All. 149: 1982 All.W.C. 126: (1982) 8 All.L.R. 149.

The facts and circumstances tc be established to prove execution of a document depend on the nature of pleas; where the only plea is that the document is not signed by the executant and is a forgery, the party pleading execution need not adduce evidence to show that the executant knew of its contents; ordinarily, no one signs a document without knowing its contents; if the plea taken is to the contrary, in certain circumstances, it may be necessary for the party relying upon the document to place material before the Court to satisfy it that the executant had knowledge of its contents: A.I.R. 1971 S.C. 2548.

4. Execution of document—Proof of.—*See* A.I.R. 1965 Ori. 126. 'Execution' denotes a conscious act of subscribing to a document; to prove execution, it must be shown that the person executing it consciously put his mark or signature on it after having known and understood its contents; the best witness to prove execution is perhaps the scribe but where the scribe cannot be produced either because he is dead or his attendance cannot be easily procured, it is no doubt open to the party relying on the document to produce other evidence which must unimpeachably show or furnish reasons to believe that the executant had consciously subscribed to the document; mere proof that the person's signature appear on the document cannot by itself amount to its execution: 1976 Kash.L.J. 306.

The execution of a document cannot be deemed proved as it is required by the Evidence Act merely because it is proved in the sense of the definition 'proved'. That definition of the word 'proved' must be read along with S. 67. S. 67 makes proof of execution of a document something more difficult than proof of matter other than the execution of a document: A.I.R. 1928 All. 303. *See* also 1941 All.W.R. (Rev.) 461: 1941 O.A. (Supp.) 402; A.I.R. 1942 Pesh. 83.

A document relied upon in evidence requires (*i*) proof of its execution; (*ii*) proof of its contents; and (*iii*) assessment of its evidentiary value as a whole. Consent to exhibit the document merely proves its execution which cannot invest it with any probative or evidentiary value if otherwise it has none. The proof of a document is independent of its evidentiary value; consent to exhibit merely dispenses with the requirement of its proof; but if the document is intrinsically inadmissible, no amount of consent can make it admissible. A ledger book becomes relevant only under S. 34; if it is not so relevant, it becomes wholly irrelevant; no amount of consent can convert its irrelevance into relevance. [A.I.R. 1914 Nag. 44; A.I.R. 1952 Assam 92, Rel. on]: A.I.R. 1981 Bom. 446.

In order to prove the execution of a document it must be shown that the person executing it consciously subscribed to it in the sense that he put his mark or signature on it after having known and understood its contents. Mere proof that the person's signature appears on the document cannot, by itself, amount to execution of the document: A.I.R.

1957 Manipur 9. It is also settled that if an illiterate person affixes his thumb-mark to a document, the onus to prove that the document was properly explained to the person affixing his thumb-marks so as to make him understand its true import is on the person relying on the document: A.I.R. 1992 Madh. Pra. 22.

From the mere exhibition of the document, it does not follow that the Court is precluded from examining on evidence whether the document was executed by its purported executant; exhibition of the document is only its formal proof; on execution being challenged, the Court of fact is clearly entitled to weigh the evidence to ascertain whether the document was really executed by its purported executant: A.I.R. 1989 All. 130.

Where a document is purported to have been executed by a *paradanashin* or illiterate woman, the parties relying upon it and seeking to bind the lady with the contents thereof, must not only formally prove the document but must in addition prove that the contents were read over and explained to the lady-executant: A.I.R. 1972 Ori. 132: 38 Cut.L.T. 13.

The correct view to take in regard to an execution of a document which is denied and the signature thereto only is admitted, is if there is nothing else and no other circumstances are pleaded, it is the person who alleges that the document was executed who has to prove that it was so executed in the sense that the executant intended to make and bring into existence the document which it purports to be: 1983 Hindu L.R. 364 (D.B.).

In order to exhibit a document under S. 67, *held*, it must have been proved; thus, where the witness admitted in cross-examination that he did not know who prepared it, the decree based on the document could not be sustained: A.I.R. 1991 N.O.C. 108 (Gau.).

Where there was no satisfactory evidence to prove the execution of the original sale deed as the evidence of the only attesting witness was found to be not acceptable, *held*, even if the secondary evidence in the shape of certified copy of the original was adduced, execution of the original was not proved. [In view of A.I.R. 1973 Bom. 242, the decision in A.I.R. 1946 Bom. 193 must be treated as overruled]: A.I.R. 1984 Bom. 19.

Where the pronote and receipt which were written in Hindi were signed by the defendant in Hindi at several places and the witnesses also testified that same were signed in their presence after receipt of loan in cash, *held*, execution of said documents was clearly proved *vide* S. 67: A.I.R. 1986 All. 185: (1986) 12 All.L.R. 52.

Will.—Where the propounder of the will led no evidence on both the counts, much less satisfactory evidence of its due and valid execution by the executant nor for removing suspicious circumstances surrounding the will, *held*, the finding of the trial Court that the will was validly executed could not be upheld. [A.I.R. 1959 S.C. 443; A.I.R. 1982 S.C. 133, Foll.]: A.I.R. 1989 Guj. 75: (1989) 29 Guj.L.R. 1412.

Execution of will—Proof—Presumption in favour of due execution of will; if signatures of testator and attestors are proved and attestors are not available—Registration of will does not *ipso facto* constitute proof of valid execution—Non mutation in revenue records does not invalidate a will: (1966) 2 An.W.R. 134.

Where evidence of both the attesting witnesses was clear that the testator had signed the will in their presence and they themselves had also signed it as attesting witnesses, and the expert evidence also corroborated them, *held*, the defendant having cast no doubt about execution of the will, the same stands proved: A.I.R. 1989 All. 17: (1989) 14 All.L.R. 814. *See* also S. 68, *infra*.

5. Mere admission of signature/thumb-impression—Whether amounts to admission of execution.—Mere admission of the signature on a blank paper does not amount to admission of execution; a blank paper with signature cannot create liability on the person signing it; execution implies an intelligent and conscious appreciation of contents and facts connected with the document; there was, properly speaking, no execution of the document: (1976) 42 Cut.L.T. 1180.

With regard to a document whose execution is denied but only signature is admitted and there is nothing else and no other circumstances are pleaded, *held*, placing of the burden to prove execution will depend upon the circumstances of that case; but if only the signature is admitted and the execution is denied and other facts and circumstances are pleaded and shown to be existing, it is the person who alleges execution who will have

to prove that it was executed and that the executant intended to make and bring into existence the document which it purports to be: 1983 Mah.L.J. 221 (D.B.).

The execution of a document implies intelligent and conscious appreciation of its contents and the facts connected therewith; thus, where the defendant admitted only that he had put his signature on a blank paper possibly utilised by the plaintiff for fabricating the document to show that the amount was due from the defendant, *held*, it did not amount to admission of the document's execution; onus of proving that the document was duly executed by the defendant must, therefore, lie on the plaintiff: A.I.R. 1975 Mad. 333: (1975) 88 Mad.L.W. 265: (1975) 1 M.L.J. 5 (D.B.).

The plaintiff brought a suit on the basis of a promissory note purported to have been executed by the defendant but the defendant denied both the execution as well as the passing of consideration and alleged that he entrusted to the plaintiff a blank sheet of paper bearing his thumb impression and signature for the purpose of being filled up as a kychit but the plaintiff had taken advantage of it for being filled up as a promissory note executed by him—*Held*, that the onus, in a case of this type, rests on the plaintiff to prove both the fact of execution and the advance of consideration. The admission by the defendant, as to his having affixed his thumb impression as well as signature on a blank paper without stamp cannot amount to an admission as to the execution of the promissory note, nor can it enable the plaintiff to go on from there to ask for an inference that consideration has also passed. S. 114 is a permissive and not a mandatory section and the Court may, having regard to the circumstances of a particular case, refuse to raise a presumption in that case under that section although in other cases such a presumption may be properly raised. Since the plaintiff failed to discharge the burden of proving execution and consideration the suit must fail: 1957 Ker.L.T. 321: A.I.R. 1957 Ker. 63.

6. Certificate of registration—Whether in itself proof of due execution.—[*See* also S. 68, Note 11, *infra*]. When execution of a document is being challenged, the certificate of registration alone will not be sufficient proof of the due execution of the document; Registration does not dispense with the necessity of proof of execution when the same is denied; proof of execution of a sale deed, when it is denied, will have to be furnished as in the case of any other document under S. 67: A.I.R. 1972 Assam 15: 1971 Assam L.R. 140 (D.B.).

Mere registration of a document is not by itself sufficient proof of its execution. Hence, unless there is formal proof of its execution its admission in evidence is improper and illegal: (1954-55) 59 Cal.W.N. 757: A.I.R. 1955 Cal. 398.

Though a certified copy is as good as the original, mere registration of the original is no proof of its execution; there must be some proof of the execution and genuineness of the document which means that signature of the executant must be proved to be in his handwriting: A.I.R. 1979 Gau. 68.

It is true that registration, by itself, in all cases, is not proof of execution, but if no other evidence is available, the certificate of registration is *prima facie* evidence of its execution and the certificate of the registering officer under S. 60 of the Registration Act is relevant for proving execution: A.I.R. 1973 Mad. 421: (1972) 2 M.L.J. 508: (1973) 86 Mad.L.W. 122 (D.B.). It can be relied upon to prove the execution in proper cases: A.I.R. 1985 N.O.C. 183: (1984) 2 Gau.L.R. 210.

It is settled law that the Sub-Registrar's certificate under S. 60 of the Registration Act is substantive evidence; S. 67 does not require independent proof of the signatures of the executant; proof of presentation of the document or its admission by itself is sufficient: 1986 Raj.L.W. 611. It is for the party challenging execution and registration to prove that some delibrate fraud was played on the Sub-Registrar and the registration was not legal and proper: (1990) 2 Ker.L.J. 115.

Execution and authorship of document—Proof of—Registration Act, 1908, S. 60(2)—Certificate of Registration—Genuineness must be presumed under S. 79 of Evidence Act—Suit for eviction by vendee of suit house—Plaintiff held succeeded in proving the sale: I.L.R. (1963) 13 Raj. 954: A.I.R. 1963 Raj. 234.

7. Comparison by the Court.—[*See* also S. 73, *infra*]. Apart from the fact whether or not the single Judge was familiar with the Modi script in which signatures compared by him were made, and though it was permissible for the Judge under S. 73 to compare the signatures, *held*, such comparison of handwritings as a mode of proof is very hazardous and

inconclusive, especially when comparison is made by one not conversant with the subject and without guidance from the experts' evidence: A.I.R. 1973 Bom. 242: 1973 Mah.L.J. 511 (D.B.).

Where the prosecution did not discharge its basic burden of proving the signature and handwriting on documents to be that of the accused, *held*, such lacuna could not be cured by the Court comparing the accused's signature on the *wakalatnama* with the disputed signature and hold that it was that of the accused; conviction set aside as there was still no proof of the handwriting being that of the accused: 1991 Cr.L.J. 3146: 1991 Mah.L.J. 1040.

Where in a suit for recovery of money, the Court compared the admitted signature with the disputed one on the bond, *held*, the Court's finding based thereon cannot be discarded on the ground that the Court was not handwriting expert: A.I.R. 1982 N.O.C. 267 (All.).

8. Objection regarding mode of proof.—The objection regarding the mode of proof of a document has to be taken at the time when it is being exhibited and not at a later stage: (1993) 1 M.L.J. 472; A.I.R. 1973 P.&H. 477: 1973 Rev.L.R. 220 (D.B.).

Where documents were exhibited without objection, *held*, their contents thereby also stand admitted. [A.I.R. 1972 S.C. 608, Rel. on]: (1993) 2 M.L.J. 500 (D.B.).

It is now well settled that objection about mode of proof can be waived by a party and unless such objection is raised by the party at the earliest opportunity in trial Court, such objection will be deemed to have been waived and cannot be permitted to be raised for the first time in appeal: (1985) 26 Guj.L.R. 1315.

Mode of proof—Objection in second appeal: 31 Cut.L.T. 889: A.I.R. 1965 Ori. 113.

Where a document is in itself inadmissible, if no objection is taken at the time it is tendered, marked as an exhibit, and admitted to the record, omission to object so will not convert it into a document admissible at law in all subsequent stages. Where, however, a document is not in itself inadmissible, but gets admitted to the record without any objection, it stays in as good evidence incapable of being dislodged by a subsequent objection on the mode of proof only: (1968-69) 73 Cal.W.N. 751.

Account books—Entries in—Proof of—Mode of—Objection as to, not taken in trial Court—Cannot be raised in appeal: A.I.R. 1962 Punj. 27.

9. Miscellaneous.—On production of a relevant document during trial, if objection to its admissibility or otherwise is raised, the Court must decide it before admitting the document in evidence and proceeding further with the trial; where the trial Court admitted a document subject to the plaintiff's objections without mentioning even the nature of objections which it never decided, and the document being an unregistered deed of partition, *held*, the trial Court ought not to have considered it as evidence of partition: (1988) 2 Karn.L.J. 155 (D.B.).

Where the plaintiff's title to the suit property was based on a registered sale-deed and the defendants did not contend in the written statement that the deed was forged nor any such suggestion was put to the plaintiff in the witness-box, *held*, it was idle to speculate on surmises and conjectures that the deed was a forgery: A.I.R. 1974 Madh. Pra. 16: 1973 M.P.L.J. 617: 1973 Jab.L.J. 754.

Where a marriage card was issued by a living person who was not examined as a witness to prove it, *held*, it had no credential value; its mere marking even by consent does not amount to its proof. [(1968) 2 M.L.J. 411: (1968) 81 Mad.L.W. 200, Foll.]: (1986) 99 Mad.L.W. 175 (D.B.). Admissibility of money-order coupons. *See* (1978) 2 M.P.W.N. 323.

Where a document was not proved to be in the handwriting of and signed by a person who had purportedly written and signed it; one of the attesting witnesses although proved to be alive, capable of giving evidence and subject to the Court's process, was also not examined even when the document was required by law to be attested; *held*, the document fell in the category which 'shall not be used as evidence' within the meaning of S. 68: (1986) 6 Guj.L.H. 168.

The identity of the machine on which two letters have been typewritten would not by itself show that the writer of the two is one and the same person. Such a conclusion may be drawn from additional evidence, *e.g.*, internal evidence afforded by the document, or external circumstances, or the continuity of the correspondence passing between the sender and the addressee: A.I.R. 1933 All. 690. *See* also I.L.R. 37 Cal. 467.

F.I.R.—Use of—Oral complaint reduced to writing by officer-in-charge of Police Station—

68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

[1][Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]

---

1. Inserted by Act 31 of 1926, S. 2.

Report signed by complainant and countersigned by Police Officer—Handwriting of Police Officer not proved—Document not admissible in evidence for corroboration—Complaint entered in prescribed book under S. 154—Entry not complaint—Report made to Magistrate as prescribed under S. 157—Not relevant under S. 35, Evidence Act: (1962) 3 Guj.L.R. 107: (1962) 2 Cr.L.J. 55: A.I.R. 1962 Guj. 214.

Consignment notes not proved according to law as laid down in S. 67—But the transactions embodied in those notes admitted by both parties—*Held* that the doctrine of authentication by contents would come into play and the notes were proved by internal evidence afforded by their contents found to be correct on evidence aliunde: A.I.R. 1964 Cal. 209.

Execution of handnote—Proof of—Contention that document was not genuine—Decree on weighing oral evidence, *held*, was valid: A.I.R. 1965 Pat. 295.

Where in a case of smuggled goods, the accused persons made statements before the Customs authorities, which were signed not only by their lawyer but also by the accused themselves and during the trial the signatures were admitted by the accused but the lawyer was not examined to prove them, the statement must be held to be proved by this admission and it was not further necessary to examine the lawyer: (1965) 1 Cr.L.J. 490: A.I.R. 1965 S.C. 481.

Receipt purporting to be signed by a particular person—Admissibility to prove genuineness—Proof of handwriting—Necessity: (1970) 1 Cut.W.R. 278.

Where the signature of the Government Medical Officer, on the letters written by him regarding the illness and admittance of a person, were proved by competent witness who had opportunities to see him sign, *held*, such letters were admissible: 1972 Mah.L.J. 710: A.I.R. 1971 Bom. 304 (D.B.).

Where both the Courts below had given a finding that an agreement to sale, signed at first two sheets by the vendor, had been duly executed, *held*, merely because last page of that agreement was not signed, was no ground to interfere in second appeal to set aside the concurrent findings of the Courts below: A.I.R. 1988 P.&H. 41: 1986 Punj.L.J. 382: (1986-2) 90 Punj.L.R. 30: I.L.R. (1987) 1 P.&H. 93.

Where the insurer declined to pay the amount assured to the insured's nominee on the ground that the deceased's age of 48 years at the time of issuing the policy on the basis of his declaration, medical certificate and horoscope and admitted by the insurer was false and deliberate concealment of his real age of 60 years as indicated in the partnership deed and application for firm's registration to the Income-tax Department, *held*, the two documents did not require attestation by law; they are liable to be proved as per S. 67; S. 68 is not attracted: A.I.R. 1981 Madh. Pra. 69: 1981 M.P.L.J. 192: 1981 Jab.L.J. 388 (D.B.).

Section 68—Synopsis.

1. Applicability and scope.
2. Applicability of section to bonds.
3. Due attestation.
4. Attestator—Who may be.
5. Proof of document not required to be attested [*See* also Notes under S. 72, *infra*].
6. Proof of mortgage deed.
7. Proof of gift deed.
8. Proof of sale deed.
9. Proof of will—General principles.
10. Illustrative cases.

11. Proof of execution of registered documents [*See* **also S. 67, Note 6,** *supra*].

12. Proviso.

13. Practice.

14. Objection to admissibility of document.

---

1. Applicability and scope.—In the N.W.F. Province, a conveyance of property does not require to be attested and, therefore, S. 68 has no application. Hence, admission of the execution of the document by the executant is sufficient to prove execution under S. 67: A.I.R. 1942 Pesh. 83. *See* also 1942 Nag.L.J. 214: A.I.R. 1942 Nag. 84.

S. 68 has no application to the Punjab and there is no law which requires sale deed in the province to be attested: I.L.R. 10 Lah. 447: A.I.R. 1928 Lah. 148.

S. 68 applies only to those documents which are required by law to be attested. The Transfer of Property Act was not in force in Bikaner till 4th March, 1948 when the mortgage was registered. It is one thing to take into consideration the broad principles of law and it is a very different thing to apply the technical provisions of a certain Act. The provision relating to the attestation of documents is certainly a technical one and so long as the Transfer of Property Act was not adapted, it could not be said that there was any law in the former State of Bikaner where by the mortgage deed was required to be attested. Under the circumstances S. 68, Evidence Act, could not bar the admissibility of the mortgage deed simply because one attesting witness was not called for the purpose of proving its execution: A.I.R. 1955 Raj. 39: I.L.R. (1955) Raj. 278.

Mortgage executed before T.P. Act—Proof of execution—Certified copy obtained from Registrar's Office. *See* (1954) 2 M.L.J. (Andhra) 75.

A document which is not a mortgage owing to non-compliance with S. 59 of the Transfer of Property Act regarding attestation is not a document which is required by law to be attested within the meaning of S. 68 of the Evidence Act and is admissible to prove the personal covenant to pay therein which is not required by law to be attested: I.L.R. 54 Mad. 163: A.I.R. 1931 Mad. 140: 60 M.L.J. 56; 146 I.C. 694: A.I.R. 1933 Sind 257.

As a deed of reconveyance by law requires no registration under the Registration Act nor attestation, *held*, S. 68 is not attracted even if it had been registered as well as attested; that is only a mere surplusage; non-production of an attesting witness to prove execution cannot be fatal; the Court could not discard the evidence of execution as not being in accordance with law and, therefore, insufficient. [A.I.R. 1980 All. 395, Disting.]: A.I.R. 1983 All. 1: 1982 All.W.C. 717: (1982) 8 All.L.R. 700.

A release deed is not a document required by law to be attested; it is, therefore, not necessary for one of its attesting witnesses to be examined as a witness: A.I.R. 1976 Bom. 153 (D.B.).

The provision does not apply to documents which are merely to be proved for any admission contained in them and the suit is not based or founded on those documents. [A.I.R. 1939 All. 269 and A.I.R. 1947 All. 161, Rel. on; A.I.R. 1926 Oudh 266; A.I.R. 1924 Oudh 255 and A.I.R. 1924 Cal. 160, Dissent. from]: (1975) 1 Cut.W.R. 257: (1975) 41 Cut.L.T. 597.

Where the execution of the settlement deed was not in dispute, S. 68 has no application: (1994) 2 M.L.J. 193.

If the execution itself is admitted by a party, the question of further proving the execution of the document by an attesting witness will not arise: A.I.R. 1986 Cal. 23: (1986) 2 Hindu L.R. 86: (1985) 2 Cal.H.N. 357: (1985-86) 90 Cal.W.N. 95 (D.B.); (1982) 2 Guj.L.H. 933: (1982-2) 23 Guj.L.R. 464.

The necessity of examining an attesting witness would arise only when a document which is required by law to be attested is sought to be used in evidence and the execution thereof is questioned: A.I.R. 1972 Guj. 74.

Attestation—Proof of—Calling of attesting witness—Necessity: I.L.R. (1960) Cut. 214.

Attestation—Evidence of one attesting witness falling short of proof of due attestation of document—On body of document two persons appearing to be attesting witnesses—*Held*, one could not presume from such signature that document was attested by other signatory also: (1967) 33 Cut.L.T. 811.

Ordinarily, an attestor is not presumed to have knowledge of the contents of the document; mere attestation is no evidence of the attestor's consent. However, it is open to the parties to prove that the attestation took place under circumstances which implied the

attestor's consent to the transaction set out in the document. [A.I.R. 1916 P.C. 110; A.I.R. 1928 P.C. 20 and A.I.R. 1945 P.C. 82, Foll.]: (1988) 1 Ker.L.T. 310: I.L.R. (1988) 2 Ker. 63: (1988) 2 Ker.L.J. 926 (D.B.).

S. 71 is attracted only if the attesting witnesses were called but failed to prove execution of the will either by denying their own signatures or signature of the testator or having no recollection of the document's execution; it does not apply where the attesting witness fails to testify to all the ingredients of due execution of the will; his evidence cannot be supplemented by the evidence of other non-attesting witnesses: A.I.R. 1974 Ori. 170: (1973) 1 Cut.W.R. 631: 39 Cut.L.T. 672.

S. 71 provides an exception to the rule enunciated in S. 68. But to make this provision applicable, it is evident that the attesting witness will have to appear in Court as a witness. Until he appears as a witness there is no question of his denying the execution of the document, or not recollecting the execution of the document. If the witness sits at home and is not examined because there is an apprehension that he may not support the execution of the mortgage deed, in that event there is a failure to produce the evidence which is required under S. 68. Consequently, S. 71 cannot come into play: A.I.R. 1980 All. 395: 1980 All.W.C. 358: (1980) 6 All.L.R. 445.

Where an agreement sought to be specifically enforced was attested by two witnesses and registered, it was the duty of its propounder to adduce their evidence in Court; if it was found to be insufficient to prove execution, the propounder could resort to S. 71 to prove it; non-examination of the attesting witnesses and the scribe, when they were available, presumption may be raised that if examined they would have gone against the propounder: (1988-2) 102 Mad.L.W. 292 (D.B.).

Section applies only to document duly attested and not to one which has not been proved to be so: (1967) 33 Cut.L.T. 811.

Section is mandatory: (1926-27) 31 Cal.W.N. 215: A.I.R. 1927 Cal. 102. Scope of section. *See* 104 I.C. 622: A.I.R. 1927 Pat. 403; 45 C.L.J. 577.

S. 68 has to be read as mandatory and is certainly not permissive or enabling. It lays down the necessary requirements which the Court has to observe in order that a document can be held to be proved: It cannot be said that the only mandatory provision of the section is that one attesting witness has to be called and that once that is done, any *lacuna* in the evidence can be filled up by calling witness other than the attesting witnesses. Such a construction is untenable. The whole principle underlying S. 68 is that execution of the will must be proved by at least one attesting witness that it is only an attesting witness who is entitled to prove the execution of a document, such as, a will. It is a concession that the Legislature has made, and if that concession does not result in complying with the mandatory requirements of S. 68, then the only proper method is to call the other attesting witness so that both the attesting witnesses are before the Court and the due execution of the will (or other document) is proved by the two attesting witnesses, which requirements are necessary before a will can become a valid document:(1949) 51 Bom.L.R. 246: A.I.R. 1949 Bom. 266.

If S. 68 was intended to express that a document required by law to be attested should not be used as evidence for any purpose until one attesting witness at least had been called, then the words 'for any purpose' would have found a place in the section. Those words are not in the section and, therefore, it has to be concluded that this was not the intention of the framers of the Act. There is no reason why an admission in one document should require a different kind of proof from an admission in another document. The mere fact that one of the documents requires to be executed with attestation and that attestation must be proved for the purpose of giving legal effect to the document does not appear to have any bearing on the question as to what proof should be given of the document where it is tendered merely to prove an admission in writing. S. 68 does not apply to the case of a document which is merely to be proved for the purpose of an admission: I.L.R. (1939) All. 366: A.I.R. 1939 All. 269. *See* also (1989) 1 An.L.T. 404: (1989) 1 A.P.L.J. 436.

Proof of document required by law to be attested—Examination of scribe, without examining any of the attesting witnesses—Not sufficient—Admission of execution of document by deceased person is only binding on him—Execution has to be proved again against legal representatives—Person who can be treated as attesting witness stated.

Held: The rule enacted in S. 68 is stringent and mandatory that even in a case where the

document is lost and secondary evidence is allowed to be led, the formality of an attesting witness being called has to be observed. Failure to call any of the attesting witnesses where it is not established, that all of them are dead, or were incapable of giving evidence is a fatal defect and a document cannot be held to have been proved.

Unless the person who witnesses the signing of the document by the executant thereof signs or puts his signature with the intention of attesting the document, he cannot be called an attesting witness.

In the instant case from the evidence of P.W. 1 it cannot be said that he put his signature on Exhibit A-1 with the intention of attesting it.

Admission by an executant of execution of a document is sufficient proof of execution as against him alone. Persons claiming through him can take objection to the execution and the execution will have to be proved as against them: (1970) 2 An.W.R. 88

Proof of execution of document required by law to be attested—Failure to secure attendance of surviving attesting witness in spite of exhausting all processes of Court—Bar imposed by S. 68 not attracted—Document could be proved under S. 69: 1969 Pat.L.J.R. 152: 1970 B.L.J.R. 476.

Where a document is attested by marginal witnesses at least one of them should be produced on the analogy of S. 68 even though it may not be clear whether the document was required by law to be attested or not when a document is in question, and has been attested by marginal witnesses, the mere statement of the scribe will not be sufficient to prove it: 1948 R.D. 306; 1950 R.D. 170.

Where there is a denial of execution of a registered lease, and a marginal witness, though he did not know the language in which the executant had signed it, proves due execution, it will be sufficient proof of execution: 1948 R.D. 53.

Proof of execution of attested document—Attesting witness cannot be presumed to know its contents: (1970) 36 Cut.L.T. 636.

Mere proof of thumb-marking a document by an illiterate person is no proof of due execution; it must further be shown that the executant had been told the contents and purport of the document before he thumb-marked it; due execution must always mean that there was concurrence between the mind of the executant and the document's contents before it was thumb-marked or signed by the executant: (1977) 44 Cut.L.T. 26: (1977) 1 Cut.W.R. 234.

To make a mortgage deed or a gift deed admissible in evidence as a deed of mortgage or gift, as the case may be, it is enough to comply with the provisions of S. 68 or S. 69. However, if the question raised is whether the document did create a mortgage or gift or not, it must be proved that the requirement of law as contained in Ss. 59 and 123, Transfer of Property Act, have been complied with. [A.I.R. 1932 All. 527 (F.B.), Foll.]: A.I.R. 1972 Gau. 44.

Where the execution of a registered mortgage deed is not denied by the mortgagor, it is not necessary to call the attesting witnesses of the deed to prove it: I.L.R. 12 Luck. 681: A.I.R. 1937 Oudh 149. *See* also (1981) 1 M.P.W.N. 93. To prove a deed of gift, the production of a witness, who identified the donor and attesting witnesses and who was personally known to the Sub-Registrar, and an entry in favour of the donee in the village records are sufficient: 60 I.C. 234. The proper way of proving an entry in the Register of Motor Vehicles would be either that the Register itself should be produced by a proper official or a duly authenticated copy of the material part of the register placed before the Court. A mere statement by the Commissioner of Police made in answer to a letter written by the Corporation, without his being called or the register produced, cannot be accepted in proof of the ownership of a car: (1931-32) 36 Cal.W.N. 1147: A.I.R. 1933 Cal. 678.

An illiterate witness cannot prove a signature because he cannot identify the handwriting or signature which is essential for the proof of the signature: 1948 R.D. 461.

Attestation by mark—Illiterate witness—Effect of. *See* 12 All.L.J. 1114: 26 I.C. 84. The fact that one of the attesting witnesses has turned hostile, is not a sufficient ground to excuse the party producing the document from his duty of calling the said witness. It is always open to him to cross-examine that witness with the permission of the Court: A.I.R. 1941 Oudh 89: 1940 O.W.N. 1077.

S. 68 only applies when execution of a document has got to be proved. Where execution has not got to be proved, it is not

necessary to call any attesting witness, unless it is expressly contended that the attesting witness has not witnessed the execution of the document in question: (1946) 48 Bom.L.R. 83: A.I.R. 1946 Bom. 304. The word 'execution' in S. 68 includes attestation as required by law. Where the document is registered and its attestation not denied, it is not necessary to call an attesting witness: 1945 All.L.J. 537: A.I.R. 1946 All. 178. 'Execution' of mortgage deed—Meaning of. *See* (1938-39) 43 Cal.W.N. 1025: A.I.R. 1939 Cal. 688.

Indisputably 'execution' and 'attestation' are two different acts, one following the other in that order; attestation of a document obviously is meant to ensure that the executant was a free agent neither under pressure nor subject to fraud; the reason behind the legislative imperative, set out in S. 68, to call at least one attesting witness for proof of an attestable document appears to be that he is a witness best suited to tell the Court about the circumstances under which the document was executed inasmuch as he was a witness appointed or agreed upon by the parties to speak to the circumstances of its execution before any controversy had arisen between them; what is more vital for the Court to determine is whether the document requiring attestation had been executed in an upright manner; the attesting witnesses can help the Court best in formulating its opinion about due execution of the document: A.I.R. 1972 Gau. 44.

'Execution' not only means signing by the executant, but means and includes all the series of acts which would give validity of the document concerned. In case of a deed of gift, mere admission by the executant, that it has been signed by him, cannot dispense with the proof of attestation: (1976) 1 Cut.W.R. 59.

The word 'execution' used in S. 68 includes attestation as required by law and in the case of documents required by law to be attested, not only the signature has to be proved but it has also to be proved that the document was duly attested. It is not necessary to produce both the attesting witnesses. But it is certainly essential to produce some evidence to show that there was such a second attesting witness also: 1948 R.D. 211(2): 1948 All.W.R. (Rev.) 132.

S. 68 relates to those documents which require to be proved at the trial of a suit. If by any rule of law or pleadings, such proof is not required, S. 68 is not attracted; S. 58 overrides S. 68 and obviates the necessity for calling an attesting witness unless the execution of the will or its attestation is in dispute; thus, in view of O. 8, R. 5, of the C.P.Code in the absence of any such plea in the written statement, it will be the height of technicality and waste of judicial time to insist on examination of an attesting witness before the document could be used as evidence. [1980 Ker.L.T. 493 held not good law]: A.I.R. 1990 Ker. 226: (1990) 1 Ker.L.J. 114: (1990) 1 Hindu L.R. 235 (D.B.).

It does not necessarily follow that because an attesting witness is unable to point to the signature on a document of the person whose signature he purports to have attested, that he has failed to prove the signature within the meaning of Ss. 67 and 68. If he has seen the other person sign or affix his mark in his presence or to have received from the executant a personal acknowledgment of his signature or mark, it would be enough to satisfy the definition of 'attested' under the Transfer of Property Act. S. 67 only shows what has to be proved and S. 68 what kind of evidence is essential for this purpose and when this is forthcoming there is no reason why the word 'proved' in S. 3 should not be construed according to the definition: 1943 O.W.N. 425: A.I.R. 1944 Oudh 40.

The section does not apply to account books which do not require attestation: I.L.R. 51 All. 864: A.I.R. 1930 All. 38.

Where a document was not proved to be in the handwriting of, and signed by, a person who had purportedly written and signed it; one of the attesting witnesses although proved to be alive, capable of giving evidence and subject to the Court's process, was also not examined even when the document was required by law to be attested; *held*, the document fell in the category which 'shall not be used as evidence': (1986) 6 Guj.L.H. 168.

Under S. 67, a document purported to be written wholly or partly and signed by a person is required to be proved as so written and signed; S. 68 further lays down that a document required by law to be attested shall not be used as evidence until at least one of its attesting witnesses is examined, if alive, capable of giving evidence and subject to the Court's process, as a witness; but proviso to the section except in case of wills further lays down that the requirement of examining such

witness is not necessary unless the executant specifically denies its execution: A.I.R. 1977 Ker. 41: I.L.R. (1976) 2 Ker. 678 (D.B.).

The language of S. 63 of the Indian Succession Act read with Ss. 67 and 68 of the Evidence Act make it obligatory that the purported handwriting and signatures of the executant on the document must be proved to have been written or made by the executant and if the document is required by law to be attested, it shall not be used as evidence until at least one attesting witness is examined and proves execution of the document if he is alive, capable of giving evidence and is subject to the Court's process; however, if no attesting witness can be found, all that is required is to examine a witness who is able to prove the handwriting and signatures of the purported attesting witness. [A.I.R. 1930 Mad. 770: 125 I.C. 231; A.I.R. 1956 Bom. 641 and A.I.R. 1927 Mad. 662: 43 M.L.J. 216, Foll.]: (1992-1) 109 Mad.L.W. 311 (D.B.).

Notwithstanding S. 68, the Court in a proper case can raise a presumption under S. 90; Ss. 68 and 90 do not militate against each other; the Court's power to raise presumptions under S. 90 is not controlled or curtailed by S. 68; whether or not the presumption should be made would depend upon the facts and circumstances of the case: A.I.R. 1989 Cal. 202: (1989) 2 Cal.L.T. (H.C.) 18 (D.B.).

Where a document, 30 years old, was acted upon throughout and, presumably, with the plaintiffs' knowledge, *held*, testimony of a witness that the signatures thereon were not those of the deceased was not sufficient to throw overboard the ancient document and subsequent events emanating from it; it is a fit case for raising the presumption under S. 90, notwithstanding S. 68: A.I.R. 1989 Cal. 202: (1989) 2 Cal.L.T. (H.C.) 18 (D.B.).

Where the insurer declined to pay the amount assured to the insured's nominee on the ground that the deceased's age of 48 years at the time of issuing the policy on the basis of his declaration, medical certificate and horoscope and admitted by the insurer was false and deliberate concealment of his real age of 60 years as indicated in the partnership deed and application for firm's registration to the Income-tax Department, *held*, the two documents did not require attestation by law; they are liable to be proved as per S. 67; S. 68 is not attracted: A.I.R. 1981 Madh. Pra. 69: 1981 M.P.L.J. 192 (D.B.).

The original of a public document is also required to be proved; otherwise there would be no check whatever, by scrutiny or examination, of its authenticity either by the Court or its officers; neither S. 67 nor S. 68 make any exception in favour of public documents: A.I.R. 1973 Bom. 14: (1972) 74 Bom.L.R. 505: 1972 Mah.L.J. 816.

S. 57(5) of the Indian Registration Act, 1908 simply provides that all copies given under this section shall be signed and sealed by the Registering Officer and shall be admissible for the purpose of proving the contents of the original document; this does not, however, do away with the provisions of S. 68: A.I.R. 1971 Raj. 303: 1971 Raj.L.W. 319.

Where an attesting witness died after giving his evidence in previous proceedings between the same parties or their predecessors and his evidence so recorded was transferred to the subsequent proceedings and the surviving attesting witness was not examined, *held*, the requirements of S. 68 stood satisfied: A.I.R. 1981 P.&H. 130 (F.B.).

Ss. 68 and 69 only require that one of the attesting witnesses should be called to prove execution of the document; once it is so proved, even if the attesting witness so examined does not prove either the signature of, or attestation by, the other witness, the document becomes admissible in evidence: A.I.R. 1981 N.O.C. 29 (All.) (D.B.); (1991) 45 Del.L.T. 352 (D.B.) [Non-production of second attesting witness is not fatal].

2. Applicability of section to bonds.—A bond is not required by law to be attested and as such S. 68 would not be applicable to it. The fact that it is attested would not affect the question: 1948 O.W.N. 85: A.I.R. 1948 Oudh 258. The definition of bond in S. 2(5) of the Stamp Act is not exhaustive, nor is it proper to infer from the definition in an Act which deals with stamp matters only that it means that such a document is required by law to be attested. Therefore, it is S. 72 which applies to the case of a bond and not S. 68, and examination of the attesting witnesses to prove execution is not necessary: 1940 Nag.L.J. 70: A.I.R. 1940 Nag. 240.

The word 'bond' defined in the Indian Limitation Act and the Indian Stamp Act is inconclusive, not exhaustive; the bars contained in the two Acts would not apply to bonds; they are not required by law to be

attested; *held*, it is to be proved not under S. 68 but under S. 72: A.I.R. 1982 Gau. 100 (D.B.).

In a suit on a bond, the plaintiff did not produce any of the attesting witnesses. He explained that the witnesses were the near relations or were under the influence of the defendant. The Court after taking into consideration the evidence on record and the explanation given thought it fit to rely on the evidence of the plaintiff.

Held, that the production of attesting witnesses was only necessary in cases where the document was required by law to be attested and that in the circumstances no question of law was involved in the objection of the defendant based on the failure of the plaintiff to examine the attesting witnesses: I.L.R. (1957) 7 Raj. 922: 1957 Raj.L.W. 485: A.I.R. 1958 Raj. 310.

3. Due attestation.—An attesting witness must subscribe his signature with the intention that it should be complete attestation of the document and if the *animo attestandi* is not present, there cannot be a valid attestation: A.I.R. 1976 Mad. 4: (1975) 88 Mad.L.W. 518: (1975) 2 M.L.J. 155.

S. 68—'Valid attestation'—Nature of proof required. [A.I.R. 1954 S.C. 316, Rel. on]: (1971) 2 Cut.W.R. 472.

A person can be taken to have attested the factum of execution of a document required by law to be attested not only when he saw the execution but also when he signed it as an attesting witness; it cannot be presumed from mere signatures of two persons at the foot of the endorsement of registration that they had done so as attesting witnesses. [A.I.R. 1955 S.C. 346, Rel. on]: (1984) 97 Mad.L.W. 190.

It is well established that if one attesting witness alone is examined and only proves that the executant had appended or personally acknowledged his signature on the document before the witness, it is not sufficient; it has still to be proved that the executant had appended or acknowledged his signature before the other witness as well; however, if one witness alone proves that the testator had appended or acknowledged his signature before both the witnesses, other attesting witnesses need not be examined: (1984) 97 Mad.L.W. 368 (D.B.).

In view of S. 123 of the Transfer of Property Act, the essential conditions of a valid attestation are that two or more witnesses must have seen the executant sign the instrument, or have received from him a personal acknowledgment of his signature, and each of them has signed the instrument in the presence of the executant. Where the document appeared to have been executed and attested at the same sitting and there was nothing to show that the document was executed and attested at different times, *held*, merely because the attesting witness did not say in his deposition that he had signed in the presence of the executant, it could not be said that the requirements of S. 68 were not satisfied: A.I.R. 1983 Ori. 24: (1982) 54 Cut.L.T. 560.

If a document has been scribed, executed and attested with the same ink, a presumption of due attestation is permissible in law according to the well-known maxim '*omina praesumunturrite etsolemniter case act donee probetur in contrarium*': I.L.R. (1947) Nag. 649: A.I.R. 1948 Nag. 155.

Attesting witness deposing that he had attested the mortgage bond executed by *A* in favour of *B* and that other attestators also witnessed its execution—It is sufficient evidence of valid attestation: (1954) 1 M.L.J. 622: 1954 S.C.R. 919: A.I.R. 1954 S.C. 316.

The law will assume that when the witness swears that the deed was attested he means "attested according to the forms required by law". If the other side wants to challenge that statement, it is their duty, quite apart from raising it in their pleadings, to cross-examine the witness along those lines. When that is not done the plaintiff relying on the deed is entitled to assume that the mode of attestation is not being attacked and, therefore, it is enough for their witness merely to formally prove attestation: I.L.R. (1950) Nag. 321: A.I.R. 1950 Nag. 83.

Where in a suit on a mortgage, the plaintiff mortgagee states in evidence that the mortgage document was executed by the defendant and the defendant who generally denied the mortgage in his written statement does not cross-examine the plaintiff regarding the details of the execution or about attestation, it would be presumed that there was due execution and attestation of the document according to law. Attestation can be presumed when there is no specific attack on due execution: A.I.R. 1951 Nag. 343: I.L.R. (1951) Nag. 873.

Though the witness required to prove attestation may not have categorically stated

that he and the other attesting witnesses put their signature (after having seen the execution of the document) in the presence of the executants, nevertheless, the fact that they actually did so can be easily gathered from the circumstances disclosed in the evidence. Thus, where it is proved that the execution and registration of the document all took place at about the same time in the house of the executants, that the witnesses not only saw the executants put their signatures on the document, but also saw the document being explained to the lady executant by her husband as also by the registering officer, that they also saw the executants admit receipt of the consideration, which was paid in their presence and that all this happened at the same time, it can be legitimately inferred that the witnesses also put their signatures in the presence of the executants after having seen them signing the instrument: A.I.R. 1958 Assam 56.

The proper procedure to follow under S. 68 is that the witness should not only be asked whether he had attested a particular document but the document itself should be shown to him and he should be questioned whether it bears his signature. It should be further put to him whether the executant had also signed the document in his presence or that he had admitted his signature on the documents before him. If the witness says that the executant had signed the document in his presence he should also be asked to identify the signature thereon. It is necessary to bring out from the witness that he has attested the document in the sense referred to in S. 3, Transfer of Property Act: A.I.R. 1955 Raj. 39: I.L.R. (1955) Raj. 278.

Merely because an attesting witness to an agreement to sell was a resident of a place 6 miles from that of executing parties, *held*, is no ground to reject his testimony: A.I.R. 1982 All. 186.

Where none of the attesting witnesses was examined in order to prove the execution of the deed and even identifying witnesses and the scribe had also not been examined, but, the Joint Registrar who registered the document was examined to prove the execution, *held*, as the Joint Registrar had stated that even before the document was presented to him for registration, it had already contained the thumb mark and signature of the attestators to it, his endorsement with regard to execution would not show *animo attestandi;* his examination, therefore, did not satisfy the provisions of S. 68: A.I.R. 1971 Andh. Pra. 319.

4. Attestator—Who may be.—Executant of document or party to transaction not an 'attesting' witness: (1909-10) 14 Cal.W.N. 1046: 7 I.C. 735.

Scribe as attesting witness.—A writer who signs his name in token of being the scribe of a mortgage deed does not attest the deed merely by subsequently seeing the mortgagor affix his signature: 6 Nag.L.R. 152: 8 I.C. 1119. The signature of a scribe may itself in certain circumstances be regarded as an attestation which stands duly proved by his evidence. The decision in I.L.R. 41 Mad. 535, stands unaffected by the decision of the Judicial Committee in A.I.R. 1925 P.C. 89.

It is a question in each case which turns upon its own circumstances whether a scribe can or cannot be regarded as an attesting witness. A scribe may be an attesting witness as well as the writer. But the fact that he signed as an attesting witness must be duly proved: (1950) 2 M.L.J. 262.

A writer of a deed who has not signed it as witness but has, as a matter of fact, been a witness of execution is a competent attesting witness: 146 I.C. 694: A.I.R. 1933 Sind 257.

The proof contemplated in S. 68 can be furnished by the scribe of the document who could speak to the execution of it and it is not essential that it should be proved only by at least one of the attesting witnesses. It is true, in cases where the scribe signed the memo. before the document was actually executed, it would mean he did not witness the execution and it would not satisfy the requirements of that section if such a person is examined as an attesting witness. Thus, it depends greatly upon the facts of each case, whether a scribe is also an attesting witness or not. Where the writer of the document signed the same as a scribe after the attesting witness had fixed their signatures and also deposed that he saw not only the executant affixing his signature but the attestation as well, it would be sufficient proof of execution of the document: 1956 An.W.R. 632: A.I.R. 1956 Andhra 195.

It will be a question of fact in each case to be determined as to under what circumstances and in what manner the scribe acted and attested the will or not. The mere fact that the will was scribed by a person did not mean that

he could not prove the will as an attesting witness. [A.I.R. 1956 Andhra 195, Rel. on]: A.I.R. 1986 P.&H. 230.

The scribe of a document may perform a dual role; he may be an attesting witness as well as the scribe, but he will not be so unless he intends to sign the document as an attesting witness. When a person puts his signatures on the document both as scribe and as attesting witness, the inference is that he functioned both as scribe and as attesting witness: A.I.R. 1983 Ori. 24: (1982) 54 Cut.L.T. 560.

Registering Officer—A Registering Officer signing a document in performance of his official duty does not thereby become an attesting witness of the will; to be taken as an attesting witness, he must have put his signatures to authenticate the executant's signature with the animus of the attesting witnesses in the presence of the executant; there must be necessary evidence in this regard on the record to prove his *animo attestandi*; mere non-perfunctory registration of the document by him is no such proof: 1988 Rajdhani L.R. 387: A.I.R. 1989 N.O.C. 47 (Del.).

When the Sub-Registrar did nothing except to sign the registration endorsement on the document, which he is duty bound to do under the Registration Act which requires him to ascertain whether the person presenting the document for registration had executed the same and on getting an affirmative reply makes endorsement to that effect and signs the registration endorsement on the documents, *held*, by no stretch of imagination could it be said that the Sub-Registrar was doing so as an attestor; it is well established that it is *animo attestandi* which makes a signatory to the will an attesting witness: (1991) 2 M.L.J. 478.

Where the testator at the registration of his will put his thumb-impression in the presence of the Sub-Registrar who also signed the endorsement, *held*, the Sub-Registrar also becomes an attesting witness; the contents of his endorsement also become admissible and true; there remains no necessity to prove the execution of the will by other evidence: (1994-1) 106 Punj.L.R. 525.

A Sub-Registrar who has signed a document in the presence of the executant after receiving from him an acknowledgment of execution is an attesting witness: 1940 Nag.L.J. 437: A.I.R. 1940 Nag. 382.

Beneficiary—Attestor to a document may be beneficially interested—Document valid—Person not party to document can prove its execution: (1966) 2 An.W.R. 1: (1966) 2 An.L.T. 105.

Burden lies on a person having fiduciary relationship with the executant of a deed conferring benefit on him to show that the executant had independent advice and did not execute the deed under his undue influence: (1972) 85 Mad.L.W. 372.

Identifier—Identifier as attesting witness: (1958) 1 Cal.L.J. 123.

It is true that legally the witness only identifies the executant and need not be fastened with the knowledge of the contents of the document. But where the witness is related to the executant, and also knows that the executant had no interest in the property and still goes to identify him, it can legitimately be inferred that the witness had full knowledge of the contents of the deed: I.L.R. (1964) 16 Assam 237: A.I.R. 1967 Assam 9.

The change in the meaning of the word 'attested' effected by S. 2 of Act XXVIII of 1926 as amended by Act X of 1927 is retrospective in operation and the person who identifies the executant of a document before Sub-Registrar can be an attesting witness: 30 Nag.L.R. 62: A.I.R. 1934 Nag. 1.

A person identifying executant before registration authorities is deemed to be an attesting witness: 1979 All.W.C. (Rev.) 23. But *see*: The imperative requirement of S. 68 cannot be fulfilled by examination of the identifying witness because he makes the signature with the animus only to identify the executant: (1980) 2 An.W.R. 350.

Miscellaneous—Where a sale deed standing in the name of the plaintiff's brother had been attested by the plaintiff himself who also contended that the property was nevertheless purchased for the benefit of both the brothers, *held*, the attestation could only be for the purpose of binding the plaintiff to the purchase of property in the name of his brother; the plaintiff's contention rejected: (1975) 88 Mad.L.W. 549.

5. Proof of document not required to be attested.—[*See* also Notes under S. 72, *infra*]. Documents not required by law to be attested—Proof of execution—Parties, however, obtaining attestation—Attesting witness need

not be examined to prove execution: 1966 All.W.R. (H.C.) 57: A.I.R. 1966 All. 515.

Mode of proof of document which is required by law to be attested within meaning of S. 3, T.P. Act, 1882, is different from mode of proof of other kind of documents that are not so required to be attested: (1967) 33 Cut.L.T. 811.

To the deeds not by law required to be attested, S. 68 does not apply. They are governed by S. 67 which does not lay down any particular mode of proving a particular writing or signature to be in the hand of a particular person. They may be proved in any one or more of the following modes: (*i*) by calling the person who signed or wrote; (*ii*) by calling the person in whose presence it was signed or written; (*iii*) by calling handwriting expert; (*iv*) by calling a person acquainted with the handwriting of the person having purportedly signed or written it whom the document is supposed to be signed or written; (*v*) by comparing in Court the disputed signature or handwriting with some admitted signatures or writing; (*vi*) by proof of an admission of the person who is alleged to have signed or written the document that he signed or wrote it; (*vii*) by the statement of a deceased professional scribe, made in the ordinary course of business, that the signature on the document is that of the particular person; (*viii*) by other circumstantial evidence. [1981 M.P.L.J. 192: 1981 Jab.L.J. 388, Rel. on]: 1983 M.P.L.J. 355.

6. Proof of mortgage deed.—Under S. 68, what is necessary is that an attesting witness, if available, should be called in evidence. It is wrong to think that a mortgage deed can be proved only by an attesting witness. If the latter is unable to prove it, there is no bar to its being proved by other evidence: I.L.R. 16 Luck. 615: A.I.R. 1941 Oudh 284: 1941 O.W.N. 1298; A.I.R. 1942 Oudh 201; A.I.R. 1941 Rang. 122.

A mortgage deed stands proved in accordance with the provisions of S. 68 when scribe of the deed had admittedly been produced as a witness: 1995 Punj.L.J. 267.

A mere production of the mortgage deed is not enough to fasten any liability on parties who are not the executants of the document. Even if the document has been produced alongwith the plaint, the plaintiff would not be relieved of the burden of proving the document as required by law, to entitle him to a decree on the basis of the document. A document could be proved only by calling an attesting witness, and this could be dispensed with only where the execution is admitted or has not been denied. The rule enacted in S. 68 is so stringed and mandatory that even in a case where the document is lost and secondary evidence is allowed to be led, the formality of an attesting witness being called has to be observed. Failure to call as witness any of the attesting witnesses where it is not established that all of them are dead or were incapable of giving evidence, is a fatal defect and a document cannot be held to have been proved: 1958 An.L.T. 440: A.I.R. 1958 Andh. Pra. 418.

The object of attestation in S. 59 of Transfer of Property Act and S. 68 of the Evidence Act is to protect the executant from being required to execute a document by the other party thereto by force, fraud or undue influence. Therefore, what is intended to benefit the executant cannot be construed to act to the detriment of his interest. Thus, a mortgagee who has admitted the execution of mortgage deed in lower Courts cannot be allowed to contest the suit on the ground that the mortgagor failed to prove the requirements of S. 59 of T.P. Act in not adducing evidence as to attestation of mortgage deed: (1969) 35 Cut.L.T. 821.

Preliminary decree passed and final decree barred—Subsequent suit brought by assignee of decree debt based on same mortgage bond—Plea that mortgage bond was not admissible in evidence as none of attestors had been examined could not be allowed to be raised either by original mortgagor or by his legal representatives: (1963) 2 An.L.T. 404: A.I.R. 1964 Andh. Pra. 297.

Suit for redemption of usufructuary mortgage—Execution of mortgage not denied by mortgagee—But deed not attested—Mortgage *held* invalid—Decree, however, could be granted on basis of mortgagor's title: I.L.R. (1961) 13 Assam 23: A.I.R. 1961 Assam 48.

No evidence to show document as attested by any other witness—*Held*, document was not duly attested within meaning of S. 3 and hence, it could not be enforced as mortgage bond for falling short of requirements of S. 59: (1967) 33 Cut.L.T. 811.

Person denying execution of mortgage deed by him—Subject value exceeding rupees one hundred—Deposition by one of attestators to mortgage deed that neither both attestors signed it in presence of mortgagor nor mortgagor in turn signed in their presence—Other attestor not examined—

Mortgage deed is inadmissible in evidence—Transfer of Property Act, 1882, Ss. 3, 59: (1969) 11 Ori.J.D. 1.

Mortgage, proof of—Only one attesting witness called, sufficient proof: I.L.R. 39 All. 241: 15 All.L.J. 164.

Where an attesting witness is called but his evidence has not been accepted, the contention that the provisions of S. 68 had been complied with and that no further evidence of due execution and attestation of the mortgage was necessary, cannot be accepted: (1938-39) 43 Cal.W.N. 669: A.I.R. 1939 P.C. 117: (1939) 2 M.L.J. 762 (P.C.).

Where the trial Court had admitted the mortgage deed into evidence without its formal proof in accordance with law but rejected it at a later stage, *held*, as the mistake was on the part of the Court, the party adducing said document could be given an opportunity to prove the said document in accordance with law; thus, it could not be said to be a case of mere filling in the *lacuna* in the evidence: (1989-1) 95 Punj.L.R. 229.

Where what was denied was the genuineness or the validity or the truth of the alleged mortgage and not the execution of the mortgage deed, *held*, even if none of the attestators had been examined, it could not be said that the mortgage deed had not been duly proved: (1975) 2 Karn.L.J. 37 (S.N.) 71.

Where though the execution of the mortgage deed was admitted, it was alleged that it was the outcome of coercion and undue influence, *held*, execution having been admitted, examination of the attesting witnesses for the purpose of proof of the execution of the document was not necessary: A.I.R. 1986 Cal. 132: (1984-85) 89 Cal.W.N. 700 (D.B.).

Where though the mortgagors had denied execution of mortgage deed, one of the attestators spoke about the execution, *held*, in such a case S. 71 can be called in aid and as the mortgagors had signed in presence of the witnesses before the Registrar, the trial Court was right in upholding the execution and attestation of document: (1991) 1 An.L.T. 140.

7. Proof of gift deed.—Due execution, attestation and registration are the very foundations of the validity of a gift deed; the plaintiff has to prove them in the manner contemplated by S. 68 read with S. 123 of the Transfer of Property Act; where only one of the two attesting witnesses was examined to prove the gift deed, it could not be said to have been proved; its mere registration does not do away with its proof contemplated by S. 68: I.L.R. (1979) 1 Karn. 370: (1979) 1 Karn.L.J. (S.N.) 85.

Where the gift deed was not specifically denied, *held*, it was not necessary to prove the deed in accordance with S. 68; it could be used as evidence. [A.I.R. 1951 Nag. 343; A.I.R. 1948 Nag. 155, Rel. on]: A.I.R. 1981 All. 50; (1982) 23 Guj.L.R. 464.

Where a gift deed is challenged not for want of legal attestation but on the grounds of misrepresentation, undue influence and fraud, *held*, it amounts to admission of execution; attestation, thus, need not be proved: (1971) 2 Cut.W.R. 472.

Where execution of the gift deed was denied but its propounder examined only the identifying witness without examining any of the attesting witnesses, *held*, the deed was not proved as required under S. 68; merely because the summons were issued to one attesting witness but no steps were taken to procure his presence by resort to coercive measures under O. 16, R. 10 of the Code of Civil Procedure is not sufficient to escape the rigour of S. 68: (1980) 2 An.W.R. 350.

Where there was no specific denial of execution of the gift deed as the plea raised was that the plaintiff was not aware of execution of any such deed, *held*, the trial Court was not justified in holding that the deed, not having been proved as required under S. 68, must fail: (1993) 1 Hindu L.R. 73 (Ker.).

Where the scribe of the gift deed had deposed that the executant had signed before him and the attesting witnesses attested the gift deed in his presence and one of the attesting witness also deposed to the same, *held*, the mere fact that the other attesting witness had not been produced, would be of no effect: [A.I.R. 1969 S.C. 1147, Foll.]: A.I.R. 1972 Raj. 25.

Where one of the attesting witnesses of a gift deed proved the signatures of the donor as well as both the attesting witnesses but not that each of the attesting witnesses had seen the other attesting the deed in his presence, *held*, though procedural requirements of S. 68 were satisfied, yet the party relying upon the document is not absolved, if execution is denied, to prove that each of the attesting

witnesses had seen the executant sign or affix his mark or has received from the executant a personal acknowledgment of the signature or mark: A.I.R. 1975 Mad. 88: (1974) 87 Mad.L.W. 799 (D.B.). *See* also (1979) 1M.P.W.N. 115.

Requirements of valid attestation—Executant of gift deed affixing his thumb-mark after endorsement by registering officer while registering deed under S. 58 (Registration Act, 1908)—Thumb-mark satisfies requirements of execution of document: (1968) 1 An.W.R. 359.

8. Proof of sale deed.—There is nothing in S. 54 of the Transfer of Property Act, which requires a sale deed to be attested. Thus, a sale deed though attested, does not depend upon attestation for its validity; it would, therefore, be unnecessary to prove it by calling an attesting witness: (1975) 88 Mad.L.W. 6.

There is no legal requirement that witnesses attesting an agreement of sale should be from the vendor's village: (1994-1) 106 Punj.L.R. 321.

Where a sale agreement in its recitals conveys title to the vendee with absolute rights of alienation but without consideration, *held*, the document amounted to a sale deed even if it provided for execution of a regular sale deed; being unstamped and unregistered, it is not admissible. [A.I.R. 1961 Andh. Pra. 424, Foll.]: (1984) 2 An.W.R. 105: (1984) 1 An.L.T. 158.

9. Proof of will—General principles.—The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, reference must inevitably be made to the statutory provisions which govern the proof of documents. Under S. 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Ss. 45 and 47 of the Act, the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. S. 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. Ss. 59 and 63 of the Indian Succession Act are also relevant. The question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. It would *prima facie* be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by S. 63 of the Indian Succession Act. The rest to be applied would be the usual test of the satisfaction of the prudent mind in such matters. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will: A.I.R. 1959 S.C. 443; (1973) 1 Cut.W.R. 643; (1991) 3 Karn.L.J. 188.

S. 68 makes an important concession to those who wish to prove and establish a will in a Court of law. Although S. 63 of the Succession Act requires that a will has to be attested by two witnesses, S. 68 of the Evidence Act permits the execution of the will to be proved by only one attesting witness to be called. But it is important to note that at least one attesting witness should be in a position to prove the execution of the will. If that attesting witness can prove the execution of the will, the law dispenses with the evidence of the other attesting witness. But if that attesting witness cannot prove the execution of the will, then his evidence has to be supplemented by the other attesting witness being called to prove the execution. But the execution of the will, as required by S. 63, Succession Act, does not merely mean the signing of it by the executant (testator or testatrix) or putting his or her thumbmark on the document; it means all the formalities required and laid down by S. 63 Succession Act; if the one attesting witness who is called does not, therefore, prove the attestation of the will by the other attesting witness, his evidence would fall short of the requirements of S. 68, Evidence Act: (1949) 51 Bom.L.R. 245: A.I.R. 1949 Bom. 266.

Reading S. 63 of the Succession Act with S. 68 of the Evidence Act, it is clear that what a person propounding a will has to prove is that the will was duly and validly executed and that has to be done by not simply proving that the signature on the will was that of the testator but that the attestations were also made properly as required by Cl. (*c*) of S. 63 of the Succession Act. Under S. 63(*c*) of the Succession Act, it is necessary to prove that one or more witnesses had properly attested the will

The Evidence Act only lays down the mode of proving; it does not define what is required to be proved under S. 63(*c*) of the Succession Act. When a person comes to Court to establish the authenticity and the valid execution of a will, the mere formal execution and its valid execution cannot be separated. To prove the valid execution of a will, there must be proof of both the attestations. There cannot be a valid execution without proper attestation under S. 63, Succession Act, and if such proper attestation is not proved, there is no proof of execution under S. 68, Evidence Act. S. 68, Evidence Act, does not say that a document required to be attested by two witnesses shall be proved by the evidence of one of them. All that the section provides is that such a document shall not be accepted in evidence unless the evidence of 'at least' one of the attesting witnesses is called. The words "at least" are of the utmost importance and pre-suppose that more evidence may be required; it can only be by reference to the circumstances of each case that the quantum of evidence necessary to discharge the onus of proof can be measured. If one attesting witness only proves that the testator had acknowledged his signature to him, that does not dispense with proof of acknowledgment by the testator before the other attesting witness. All that S. 68, Evidence Act, means is that if two attesting witnesses had signed in each other's presence, it is not necessary to examine both of them to prove that they have received the acknowledgment from the testator: (1945) 47 Bom.L.R. 709: A.I.R. 1946 Bom. 12.

The onus is upon the party propounding a will and he must satisfy the Court that the instrument so propounded is the last will of a free and capable testator. If circumstances exist which excite the suspicion of the Court, it is his duty to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document; and it is only then that the onus is shifted on those impeaching the will to prove if there are other affirmative circumstances to detract from its legality. The principles that govern such cases are: (*1*) a propounder of a will has to prove due and valid execution of the same, and if there are suspicious circumstances surrounding the execution of the will, the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence; (*2*) a will has to be proved like any other document except as to the special requirement of attestation prescribed by S. 63 of the Succession Act. It would be idle in the case of proof of wills as in the case of other documents, to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters; (*3*) even though there is an element of solemnity in the decision of the question whether the will propounded is the last will and testament of the deceased testator because of his non-availability to prove the same, the Court in dealing with proof of wills will start on the same inquiry as in the case of proof of other documents ordinarily. When the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator and of the signature as required by law, Courts would be justified in making a finding in favour of the testator.

Direct or positive evidence regarding the execution of the will has to be considered and then if there are circumstances present to create suspicion, the Court is bound to find out those circumstances and look for evidence for the purpose of deciding whether those suspicions have been removed. The process cannot in any way be reversed. It is not permissible to a Court of probate to consider aliunde the terms of the will, to consider whether they are generous or not, to consider whether the relations who had natural and legitimate claims on the testator's bounty have been cut off and then consider whether the will is forged or not with such pre-conceived ideas and refuse to grant probate of the will: 1968 Ker.L.J. 123; (1991) 1 An.L.T. 5.

The law as to attestation of wills is contained in S. 63(*c*) of the Succession Act and the mode of proving documents required by law to be attested has been laid down in Ss. 68 to 72 of the Evidence Act. Nothing in these provisions makes it a necesary element in the proof of attestation that the signatures of all the attesting witnesses of a will should be identified, and it is not permissible to add to the statutory requirements of the mode of proving it. What has to be proved is that each of the attesting witnesses saw the testator signing the will or received from the testator a personal acknowledgment of his signature and that each of the witnesses signed the will in the presence of the testator. It is not necessary that the attesting witnesses should be able to identify the signature of each other or

even to know each other and as such there can be no basis for the requirement that the witnesses should identify each other's signature: I.L.R. (1965) 1 All. 483: A.I.R. 1966 All. 570.

S. 68 of the Evidence Act does not in any manner change or alter the requirements to be proved by S. 63(*c*) of the Succession Act. A reading of S. 63(*c*) of the Succession Act with S. 68 of the Evidence Act, establishes that a person propounding a will has to prove that the will was duly and validly executed and that should be done by not merely establishing that the signature on the will was that of the testator, but also that the attestations were made in the manner contemplated by Cl. (*c*) of S. 63 of the Succession Act: (1994) 1 M.L.J. 216 (D.B.).

Since a will takes effect after the testator's death, *held*, it is incumbent on its propounder to satisfy the Court's conscience that it is the last will and testament of the testator and prove it in terms of S. 63 of the Indian Succession Act and S. 68. [A.I.R. 1959 S.C. 442, Foll.]: (1993) 2 Hindu L.R. 554 (Andh. Pra.).

The propounder of the will has not only to prove it as provided in S. 68 but he has also to adduce evidence to explain all the suspicious circumstances in order to remove any doubt that is likely to linger in the mind of the Court. Not only the sound state of mind of the testator, but the fact that the document is the last will and testament of the testator, according to her free will uninfluenced by other sources will have to be established: A.I.R. 1991 Ker. 123.

The onus lies on the propounder to prove the will; if no suspicious circumstances surround the will's execution, proof of testamentary capacity and the signature of the testator as required by law would be sufficient to discharge that onus: A.I.R. 1990 Madh. Pra. 334; A.I.R. 1976 Cal. 377 (D.B.); 1968 Ker.L.J. 123; but if there were any suspicious circumstance like the absence of the endorsement on the back of the will in the Sub-Registrar's office that the contents of the will of which the testatrix admitted the execution were brought home to her, the propounder must satisfactorily explain it: A.I.R. 1988 Cal. 196 (D.B.).

A distinguishing feature of a will, unlike other documents, is that the will speaks from the death of its testator; when it is propounded or produced before a Court, its testator, being already dead, cannot speak about its genuineness or contents, etc. The onus, thus lies heavy on its propounder to show, by satisfactory evidence, that the will was signed by the testator, when he was in a sound and disposing state of mind, had understood the nature and effect of the disposition and had put his signature to the will of his own free will. Judging the solemnity attached, the evidence should be of disinterested, satisfactory and sufficient nature: A.I.R. 1991 Ori. 289.

Will—Mode of proof—Onus—Principles—When Court would grant probate: A.I.R. 1964 S.C. 529.

Ss. 68 and 114, *Illus.* (*g*)—Succession Act, 1925, S. 63—Will—Question about truth and genuineness of will—Propounder taking benefit under will examining only one of attestors to will as required under S. 68 and not examining other witnesses—*Held*, propounder was under duty to examine all available witnesses and to produce best available evidence in support of execution of will—Non-production of such available evidence resulted in presuming that evidence was unfavourable to him, under S. 114—Succession Act, 1925, S. 63: (1966) 2 An.W.R. 191.

The onus to prove the allegations of fraud, undue influence and coercion used in procuring the will lies on the party who makes those allegations: A.I.R. 1976 Cal. 377 (D.B.).

Execution of the will, to obtain Letters of Administration, requires proof of the testator's sound and disposing mind and proof of its execution and attestation under S. 68; though it is for the caveator who allege fraud or undue influence on the testator, to prove the same, but despite his failure to so prove, the propounder has still to clarify and explain suspicious circumstance arising in the case: A.I.R. 1989 N.O.C. 189: (1989) 1 Ori.L.R. 345: (1989) 67 Cut.L.T. 537 (D.B.).

S. 68 read with S. 63 of the Succession Act requires at least one attesting witness to be examined to prove not only about the testator signing, or affixing his mark to, the will but also about each of the witnesses having signed the will in the testator's presence: A.I.R. 1990 Madh. Pra. 334; A.I.R. 1974 Andh. Pra. 13.

To prove the execution of the will, examination of one of the attesting witnesses is enough; but that witness shall speak that he has seen the testator signing or affixing his mark to the will and has seen the other person attesting the will: (1993) 2 Hindu L.R. 300 (Andh. Pra.) (D.B.).

It cannot be laid down as a matter of law that because the witnesses did not state in their examination-in-chief that they signed the will in the presence of the testator, it cannot amount to due attestation; it will depend upon the circumstances elicited in their evidence whether the attesting witnesses had signed in the presence of the testator; where a will duly signed by the testator was attested by two witnesses not in the presence of each other but at different times, the proof of both the attestations in the presence of the testator is necessary; there need not be positive evidence from the attesting witnesses that the testator's signature was on the will when they signed it; the production of the will by the testator with his signature upon it and his request to the witness to attest it, is a sufficient acknowledgment by the testator of his signature on the will. [A.I.R. 1955 S.C. 363, Foll.]: A.I.R. 1985 N.O.C. 160: 1985 Ker.L.T. 14.

The attestor's participation even at the time of registration does not dispense with the proof of execution and attestation of the will in accordance with S. 68: A.I.R. 1974 Andh. Pra. 13.

The provisions of S. 68, Evidence Act, are mandatory and they apply to a will as it is a document required under S. 63(*c*) of the Succession Act to be attested. Under S. 68 of the Evidence Act what is necessary is that an attesting witness if available should be called in evidence. The expression 'called' in the section is not used in the sense of 'summoned' and it clearly means tendered for the purpose of giving evidence: I.L.R. (1952) Nag. 189: A.I.R. 1952 Nag. 88.

It cannot be presumed from the mere signatures of two persons appearing at the foot of the endorsement of registration of a will that they had appended their signatures to the document as attesting witnesses or can be construed to have done so in their capacity as attesting witnesses. S. 68 of the Evidence Act requires an attesting witness to be called as a witness to prove the due execution and attestation of the will. This provision should be complied with in order that those two persons might be treated as attesting witnesses: A.I.R. 1955 S.C. 346.

Will—Attestation—Proof—Scribe and Sub-Registrar as attesting witnesses. *See* A.I.R. 1957 Raj. 180. The provisions of S. 281 of the Succession Act are merely supplementary and do not dispense with any other proof that may be necessary. Although a petition for probate of a will is verified by one of the attesting witnesses as required by S. 281 of the Succession Act, an affidavit should be filed by an attesting witness proving the execution of the will as required by S. 68 of the Evidence Act: (1951-52) 56 Cal.W.N. 650. Proof of execution of will made by Hindu in 1901, in the Punjab—Endorsement of registration—Admissibility. *See* A.I.R. 1957 Punj. 146.

Where there are more than two attesting witnesses it is not necessary to call or produce all the attesting witnesses. If one of the attesting witnesses is examined for purposes of proving its execution, the requirement of law would be complied and the will would be proved in accordance with S. 68 provided his testimony inspires confidence: A.I.R. 1983 N.O.C. 170 (All.).

Undoubtedly, a 'will' is a document required by law to be attested; thus, where an registered will was neither proved to have been attested and executed as required under S. 68, *held*, it could not be taken into consideration for establishing the claim made thereunder: A.I.R. 1989 J.&K. 51: 1988 Kash.L.J. 585 (D.B.).

Where three persons had signed the will immediately before the thumb-impression of the testatrix on the will though they were not described or labelled as attesting witnesses, *held*, such labelling is not necessary under statute; merely describing a signator on a testamentary document as an attesting witness is no evidence of its attestation which signifies that the attestor is a witness to the execution; under S. 63(*c*) of the Indian Succession Act, a person who signs the document in the executant's presence after seeing execution of the document or after receiving personal acknowledgment of execution from the executant is its attesting witness; that is the real test, not his labelling as such: A.I.R. 1977 S.C. 63: (1976) 4 S.C.C. 554: 1977 Hindu L.R. 1: (1977) 1 S.C.R. 578.

Where there was no pleading that the attestors were dead or that the plaintiff had knowledge about the execution and attestation of the will and the defendant had specifically disputed the validity of the will, *held*, in absence of examination of attestator, execution of will by the executor in a sound and disposing state of mind was not proved: (1993) 1 Hindu L.R. 649 (Mad.).

Proper attestation—Contention that for valid attestation there must be something in will itself to indicate that person concerned signed as witness and omission, *lacuna* or insufficiency, if any, in document in that behalf cannot be supplemented, or supplied by other evidence, is an extreme proposition: I.L.R. (1966) 1 Cal. 408.

Where the two attesting witnesses deposed that the testatrix took them to the house of the Vakil where the whole process of execution, reading out, verifying its correctness and signing by the testatrix and the attesting witnesses was all done at one stretch and it was not suggested to the witnesses that the testatrix had left immediately after appending her signatures on the will, *held*, it stood established that the attesting witnesses and the testatrix had signed the will in the presence of each other. [A.I.R. 1955 S.C. 363; I.L.R. 1967 Raj. 630, Foll.]: (1986) 99 Mad.L.W. 647. *See* also (1994) 23 All.L.R. 44.

It is not an imperative condition that both the attesting witnesses should be present at the same time; if they signed the will at different times, the will cannot be said to have become invalid. Thus, where out of the two attesting witnesses only one was examined in the Court and the additional evidence to prove attestation was supplied by both of them subscribing to the verifications filed alongwith the application wherein they had said that they had attested the will, coupled with the further fact that it was a registered will, *held*, requirements of S. 68 were satisfied: A.I.R. 1994 Ker. 85 (D.B.).

Proof of the signature of the testator in a will is a vital matter which requires to be proved. It is true that the evidence insisted by law is that of the attestators. But that is not to say that other kinds of evidence is shut out by law. If there is anything suspicious in the signature, evidence of an attestor who attests the signature can certainly be corroborated or contradicted by expert opinion. Thus, it cannot be said that evidence of an expert on signature or handwriting in a will is not relevant. [A.I.R. 1989 Ker. 228, Overruled]: A.I.R. 1991 Ker. 259: (1991) 1 Ker.L.J. 154: (1992) 1 Hindu L.R. 606 (D.B.).

It is only when answers to the cardinal questions (Did the testator sign the will? Did he understand the nature and effect of dispositions in the will? Did he sign the will after having understood such nature and effect? Whether the special requirements of attestation prescribed under S. 63 of the Indian Succession Act had been complied with?) are in the affirmative that a will can be said to have been duly executed. [A.I.R. 1959 S.C. 443, Foll.]: (1993-1) 111 Mad.L.W. 580: (1993) 2 Hindu L.R. 176 (D.B.).

Though under S. 68 only one attesting witness, if alive and subject to the process of the Court and capable of giving evidence, has to be called to prove the execution of the document, it would be incumbent on the propounder or the person claiming under the will to prove that the said document was executed as required under S. 63(*c*) of the Indian Succession Act, and then only that document can be given effect to as a will. [A.I.R. 1966 All. 570; (1966) 2 An.W.R. 134; A.I.R. 1959 S.C. 443; A.I.R. 1977 S.C. 63 and A.I.R. 1927 Mad. 1054 (F.B.), Disting.]: A.I.R. 1978 Ori. 145: (1978) 1 Cut.W.R. 56: 45 Cut.L.T. 323.

S. 68 requires that before a document, which requires attestation can be admitted in evidence, one of its attesting witnesses should be examined. It is not necessary that more than one attesting witness must be examined to prove the due execution of the will. [A.I.R. 1955 S.C. 363, Foll.]: 1971 Cur.L.J. 195 (Punj.).

A will, even if registered, falls under the ambit of the main section; it has been excluded from the purview of the proviso: (1993) 1 Hindu L.R. 406 (Mad.).

It is not right to say that if a certified copy of the will is produced, requirement of S. 68 of examining at least one attesting witness is not applicable. [A.I.R. 1959 S.C. 443 and A.I.R. 1925 All. 56 and A.I.R. 1927 Cal. 102, Rel. on]: A.I.R. 1975 All. 395.

Registration of a will though not required under law is only a piece of evidence of the execution. It cannot have greater sanctity. Registration cannot take the place of due attestation of the document: A.I.R. 1974 Andh. Pra. 13.

In case execution of will is admitted, there is no need to examine the attestors in compliance with the provisions of S. 68: (1988) 1 An.L.T. (N.R.C.) 19.

A will is required to be proved formally only when the execution of document is questioned; if its execution is admitted either expressly or by way of implication, then the production of attesting witnesses to prove the

same is not at all necessary. [A.I.R. 1952 Cal. 7 and A.I.R. 1955 S.C. 346, Disting.; A.I.R. 1946 All. 178, Foll.; A.I.R. 1946 Bom. 304 and A.I.R. 1947 Mad. 422, Rel. on]: A.I.R. 1978 N.O.C. 100: 1977 R. D. 419 (All.).

Where execution of a will is admitted and its attestors are dead, evidence of a person acquainted with the testator's handwriting is sufficient proof of the will; proviso to S. 68 also does not apply to a will and examining at least one attestor as a witness is mandatory; it is true that on admission of the will under S. 58 no proof is necessary. But if nevertheless parties adduce evidence which is found to be unacceptable, it is no excuse to contend that they could not produce or prove the document as it had been admitted. [(1988) 2 A.P.L.J. 95, Foll.]: (1990) 2 Hindu L.R. 536: (1990) 1 An.L.T. 17.

Where the plaintiff himself produced the will and admitted its execution but impeached only validity of bequeathment of certain properties, *held*, it is S. 58, and not S. 68, which is attracted: A.I.R. 1994 Andh. Pra. 284: (1994) 1 An.L.T. 217 (D.B.).

S. 68 makes it evident that a document required by law to be attested shall not be used as evidence until at least one of the attesting witnesses is examined and proves its execution; the section is imperative and stringent; from its proviso it is not possible to hold that the section's rigour can be watered down by allowing a will not so proved to be used as evidence for collateral purposes: A.I.R. 1990 Ker. 146: (1989) 2 Ker.L.J. 349: (1989) 2 Ker.L.T. 813.

The requirement of a valid attestation of a will under S. 63 of the Indian Succession Act is that two or more witnesses should have either seen the testator signing the will or received from him a personal acknowledgment of having signed it and thereafter they should have themselves signed it in the presence of the testator with the intention of bearing witness to the execution thereof; the witnesses must have affixed their signatures *animo attestandi*; signatures affixed to certify that the signatory was a scribe or an identifier or a registering officer would not make him an attesting witness. [A.I.R. 1984 P.&H. 181; A.I.R. 1983 P.&H. 384, Overruled]: (1992) 1 Hindu L.R. 188: 1991 Punj.L.J. 763 (D.B.).

S. 68 plainly shows that the requirement of examining at least one attesting witness of a will is to be fulfilled 'if there be an attesting witness alive'; if the attesting witnesses are dead, the will can certainly be proved in the manner provided for proof of documents: A.I.R. 1991 Madh. Pra. 11.

Proof of execution of will—All surviving attestors, examined—Non-examination of scribe is of very little consequence. [A.I.R. 1939 Cal. 87, Rel. on]. Succession Act, 1925, S. 63: A.I.R. 1962 Andh. Pra. 178.

Execution of will—Meaning: I.L.R. (1965) 1 All. 483: A.I.R. 1966 All. 570.

Registration of will not requiring registration—Sub-Registrar and identifying witnesses may become attesting witnesses: 1964 Ker.L.T. 676: A.I.R. 1965 Ker. 32.

Will duly registered—Does not dispel suspicion: A.I.R. 1969 Assam 118.

Presumption of actual execution and attestation of a will more than thirty years old and produced from proper custody, can be raised under S. 90: (1990) 1 Ker.L.T. 559.

Questions as to execution and attestation of will—Suspicious circumstances attending execution—Quantum of proof of execution are questions of fact—Test of proof is satisfaction of prudent man: 1967 Raj.L.W. 456.

10. Illustrative cases.—Where the only attesting witness examined failed to prove that the thumb-mark on the will was put by the testator in his presence, *held*, the bar of S. 68 would disentitle the Court to take the will into consideration; the testimony of another witness, not the attesting witness, that the testator alongwith attesting witnesses had put their signature on the will in his presence, there being a vast difference between a signature and a thumb-impression, the will was not proved to be that of the testator: A.I.R. 1990 Madh. Pra. 334; (1981) 2 M.P.W.N. 61.

Where the attestor's unchallenged testimony disclosed that both of the attestors were present at the time the will was executed by the testatrix whom they had seen executing the will and that they both had attested the will, *held*, the execution of the will by the testatrix and its attestation stood duly proved in accordance with law: A.I.R. 1989 Mad. 99: (1988-1) 101 Mad.L.W. 425.

Where the propounder of the will led no evidence on both the counts, much less satisfactory evidence of its due and valid

execution by the executant nor for removing suspicious circumstances surrounding the will, *held*, the finding of the trial Court that the will was validly executed could not be upheld: A.I.R. 1989 Guj. 75: (1988-2) 29 Guj.L.R. 1412.

Execution of Will—Attesting witness stating that Will was executed by a village lady of her own free will, that she was made to understand its contents and that thereafter she affixed her finger prints upon the same—Two other witnesses having died and the scribe having become resident of Pakistan could not be produced—Will found in possession of legatees but not produced at earliest possible time—Legatees allowed to produce Will on payment of costs—Costs paid and accepted by other party—Concurrent finding of Courts below that Will was executed by that lady—*Held*, Courts below did not err in holding the Will as proved: 1969 Kash.L.J. 130.

Where the Sub-Registrar deposed as to the whole process of registering the will as having duly been gone through but did not know the executant, one of the attesting witnesses denied attestation and the son of the other attesting witness merely proved his father's signature on the will, *held*, the will could not be said to have been proved; Ss. 69 and 71 were not attracted: A.I.R. 1978 Mad. 78: (1978) 91 Mad.L.W. 28: 1978 Hindu L.R. 614: (1978) 1 M.L.J. 456 (D.B.).

Where the Sub-Registrar was not produced as an attesting witness nor was there any mention in his endorsement of executant having admitted the correctness of her will and the plaintiffs were not prepared to get the executant's thumb-impression on the will compared with another thumb-impression of the executant, *held*, due execution of the will is not proved: (1987-2) 92 Punj.L.R. 277.

Where evidence of both the attesting witnesses was clear that the testator had signed the will in their presence and they themselves had also signed it as attesting witnesses, and the expert evidence also corroborated them, *held*, the defendant having cast no doubt about execution of the will, the same stands proved: A.I.R. 1989 All. 17: (1989) 14 All.L.R. 814.

Where a will was proved by examining two attesting witnesses and the third witness though summoned through the Court and personally requested to appear as a witness but he did not, *held*, for non-examination of the third witness, no adverse inference could be drawn against the propounder; it was not incumbent upon him to compel the third witness to appear in the Court by resorting to O. 16, R. 10 of the C.P.Code: A.I.R. 1985 Cal. 349: (1984-85) 89 Cal.W.N. 832 (D.B.).

Where one of the attesting witnesses after fully supporting in examination-in-chief the will's execution, but in cross-examination 'became deaf', the other witness after being partly examined was rendered incapable of speaking sensibly, the scribe of the will was dead but his handwriting and signatures were identified by the scribe's grandson, the Sub-Registrar testified that the testator was identified and had produced the will before him for registration and on the Sub-Registrar's reading on and explaining the will in the presence of the witnesses the testator had admitted the same to be correct and thumb-marked it and the handwriting expert found that the executant's thumb-impression on the will tallied with his proved thumb-impression, *held*, due execution of the will is proved: (1991-2) 100 Punj.L.R. 389: (1991) 2 Rev.L.R. 342.

Where one of the attesting witnesses denied execution of the will by the testator but its execution and attestation by the two witnesses by the scribe and the Sub-Registrar, *held*, the will stood proved as duly executed. [A.I.R. 1939 P.C. 17; A.I.R. 1959 Cal. 243 and A.I.R. 1925 P.C. 89, Disting.]: A.I.R. 1984 N.O.C. 101: (1983) 2 Land L.R. 364 (P.&H.).

Where a will had been proved as true, valid and genuine in an earlier proceeding between the parties which operate as *res judicata* in the subsequent proceedings between them, *held*, it is not necessary to prove it again by examining one of its attesting witnesses; S. 68 is not attracted to it. [A.I.R. 1981 S.C. 2198, Rel. on]: (1992-2) 110 Mad.L.W. 454.

The proof of a will must satisfy the requirements of S. 68 as also S. 63 of the Indian Succession Act, 1925; where a witness (other than an attesting witness) deposed that the testator had signed the will in his presence and that he had also seen other witnesses attesting it, it could not be inferred that the attesting witnesses had signed the will in the presence of testators; A.I.R. 1955 S.C. 363 is not attracted to the facts of the case: A.I.R. 1981 Mad. 252: (1981) 94 Mad.L.W. 287: (1981) 2 M.L.J. 89: 1981 Hindu L.R. 643.

Where one of the attesting witnesses who was alive and who was also summoned by the first appellate Court was not able to prove the will in question, *held*, the will could not be said to have been proved: A.I.R. 1980 All. 292: (1980) 6 All.L.R. 345.

Where the execution of the will was proved by its scribe and the attesting witnesses, *held*, its propounder had satisfactorily proved the will by its executant: A.I.R. 1976 Gau. 94 (D.B.).

Where two wills were executed at the same time, one designedly vague and the other supplementing it, and the thumb-marks appended thereon were unclear and unidentifiable, *held*, the propounder not having satisfactorily explained the suspicion arising therefrom, they were not the last wills of the testator: A.I.R. 1973 Raj. 295: 1973 W.L.N. 65: 1973 Raj.L.W. 819.

Where the will bore purported signatures of the testimony at the margin and not at the end of the document and was not shown to have been attested by any witness and the envelope under which it was deposited with the Sub-Registrar contained some endorsement by use of word (admitted) with two named persons as identifiers, *held*, it does not amount to due execution of the will; a will has to be executed in strict compliance of S. 63 of the Indian Succession Act: A.I.R. 1977 P.&H. 103: (1977) 79 Punj.L.R. 191: 1977 Rev.L.R. 179.

Though a will can be proved in the manner laid down in S. 63 of the Succession Act, 1925 and S. 68 of the Evidence Act when conditions thereof are *prima facie* satisfied, where the facts of a particular case reveal a suspicious background, it become obligatory for the Court to scrutinise thoroughly all the surrounding facts and circumstances: A.I.R. 1980 N.O.C. 138 (All.).

Where sons were too willing to appropriate the houses settled in their favour by their father but not ready to reconcile with the division of his fifth house between his three daughters as is evident from the narration in the will, *held*, they are no suspicious circumstances and create not even a semblance of doubt about the will's validity: (1993-1) 111 Mad.L.W. 580: (1993) 2 Hindu L.R. 176 (D.B.).

Where the scribe stated that the propounder was not present during the writing and attestation of the will but the other witness deposed about the propounder's presence and his taking part in execution and registration of will, *held*, the execution of the will was surrounded by suspicious circumstances, especially when the testatrix was not in a sound disposing state of mind due to cerebral stroke. [A.I.R. 1977 S.C. 74, Foll.]: A.I.R. 1984 N.O.C. 193 (Karn.) (D.B.).

Where by and large suspicious circumstances surround the execution of a will, the Court should ensure that all legitimate suspicions are removed before the document is accepted as the testator's last will. The Courts naturally start with suspicion which tend to make the initial burden very heavy; unless it is satisfactorily discharged, Courts would be reluctant to accept the will as duly proved; a caveat alleging fraud, undue influence or coercion, etc. in respect of the will's execution requires proof thereof by the caveator but even in the absence of such pleas, the propounder has the burden of discharging the initial onus to remove legitimate doubts in the matter. Thus, where delay in producing the will was clubbed with factors which threw doubt on its genuineness and the propounder had failed to discharge his burden of proving execution of the will, it was *held*, to be not genuine: A.I.R. 1991 Ori. 289.

Where one of the attestors testified that the will was executed by both the attestors in the testator's presence in hospital and he had seen the testator signing the will and he was not cross-examined on these points and the other attestor deposed that he had already signed the will at the scribes office, and the Court found the will having been proved as duly executed, *held*, merely because the testator had totally disinherited his eldest son for having been amply and generously provided for otherwise, it could not be deemed a suspicious circumstance. [A.I.R. 1955 S.C. 363; A.I.R. 1916 Cal. 374; I.L.R. (1949) 1 Cal. 471 and A.I.R. 1975 Ker. 141, Rel. on]: A.I.R. 1988 Ker. 315: (1988) 1 Ker.L.T. 184: I.L.R. (1988) 2 Ker. 156 (D.B.).

Where due execution of a will is otherwise proved, *held*, no adverse inference against its genuineness can be drawn merely because the wife had bequeathed her whole property to her husband to the exclusion of her children; there is nothing unnatural or unusual therein; a mere delay of 3 years in initiating probate proceedings by the husband is equally of no importance: (1992) 1 Hindu L.R. 209 (Del.) (D.B.).

Where the due execution of the will otherwise stood proved, but it was impeached on the ground of the testator having bequeathed all his properties of his son from the earlier marriage but completely disinherited his second wife and his marriageable daughter from her and it was shown that the deceased was living with his son, separate from his second wife, an earning lady, and his daughter and he had made provision for his daughter's marriage during his life time, *held*, in the absence of the allegation of undue influence, mere disinheritance of the second wife and daughter was no suspicious circumstance; at any rate it has been explained: (1989) 39 Del.L.T. 37.

Where except for her husband, the testatrix had completely excluded all her close relations and class I heirs in the will, the husband had admittedly played a very important role in the will's execution and attestation, the will itself was disclosed three years after her death, out of the two attesting witnesses only one was examined as a witness though the other was also available, and, furthermore, the will's draft, admittedly in existence before the will was signed, was also not produced, *held*, the will was not genuine: A.I.R. 1988 Del. 273: (1987) 31 Del.L.T. 388: (1987) 92 Punj.L.R. 75.

Where one of the sons was completely disinherited in the will, otherwise proved to be duly executed, and there was nothing to show that there was any one interested in employing undue influence or fraud to deliberately disinherit the son, *held*, the will should not be denied merely for ignoring the son; besides, though never enjoying affection of his father, the son was subsequently settled with substantial property: (1993) 1 Hindu L.R. 644 (Mad.) (D.B.).

Where a brother of the deceased testatrix claimed under her will the genuineness whereof was doubted but another brother, also having 1/3rd share in the properties left behind by the deceased, in his 'no-objection' affidavit, deposed that their sister had left the will which was proved by as many as three attesting witnesses as having been executed by the deceased, *held*, the genuineness of the will was established; the legatee was entitled to grant of probate: A.I.R. 1987 Del. 360.

Where the propounder admitted that he took his wife (the testatrix) to the Advocate, had the will prepared and he got the entire benefit relating to her one-third share, *held*, as the propounder himself had taken prominent part and had received substantial benefit under the will, it could be treated as a suspicious circumstance attending the execution of the will: (1975) 88 Mad.L.W. 4 (S.N.).

Where during pendency of a partition suit against *'A'*, he died and in view of his will in favour of *'B'*, other heirs stated that *'B'* alone should be substituted in place of *'A'*, *held*, no objection could be taken by the plaintiff that *'B'* could not have been substituted as sole heir without proving the will under S. 68: 1982 Rajdhani L.R. 281: A.I.R. 1983 N.O.C. 162 (Del.).

Will executed in Jaipur State in 1930—Proof of.—Prior to the enactment of Jaipur Succession Act 1943 (XIX of 1943), which received the assent of His Highness on the 24th of May, 1943, there was no law which required a Will to be attested in the year 1930. The Will, therefore, could be proved in the ordinary way like any other document. Where the scribe of a registered Will deposed that he had scribed the Will under the instructions of the testatrix and the latter had herself affixed her thumb impression after he had read over and explained the Will to her, the Will should be *held* to be duly proved: 1957 Raj.L.W. 254: A.I.R. 1957 Raj. 261.

Execution of will in 1939 in Dharangadha State—No evidence as to law of due execution in State at the time adduced—Before taking objection to admissibility of will on ground of want of proof of the execution, facts necessary to attract provisions of S. 68 must be proved—Will produced by plaintiff but not exhibited—Defendant making use of will in cross-examination of plaintiff and will marked as exhibit at instance of defendant—Defendant must be taken to have waived requirement of formal proof: I.L.R. (1961) Cut. 635.

Questions as to execution and attestation of will—Suspicious circumstances attending execution—Quantum of proof of execution are questions of fact—Test of proof is satisfaction of prudent man: 1967 Raj.L.W. 456.

11. Proof of execution of registered documents.—[*See* also S. 67, Note 6, *supra*]. The certificate of the Registrar is *prima facie* evidence of the execution of the document and may be sufficiently conclusive that the deed in question was duly executed especially when there is no evidence to throw any doubt: Thus, where there was no oral evidence in support of the execution of the document in question

and the document was not attested by any witness and the scribe who was examined as a witness could not recall anything on the basis of the certified copy and the executants of the document were also dead. *Held*, that certificate of the Sub-Registrar certifying the admission by the executants of the execution of document was enough to prove the execution of the deed by them. Ss. 58, 59 and 60 of the Indian Registration Act provided that such facts mentioned in the endorsement may be proved by those endorsements: A.I.R. 1958 Manipur 16.

The certificate endorsed on a registered deed by the registering officer is a relevant piece of evidence; it has been so held, by the Lahore High Court in A.I.R. 1929 Lah. 711 on the authority of 33 Ind. App 60 which says that registration is a solemn act to be performed in the presence of a competent official appointed to act as Registrar whose duty it is to attend the parties during the registration and see that the proper persons are present and are competent to act, and are identified to his satisfaction; and all things done before him in his official capacity and verified by his signature will be presumed to be duly proved and in order. (Case law extensively discussed): A.I.R. 1977 Ker. 41: I.L.R. (1976) 2 Ker. 678 (D.B.).

When the document produced is a certified copy of a registered public document, *held*, non-production of attesting witness would be of no effect: (1979-2) 20 Guj.L.R. 390.

Mere placing on record a certified copy of registered document would not amount to proving the original by way of secondary evidence: 1983 Rev.L.R. 318.

Attestor of a document cannot be presumed to have knowledge of contents or given his consent, same must be proved by independent evidence: (1984) 2 An.W.R. 397 (D.B.).

12. Proviso.—*See* 149 I.C. 1109(1): A.I.R. 1934 Lah. 282; (1979-2) 20 Guj.L.R. 51. The amendment of S. 68 by Act XXXI of 1926 is a provision relating to processual law and not to substantive law and, therefore, must be taken to be retrospective in its operation: A.I.R. 1929 Mad. 881: 57 M.L.J. 588; 37 Mad.L.W. 677: A.I.R. 1933 Mad. 432; 144 I.C. 89: A.I.R. 1933 Mad. 612.

The proviso to S. 68 only removes the necessity of calling an attesting witness to prove the execution of the documents therein referred to and does not relieve the party of the necessity of proving a mortgage as prescribed under S. 59, Transfer of Property Act. [A.I.R. 1929 Pat. 422, Diss.]: I.L.R. 11 Rang. 26: A.I.R. 1933 Rang. 6.

The words 'Indian Registration Act, 1908,' occurring in proviso to S. 68 could not be interpreted so as to confine the application of the proviso, only to documents registered according to the provisions of that particular Registration Act and not of any previous Registration Act: 178 I.C. 198: A.I.R. 1939 Pat. 47.

Proviso to S. 68 only dispenses with calling an attesting witness to prove execution of a document required by law to be attested and has been registered, unless its execution is specifically denied by the other side; the handwriting, even on the registered document must be proved to be in the hand of the document's writer: A.I.R. 1976 Bom. 264:: 1977 Mah.L.J. 68 (D.B.).

If a registered document, not being a will, is specially denied, it will be necessary to call an attesting witness to prove the execution of the document. When the attesting witness, is very much alive and is subject to the process of the Court and is also capable of giving evidence: A.I.R. 1980 All. 395: 1980 All.W.C. 358: (1980) 6 All.L.R. 445.

'Specifically denied' used in the proviso means with 'exactness and precision', 'in a definite manner', it means something more than a general denial. [A.I.R. 1951 Nag. 343, Rel. on]: A.I.R. 1977 Ker. 41: I.L.R. (1976) 2 Ker. 678 (D.B.); I.L.R. (1985) Karn. 1614.

'Specific' means with exactness and precision in a definite manner; clearly something more is required to connote specific denial in juxtaposition to general denial. Specific denial of execution of a gift deed would be an unambiguous and categorical statement that the donor did not execute the deed; not only the denial must be in express terms but it should be unqualified, manifest, explicit, certain and definite; what has to be specifically denied is the execution of the document. Other contentions not necessarily and distinctly referring to the execution of the document by the executant cannot be gathered for the denial contemplated in the proviso. [A.I.R. 1949 Nag. 149; A.I.R. 1959 Mys. 148; A.I.R. 1943 Oudh 46; A.I.R. 1932 All. 320; A.I.R. 1955 Tripura 70; A.I.R. 1951 Nag. 343, Rel. on]: 1984 Ker.L.T. 855.

S. 68 requires examination of an attesting witness if a document other than a will is 'specifically denied'; usage of the adjective 'specific' to the word is not superfluous but deliberate, mere denial is not sufficient nor asking that the other party be put to strict proof; by the use of the word 'specific' the Legislature intended that the defence of the execution of denial should be unambiguous and indisputably convey that the execution is denied: (1984) 97 Mad.L.W. 378: (1984) 2 M.L.J. 152.

The words 'specifically denied' used in the proviso to S. 68, do not mean more than this that the denial in question should relate to the specific document which is sought to be denied and that the denial should leave no room for doubt that the particular document is denied by the person against whom it is sought to be used. The proviso does not lay down that the denial should be contained in the written or oral pleadings: 1943 O.W.N. 105.

The words 'specifically denied' in the proviso to S. 68, means specifically denied by the party against whom the document is sought to be used and not only by the executant thereof. It is not correct to hold that it is only when the executant of a document required to be attested specifically denies the attestation thereof that it becomes necessary to prove that the document was duly attested. Hence, the calling of an attesting witness cannot be dispensed with unless its execution is admitted by the defendant in the suit. The denial is to come from the party who is entitled to dispute or is interested in disputing its execution: I.L.R. (1948) Nag. 621: A.I.R. 1949 Nag. 149, followed in (1956) 69 Mad.L.W. 815 and A.I.R. 1959 Mys. 148.

The 'specific denial' referred to in the last sentence of the proviso to S. 68 is not confined only to a denial by the executant but contemplates a specific denial by the party against whom the document is sought to be used. Hence an attesting witness has to be called even if execution is denied by one against whom the document is sought to be used: I.L.R. 19 Luck. 365: A.I.R. 1943 Oudh 416; A.I.R. 1955 Tripura 17.

It cannot be said that a denial to be specific denial for purposes of S. 68 must be a denial as regards the proper attestation of the document in question, that is a denial of the validity thereof on the ground that it was not properly attested. The words 'specifically denied' used in the proviso to S. 68 only mean that the denial in question should relate to the specific document which is sought to be denied and that the denial should be unqualified so as to leave no doubt that the execution of the particular document is denied by the person against whom it is sought to be used: 1943 O.W.N. 136: A.I.R. 1944 Oudh 99.

The requirement of 'specific denial' of execution in the proviso applies not only to the executant of the document but also to all other persons interested in denying the execution. [A.I.R. 1949 Nag. 149; A.I.R. 1959 Mys. 148; A.I.R. 1943 Oudh 46; A.I.R. 1932 All. 320; A.I.R. 1955 Tripura 70; A.I.R. 1951 Nag. 343, Rel. on]: 1984 Ker.L.T. 855.

The plea that a party is not aware of the execution of the document does not amount to specific denial of execution: A.I.R. 1992 Ker. 261: (1992) 1 Ker.L.J. 742: (1992) 1 Ker.L.T. 461: I.L.R. (1992) 2 Ker. 187.

Where one of the defendants had filed no written statement and there was no denial of execution by him and the other had denied execution on the purported date, *held*, the proviso to S. 68 was not attracted: (1988-2) 102 Mad.L.W. 292 (D.B.).

Nothing in the proviso to S. 68 suggests that persons not parties to the document cannot deny its execution; what is required is the specific denial of the document's execution having been effected by its purported executant; there is no warrant for eliminating all persons other than parties to the document from resorting to S. 68: A.I.R. 1989 Ker. 163: (1989) 1 Ker.L.T. 63: (1988) 2 Ker.L.J. 805.

Where a defendant in a suit on a mortgage does not admit the execution and completion of the document, and receipt of consideration, and his pleader contended that the execution and due attestation of the mortgage bond was not proved against his client, it must be held that the execution has been specifically denied: (1938-39) 43 Cal.W.N. 669: A.I.R. 1939 P.C. 117: (1939) 2 M.L.J. 762 (P.C.).

Non-compliance—*Held*, that the execution of the mortgage deed not having been proved and the execution having been denied, it could not be admitted in evidence: (1956) 2 M.L.J. 157: A.I.R. 1956 Mad. 682.

The net effect of S. 68 is that if the execution of a document of gift is specifically denied, then an attesting witness must be called to

prove it. If, however, such execution is not specifically denied, then it would not be necessary to call an attesting witness to prove the same. But the document all the same will have to be proved. The effect of the proviso is that the due execution and attestation of the gift deed will have to be proved, although it may be proved by calling a person other than an attesting witness: A.I.R. 1960 Mys. 234.

What is required by proviso to S. 68, Evidence Act is denial of execution either by the person executing it or by anyone who is sought to be bound by the document and it need not necessarily be only by the person executing the document.

Where a redemption is sought against persons who are not parties to the mortgage, *i.e.*, against the sons of the mortgagee and where the mortgage is denied, it is for the plaintiff to prove the mortgage, which must necessarily be, by proof of not only the execution in the sense of signing the document but that it has been duly attested by at least two attesting witnesses as required by the provisions of the Transfer of Property Act: (1956) 69 Mad.L.W. 815.

Specific denial of execution—What amounts to—Defendant not only denying execution but requiring plaintiff to prove due execution of gift deed which included attestation—This was specific denial. [A.I.R. 1939 P.C. 117, Rel. on]: I.L.R. (1964) 14 Raj. 259: 1964 Raj.L.W. 196: A.I.R. 1964 Raj. 39.

Scope—Denial should be by party to litigation—Executant not party to litigation—Attesting witness must be called—No objection taken in trial Court—Party cannot object in appeal: (1963) 65 Punj.L.R. 1133.

Proviso—Scope—Dispute whether document is mortgage-bond or money-bond—Execution not specifically denied—*Held*, still due attestation must be proved though not by any attesting witness in order to take advantage of transaction as mortgage [Case-law discussed] (1967) 33 Cut.L.T. 811: I.L.R. (1967) Cut. 593.

Where the defendant mortgagor in his written statement alleged that the mortgage had not been executed according to law and that he had not received any consideration, it amounts to denial of legal execution of the document so that the plaintiff mortgagee is not relieved of his burden to prove due execution of the mortgage including its attestation. If the plaintiff fails to prove due execution, the mortgage is not admissible in evidence: 25 Cut.L.T. 291.

The admission of execution contemplated by S. 70, and the failure to make a specific denial of execution contemplated by the proviso to S. 68 of the Evidence Act, relate only to the person who has actually executed or purported to have executed the document; that is to say, the person who is in a position to admit or deny execution, and it is manifestly implicit that such person must be a party to the suit: I.L.R. (1943) Kar. 420: A.I.R. 1944 Sind 61.

Where there is no specific denial of the execution of a registered Kabuliyat, it is unnecessary to prove the document formally according to the proviso to S. 68: I.L.R. 19 Luck. 183: A.I.R. 1943 Oudh 218.

Where the defendant not only denies the execution of the suit mortgage deed but also its genuineness, the execution of the mortgage is 'specifically denied' and the proviso to S. 68 becomes applicable and it is incumbent upon the plaintiff to produce at least one of the attesting witnesses: A.I.R. 1941 Oudh 89: 1940 O.W.N. 1077.

The word 'execution' as used in the proviso to S. 68 in the case of mortgage bonds includes all the series of acts which would give validity to the instrument *qua* mortgage, *i.e.*, the word 'execution' not only means signing by the borrower but the attestation of the signature by the witnesses as required by S. 59 of the Transfer of Property Act. If, therefore, in a suit on a mortgage bond, the defendant admits the signature but denies the attestation, it must be taken that he denies the execution of the mortgage bond and his denial requires the plaintiff to prove the mortgage bond by examining one of the attesting witnesses, if available: I.L.R. (1937) 1 Cal. 507: (1936-37) 41 Cal.W.N. 306; 1940 O.W.N. 1077: A.I.R. 1941 Oudh 89; 1942 O.W.N. (B.R.) 255; (1938-39) 43 Cal.W.N. 1025: A.I.R. 1939 Cal. 688.

The execution contemplated in S. 70 is not a mere signing of the document, but a due execution or execution in accordance with what the law requires for a particular document. In the case of document required to be attested, there can be no execution unless there has been a signing by the executant in the presence of the attesting witnesses, and execution is not complete unless the deed is attested by two witnesses. If a question of

attestation is put in issue, the plaintiff must prove that the document has been duly attested, and the plaintiff is not relieved of the obligation of calling an attesting witness under S. 68. A statement by the executant that when he signed the deed there were no alterations or erasures and there were no attesting witnesses to the document, etc., is not an admission of execution at all, but a denial of execution: A.I.R. 1938 Mad. 43: I.L.R. (1938) Mad. 523.

What has to be specifically denied is the execution of the document. Other contentions not necessarily and distinctly referring to the execution of the document by the alleged executant cannot be covered by the denial contemplated in this proviso. Such contentions may be, for instance, in respect of the consideration for the document or the sham or colourable nature of the transaction evidenced by the document: A.I.R. 1959 Mys. 148.

Where a registered deed of mortgage is attacked on the ground that it represents a sham and nominal transaction entered into for defeating claim of a creditor, there is no specific denial of execution so as to make it incumbent on the plaintiff to call the attesting witnesses to prove the execution of the document. A document may represent a sham transaction notwithstanding that it has been executed by the person who is mentioned in the document as the executant: A.I.R. 1942 Mad. 121; (1944) 1 M.L.J. 28 (F.B.).

Where a stranger to the document denied its execution and impeaches it as concocted and fraudulent, *held*, it amounted to a specific denial under S. 68; even if the document was executed by the mother as a guardian of her minor children, as well as in her individual capacity, the denial as aforesaid would still be specific though execution on behalf of the minors is not separately denied: A.I.R. 1989 Ker. 163: (1989) 1 Ker.L.T. 63: (1988) 2 Ker.L.J. 805.

Where the execution of a document is admitted or not denied it is not necessary to prove the attestation: 42 I.C. 91. (Under the present amendment want of specific denial dispenses with proof by attestor): 14 R.D. 494; 1936 O.W.N. 1113: A.I.R. 1937 Oudh 149; A.I.R. 1936 Oudh 270: 161 I.C. 605; 17 R.D. 70; 1934 All.L.J. 817: A.I.R. 1934 All. 507. *See* also A.I.R. 1933 Lah. 378.

If any of the defendants to a suit denies that any of the alleged executants executed the deed, the plaintiff must produce one of the marginal witnesses to prove the document: 1932 All.L.J. 207: A.I.R. 1932 All. 320. *See* also 1936 A.M.L.J. 54.

Executant of a mortgage deed, admission by, whether binds others not admitting: I.L.R. 44 Cal. 345: (1915-16) 20 Cal.W.N. 1044.

Where in a suit on mortgage-bond by the mortgagee, apart from the executants who admit the execution of the bond, the minor sons of one of the executants are parties to the suit who do not admit the mortgage and put the mortgagee to proof of the mortgage and the payment of consideration thereunder, *held*, in order to pass a mortgage decree against the minors, it is absolutely necessary that the execution and attestation of the mortgage should be proved. For, where a party to an attested document admits its execution, a third party is not bound by such admission: And, further, if in such a case the mortgagee does not purposely file the original mortgage-deed then though the executants admit execution of the mortgage yet the mortgage cannot be said to have been proved against the minor who are not parties to the transaction: A.I.R. 1959 Ori. 126: 25 Cut.L.T. 66.

Appellant (defendant) executed a mortgage deed. In the suit after written statement was filed the defence of the appellant was ordered to be struck out for non-payment of costs saddled during trial. The Courts below held that as the appellant had admitted the execution and attestation of the mortgage deed in his written statement, it was not incumbent on the respondent to prove execution and attestation as required by S. 68 of the Evidence Act.

Held, that when the defence of the appellant had been struck out, no admission made by him in his written statement could be taken into consideration. On account of the order striking out the defence, the written statement was as good as non-existent. The respondent was to prove execution and attestation of the mortgage deed as if the appellant was *ex parte* and as if he had not filed any written statement at all.

Where a defendant is *ex parte*, it is necessary for the plaintiff to prove execution and attestation of the deed. But the standard of proof required in such a case cannot certainly

be the same, as would be necessary in the case of a specific denial. Even a slight evidence about the execution and attestation might suffice to prove the deed: 1959 M.P.L.J. (Notes) 217.

13. Practice.—Attestation being a mixed question of law and fact, point cannot be raised for the first time in second appeal: 97 I.C. 611: 1926 Mad.W.N. 559.

Where in spite of the best efforts of the plaintiff, the attesting witness could not be served with summons and by the time the appeal was filed, the witness was dead. *Held*, that, whether under the amendment to S. 68 or S. 69, it was open to the plaintiff to prove the document by other means, his own evidence held in the circumstances sufficient: 144 I.C. 89: A.I.R. 1933 Mad. 612.

No doubt only one attesting witness to deed be called, if that attesting witness speaks to attestation by the attesting witness. But if he does not do so, it is necessary to prove that the deed was properly attested by those other attesting witnesses. Where it is impossible to call any attesting witnesses and where all that can be proved is their handwriting, it will be presumed, until the contrary is shown, that the persons who purported to have signed were in fact attesting witnesses: A.I.R. 1941 Rang. 122.

Where the executant of a mortgage deed, the writer of a deed and the attesting witnesses have all died, having regard to the new definition of attestation in S. 3, Transfer of Property Act, and to the varied mode of proving a registered document under S. 68, Evidence Act, as amended it is sufficient to satisfy the Court that the execution which was not specifically denied was so probable that a prudent man ought under the circumstances of the case act upon the supposition that it was so executed: A.I.R. 1929 Sind 235. No attempt to prove attestation of mortgage deed—Document cannot be used as evidence: A.I.R. 1929 All. 389.

Execution of mortgage deed not specifically denied—Need not be proved: 30 Bom.L.R. 565; and examination of attesting witness is not necessary: A.I.R. 1927 Pat. 403. *See* also I.L.R. (1937) All. 723: A.I.R. 1937 All. 646.

It is not the law that a plaintiff in a suit on a mortgage bond should call the attesting witness to the bond who are alive before he can take advantage of S. 71. It is incumbent on the plaintiff to call at least one witness, and if that witness denies or does not recollect the execution of the document then the execution may be proved aliunde. Whatever the English law may be Ss. 68 to 71 do not necessarily state it: 19 Pat.L.T. 234: A.I.R. 1938 Pat. 301. *See* also A.I.R. 1939 P.C. 117: (1939) 2 M.L.J. 762 (P.C.); 181 I.C. 572: A.I.R. 1939 Pat. 555.

Defendant admitting execution of mortgage deed but denying attestation—Duty of plaintiff to prove due attestation: 1936 All.L.J. 297: A.I.R. 1936 All. 169.

Where the party challenging a certified copy of a registered deed of gift, does not specifically deny that it is the copy of the deed, according to the proviso to S. 68 the production of attesting witnesses to prove execution and attestation of the deed is not essential: A.I.R. 1939 Lah. 414.

Where execution of a document is not denied, the execution and attestation of the document can be proved by other evidence and it is unnecessary to call any of the attesting witnesses: 190 I.C. 413: A.I.R. 1940 Rang. 184. *See* also A.I.R. 1941 Rang. 122.

A deed of relinquishment is not a document required by law to be attested; so it can be proved by the unchallenged evidence of the alleged writer thereof: 14 L.R. 466 (Rev.): 11 R.D. 637.

A document executed in England and requiring to be attested under the English law but not requiring to be attested under the Indian law, relating to property in India may be proved only by proving the signature of the executant: I.L.R. 7 Pat. 520: 111 I.C. 57: A.I.R. 1928 Pat. 304.

In a case the plaintiff claimed title to certain property under a gift deed. During his cross-examination, the plaintiff stated that the executant had signed and put his left thumb-impression on the deed of gift and then witnesses had signed as witnesses. The defendant argued that the plaintiff was bound to prove attestation of the gift deed. *Held*, that there was no validity in the argument in view of the facts elicited in the plaintiff's cross-examination and that this objection had not been taken at any stage of the proceedings: 1969 Pat.L.J.R. 4.

69. Proof where no attesting witness found.—If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

---

14. Objection to admissibility of document.—Where objection is not to admissibility of a document but to its mode of proof, when the document is purportedly attested by two witnesses and *prima facie* executed in the manner required by S. 70 of the Indian Succession Act, the objection has to be taken at the time of its admission in evidence; if no objection was then taken, it cannot be taken subsequently. It is now well established that if a document is admissible and no objection is taken by the opposite party to the mode of its proof at the relevant time, then that party cannot be heard later that the document was not properly proved: 1973 Cur.L.J. 373 (D.B.).

After the document is admitted in evidence upon formal proof being dispensed with and without any objection, *held*, no objection can be taken at the appellate stage: A.I.R. 1986 Cal. 23: (1986) 2 Hindu L.R. 86: (1985) 2 Cal.H.N. 357: (1985-86) 90 Cal.W.N. 95 (D.B.).

Section 69—Notes.

The Court cannot compare the signature of an attesting witness on a bond with his agreed signature. This procedure of proving the signature of an attesting witness is unwarranted by law: A.I.R. 1949 Kutch 3: 50 Cr.L.J. 964. *See* also A.I.R. 1950 Kutch 17. Mortgage—Proof of—Death of attesting witness. *See* I.L.R. 34 All. 615: 10 All.L.J. 217; 11 Nag.L.R. 9: 27 I.C. 866; I.L.R. 35 All. 364: 11 All.L.J. 379.

S. 69 requires proof of (*1*) the signature of at least one attesting witness and (2) the signature of the executant; it is, however, not necessary that a single witness should prove both the signatures: (1992-2) 110 Mad.L.W. 523: (1993) 1 Hindu L.R. 406.

Resort can be made to S. 69 not as a general rule, but only when the absence of the attesting witness can be sufficiently accounted for. If the witness denies the signature or does not recollect the execution of the document, its execution may be proved by other evidence: (1967) 33 Cut.L.T. 811: I.L.R. (1967) Cut. 593. *See* Evidence Act, 1872, S. 68: I.L.R. (1965) 1 All. 483: A.I.R. 1966 All. 570.

Where genuineness of a document is disputed but neither its executant nor attesting witnesses are alive and available, *held*, it should be proved in the manner prescribed under S. 69; the Court should not raise the presumption under S. 90 but admit the document and direct the parties to adduce evidence to prove it: A.I.R. 1993 Pat. 129: 1993 B.B.C.J. 355: (1993) 2 B.L.J. 289: (1993) 2 Pat.L.J.R. 28 (D.B.).

A will which was a registered document of 30 years old, when tendered in evidence and was produced from a proper custody, should be presumed as a valid and genuine document. Where all the parties to a will, excepting the beneficiary are dead and the signature of the scribe has been identified by his fellow deed writer who was acquainted with his signature, the will could not be said to have not been proved. In such circumstances, the onus shifts to the defendants and where none of them examine themselves, the presumption does not stand rebutted: I.L.R. (1979) 2 Cut. 130: (1979) 48 Cut.L.T. 211.

It must be proved that "no attesting witness can be found". The party must ask the Court to exhaust all processes of the Court as by adopting the procedure in O. 16, R. 10, C.P.Code, for the arrest of the witness and for the attachment of his property: I.L.R. 7 Pat. 312: A.I.R. 1928 Pat. 356 (Ruling before Amending Act XXXI of 1926). In order that S. 69 may be applied, mere taking out of the summon or the service of summons upon an attesting witness or the mere taking out of warrant against him is not sufficient. It is only when the witness does not appear even after all the processes under O. 16, R. 10, C.P.Code, which the Court considered to be fit and proper had been exhausted that the foundation will be laid for the application of the section. But if a party moves the Court for processes under O. 16, R. 10 when a witness summoned by him has failed to obey the summons but the Court refuses the process asked for, there is no reason why the section cannot be invoked: (1944-45) 49 Cal.W.N. 377: A.I.R. 1945 Cal. 350.

Where a will was proved by examining two attesting witnesses and the third witness

though summoned through the Court and personally requested to appear as a witness but he did not, *held*, for non-examination of the third witness, no adverse inference could be drawn against the propounder; it was not incumbent upon him to compel the third witness to appear in the Court by resorting to O. 16, R. 10 of the C.P.Code: A.I.R. 1985 Cal. 349: (1984-85) 89 Cal.W.N. 832 (D.B.).

Where none of the attesting witnesses is available for reasons permitted by law to prove execution of a will by its testator, *held*, the same must be proved by independent witnesses by evidence that attestation of at least one attesting witness is in his handwriting and signature on the will are of its purported testator; it need not necessarily be proved by evidence of same witness: (1993) 1 Hindu L.R. 406 (Mad.). *See* also (1992-1) 109 Mad.L.W. 311 (D.B.), cited under S. 67, *supra*.

To prove a document where its attesting witnesses cannot be found, *held*, identification of signatures by the witness examined to prove it is not necessary; it is sufficient if he deposes that the document shown to him was executed and attested in his presence: A.I.R. 1993 Pat. 129: 1993 B.B.C.J. 355: (1993) 2 B.L.J. 289: (1993) 2 Pat.L.J.R. 28 (D.B.).

Much reliance cannot be placed on the evidence of a non-expert witness about the identification of the executant's signature, who had only seen the executant writing only once or twice, more so when there is the question of the identification of the signature which are alleged to have been subscribed before the witness was born: A.I.R. 1972 Raj. 9: 1971 Raj.L.W. 103.

A document was signed by the petitioner and it was attested by two witnesses. Both these attesting witnesses were dead before the question of the genuineness or otherwise of this document arose. The person in whose favour the document had been made also died. And the petitioner denied the signature on this document. In such circumstances, the signature of the attesting witnesses were proved by two of their relatives who knew their handwriting. *Held*, that this evidence was by itself sufficient to establish that the document was executed by the petitioner, because there was no other conceivable way in which proof of the document could have been given: A.I.R. 1956 Bom. 641.

Where regarding a mortgage deed regularly signed and attested, the signature of all attesting witnesses who were dead were proved, as also of the mortgagor, *held*, that there was a presumption of its due execution and it lay upon the other side to rebut it: I.L.R. 39 All. 112: 15 All.L.J. 167; 41 I.C. 171.

Admission of execution recorded in registration endorsement is not admissible to prove execution: 20 O.C. 18: 38 I.C. 605. *See* also 13 Nag.L.R. 197; A.I.R. 1928 Nag. 244.

Mode of proof of document which is required by law to be attested within meaning of S. 3, T.P. Act (1882), is different from mode of proof of other kind of documents that are not so required to be attested: (1967) 33 Cut.L.T. 811: I.L.R. (1967) Cut. 593.

Where the Sub-Registrar deposed as to the whole process of registering the will as having duly been gone through but did not know the executant, one of the attesting witnesses denied attestation and the son of the other attesting witness merely proved his father's signature on the will, *held*, the will could not be said to have been proved; Ss. 69 and 71 were not attracted: (1978) 91 Mad.L.W. 28: A.I.R. 1978 Mad. 78: 1978 Hindu L.R. 614 (D.B.).

Where there was no pleading that the attestors were dead or that the plaintiff had knowledge about the execution and attestation of the will and the defendant had specifically disputed the validity of the will, *held*, in absence of examination of attestator, execution of will by the executor in a sound and disposing state of mind was not proved: (1993) 1 Hindu L.R. 649 (Mad.).

Proof of the signature of the testator in a will is a vital matter which requires to be proved. It is true that the evidence insisted by law is that of the attestors. But that is not to say that other kinds of evidence is shut out by law. If there is anything suspicious in the signature, evidence of an attestor who attests the signature can certainly be corroborated or contradicted by expert opinion. Thus, it cannot be said that evidence of an expert on signature or handwriting in a will is not relevant. [A.I.R. 1989 Ker. 228, Overruled]: A.I.R. 1991 Ker. 259: (1991) 1 Ker.L.J. 154: (1992) 1 Hindu L.R. 606 (D.B.).

70. Admission of execution by party to attested document.—The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

Section 70—Notes.

See I.L.R. (1938) Mad. 523: A.I.R. 1938 Mad. 43. Mere admission of the thumb-impression or the signature on a blank sheet of paper does not mean an admission of execution which means that the executant must have signed or put his thumb-impression only after the document is fully read out: I.L.R. (1956) Cut. 42: A.I.R. 1956 Ori. 58. *See* also S. 67, Note 5, *supra*.

The admission here spoken of does not include admissions made to the attesting witness before suit and sought to be proved by witnesses in the suit: I.L.R. 27 Cal. 190.

There is no reason to restrict the application of S. 70 to admissions made by a party during the course of the trial of the suit: 1943 O.W.N. 105: A.I.R. 1943 Oudh 218; I.L.R. (1943) Kar. 420: A.I.R. 1944 Sind 61. (Admission by person not party to document). The certificate of admission of execution endorsed by the registering officer upon a document registered by him could not be used as an admission of execution within the meaning of S. 70: 13 Nag.L.R. 197; 18 Sind L.R. 282: A.I.R. 1926 Sind 88. *See* also 20 Oudh Cases 1: A.I.R. 1936 All. 712: 1936 All.L.J. 1262. [*See* also I.L.R. 38 All. 1: 13 All.L.J. 881; 7 Nag.L.R. 85: 11 I.C. 689; 47 I.C. 9: 46 Mad.L.W. 610: A.I.R. 1938 Mad. 43].

The 'admission' contemplated under S. 70 is an admission made for the purpose of or having reference to the suit, made either in the pleadings or during the course of the trial: A.I.R. 1928 Nag. 244 (Admission of execution at the registration is not sufficient for the section). The admission referred to in S. 70 must be an admission made by a party in the proceedings in which the document is produced and is intended to be proved. The certificate of admission of execution endorsed by the registering officer upon a gift deed registered by him cannot be used as an admission of execution within the meaning of S. 70. The admission must be an admission about the due execution of the document which would include an admission as to its proper attestation. Nor can the statement made by the executant before the Sub-Registrar at the time of the registration of the deed be regarded as an admission about its due attestation: (1948) 50 Bom.L.R. 260: A.I.R. 1948 Bom. 322.

It has been held in A.I.R. 1938 Mad. 43, that for the purpose of S. 70 admission should have been made either in the pleading or during the course of the trial of the suit in which the question arose for consideration. The admission, even if it had been made before the Sub-Registrar at the time of registration will not fall within S. 70 as it is not an admission made in the course of the suit. Similar view is taken in A.I.R. 1948 Bom. 322: (1991) 2 M.L.J. 478.

The admission of execution contained in some other document such as a power-of-attorney cannot be availed of for the purpose of dispensing with the citation of the attesting witnesses: 46 Mad.L.W. 610: A.I.R. 1938 Mad. 43.

Where the executant of a document makes an admission, the exemption under S. 70 is attracted. An admission by an heir of the executant would not serve the requirement of the law and cannot serve the purpose. [A.I.R. 1970 Ori. 82, Disting.]: (1975) 1 Cut.W.R. 8.

Where a mortgagor merely says he does not admit the execution or attestation of the mortgage and puts the mortgagee to proof, the plea is not one of specific denial of the execution or attestation of the document, and proof of one attestation is quite sufficient. It is only in a case where there is not only absence of an admission but a specific denial of the validity of the mortgage that the mortgagee is called upon to prove attestation of two witnesses: I.L.R. (1937) All. 723: A.I.R. 1937 All. 646.

Section applies only to document which is duly attested: I.L.R. 5 Rang. 461: A.I.R. 1927 Rang. 233. Where in a deed of further charge the executant admits the execution of an earlier mortgage deed, the admission is a sufficient proof of execution of the mortgage deed as against the executant and no formal proof of proper attestation is necessary: 1943 O.W.N. 105: A.I.R. 1943 Oudh 218.

Non-examination of attestor and scribe of a document cannot by itself lead to the inference that the document was not executed, when the executants admit its execution: (1979) 1 An.W.R. 416.

A will is required to be proved formally only when the execution of document is questioned; if its execution is admitted either expressly or by way of implication, then the production of attesting witnesses to prove the same is not at all necessary. [A.I.R. 1952 Cal. 7 and A.I.R. 1955 S.C. 346, Disting.; A.I.R. 1946 All. 178, Foll.; A.I.R. 1946 Bom. 304 and A.I.R. 1947 Mad. 422, Rel. on]: A.I.R. 1978 N.O.C. 100 (All.): 1977 R. D. 419.

A successor-in-interest is bound by his predecessor's admission of execution where it is contained in a document on which the successor founds his title. He must be taken to have accepted it as correct when he acquired rights under that document: 1943 O.W.N. 382: A.I.R. 1943 Oudh 416.

Where there is admission of execution in the written statement, but the attesting witness called stated the mortgagor did not sign the deed in his presence, *held*, that the document must be taken to have been proved. *See* 84 I.C. 558: A.I.R. 1926 Pat. 295. As to effect of admission of execution by *pardanashin* lady. *See* I.L.R. 5 Pat. 58: A.I.R. 1925 P.C. 203: 49 M.L.J. 240 (P.C.).

Where in a mortgage suit, the defendant pleaded that she executed the bond under a misrepresentation as to its contents: *Held*, that under these circumstances, S. 70 applied and that the admission was sufficient proof of execution of the mortgage deed: A.I.R. 1929 Cal. 441.

When the admission of signature by the defendant mortgagor on the mortgage-bond is coupled with an express denial that the document was duly and properly attested, it is incumbent on the plaintiff mortgagee to call at least one attesting witness to prove the attestation. Under such circumstances, the mortgagee is not entitled to the benefit of S. 70 of the Evidence Act. The word "execution" as used in the section is in the sense of due execution or execution in the way in which a particular document is required to be executed. The admission as contemplated in this section must be shown to be an admission of due execution by a party to a document which on the face of it is an attested document. Where the mortgagor while admitting having signed the mortgage bond specifically denies due attestation, marking the document as an exhibit without objection, cannot absolve the mortgagee from proving due attestation: A.I.R. 1952 Cal. 7: I.L.R. (1953) 1 Cal. 120.

The admission of mere signature on the documents by itself, does not prove the contents thereof. The accused who did not know English signed a statement prepared in English by the Assistant Sales Tax Officer conducting an inspection, search and seizure of account books and was attested by two witnesses. In a prosecution of the accused under S. 25(1)(*f*) of the Orissa Sales Tax Act, the attesting witnesses were not produced by the prosecution. The statements were sought to be proved on the ground that they were signed by the accused. *Held*, that in the absence of the attesting witnesses, who were material witnesses, on the point not having been examined, the documents could not be treated as proved: (1961) 3 Ori.J.D. 416: (1962) 1 Cr.L.J. 83.

Admission—Meaning of—Admission of execution of mortgage bond by mortgagor—Effect. [I.L.R. (1967) Cut. 593, Reversed; A.I.R. 1927 Mad. 143, Dissent. from]: A.I.R. 1970 Ori. 82 (D.B.).

Where the defendant had admitted execution of the receipt whereby he was personally liable to pay the loan amount but he impeached its admissibility on the ground that the words '*warna rupaya doonga*' were interpolated therein later on, *held*, the receipt, its execution having been admitted, is not inadmissible; besides, the defendant had also signed before those words: A.I.R. 1986 All. 94 (D.B.).

Where a gift deed is challenged not for want of legal attestation but on the grounds of misrepresentation, undue influence and fraud, *held*, it amounts to admission of execution; attestation, thus, need not be proved: (1971) 2 Cut.W.R. 472.

See also 1978 Cur.L.J. (Civ.) 247: (1978) 80 Punj.L.R. 427.

71. Proof when attesting witness denies the execution.—If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

Section 71—Notes.

S. 71 provides that if the attesting witness to a document denies or does not recollect the execution of the document, its execution may be proved by other evidence. This is a sort of safeguard introduced by the Legislature to the mandatory provisions of S. 68, where it is not possible to prove the execution of the document, such as a will by calling attesting witness though alive. S. 71 can only be requisitioned when the attesting witnesses who have been called fail to prove the execution of the will by reason of their denying own signatures, or denying the signature of the testator or having no recollection as to the execution of the will or other document. It has no application to a case where there is no question of any attesting witness denying or not recollecting the execution of the document, or where one attesting witness who is called fails to prove the execution of the will and other execution witnesses are available who could prove that execution if they were called: (1949) 51 Bom. L.R. 245: A.I.R. 1949 Bom. 266.

S. 71 does not apply where the attesting witness fails to testify to all the ingredients of due execution of the will; his evidence cannot be supplemented by the evidence of other non-attesting witnesses: A.I.R. 1974 Ori. 170: (1973) 1 Cut.W.R. 631: 39 Cut.L.T. 672.

S. 71 is applicable only where the attesting witness 'denies or does not recollect the execution of the document'. Their Lordships were doubtful whether the description would be applicable to the case of a witness whose evidence was considered unreliable but were willing to assume that the discrepancies were due to deficient re-collection. It was held on the facts that even assuming that it would be legitimate in the above circumstances to look at the proceedings relating to the registration of the mortgage deed for the purpose of proving its due execution and attestation, the plaintiffs had failed to prove the material facts necessary to comply with the provisions of the T.P. Act: (1938-39) 43 Cal.W.N. 669: A.I.R. 1939 P.C. 117: (1939) 2 M.L.J. 762 (P.C.).

S. 71 cannot be construed as meaning that the evidence of the executant of a deed required by law to be attested is not admissible unless the attesting witnesses denied or did not recollect the execution of the document. There is nothing in the Evidence Act which preludes a party from adducing as a witness to the execution of the deed any person who happened to be present when the deed was executed and actually saw it signed by the executant and by the attesting witnesses. The section, while permitting the evidence of the executant of the deed in certain circumstances does not have the effect of rendering his evidence or that of other witnesses inadmissible: 1937 All.L.J. 161: A.I.R. 1937 All. 273.

S. 71 has no application to a case where the attesting witnesses are not before the Court. If, therefore, the plaintiff takes out summons on one of the attesting witnesses and the witness does not appear in Court, that is not enough to let in further evidence under that section. The plaintiff must exhaust all the processes of the Court in order to compel the attendance of any one of the attesting witnesses and when the production of such witnesses is not possible, the plaintiff can avail himself of the provisions of S. 69: (1938-39) 43 Cal.W.N. 1025: A.I.R. 1939 Cal. 688.

S. 71 provides an exception to the rule enunciated in S. 68. But to make this provision applicable it is evident that the attesting witness will have to appear in Court as a witness. Until he appears as a witness there is no question of his denying the execution of the document, or not recollecting the execution of the document. If the witness sits at home and is not examined because there is an apprehension that he may not support the execution of the mortgage deed, in that event there is a failure to produce the evidence which is required under S. 68. Consequently, S. 71 cannot come into play: A.I.R. 1980 All. 395: 1980 All.W.C. 358: (1980) 6 All.L.R. 445.

Where the attesting witnesses had turned hostile, *held*, execution of document could be proved under S. 71: A.I.R. 1991 Ori. 125: (1990) 70 Cut.L.T. 579.

In the event of an attestor being declared hostile, it is permissible for the propounder of the will to cross-examine such an attesting witness and it is also legitimate for such a propounder to rely upon other evidence to show that the will has been properly executed; it would be permissible for the propounder to adduce other evidence apart from the evidence of attestors in proof of the execution

72. Proof of document not required by law to be attested.—An attested document not required by law to be attested may be proved as if it was unattested.

and attestation of the will: A.I.R. 1976 Andh. Pra. 370: (1975) 2 A.P.L.J. (H.C.) 364: (1976) 1 An.W.R. 281: 1976 Hindu L.R. 387 (D.B.).

The 'other evidence' referred to in S. 71 cannot refer to the statement of witnesses who had seen the attesting witnesses sign in the presence of the executant. It only means any evidence that may be considered satisfactory by the Court seized of the matter: 1941 A.M.L.J. 75. *See* also A.I.R. 1991 Ker. 259: (1991) 1 Ker.L.J. 154: (1992) 1 Hindu L.R. 606 (D.B.), cited under S. 68, *supra*.

The word 'execution' in S. 71 not only means signing by the executant but it means and includes attestation as well. If, therefore, an attesting witness called by the plaintiff turns hostile, the plaintiff is entitled to prove attestation of the instrument by other evidence as laid down in the section. This other evidence includes his own evidence as well, although he is the grantee under the instrument: (1938-39) 43 Cal.W.N. 1084: A.I.R. 1940 Cal. 189.

Where though the mortgagors had denied execution of mortgage deed, one of the attestators spoke about the execution, *held*, in such a case S. 71 can be called in aid and as the mortgagors had signed in presence of the witnesses before the Registrar, the trial Court was right in upholding the execution and attestation of document: (1991) 1 An.L.T. 140.

A statement of the attesting witnesses to a mortgage deed that they signed the blank paper and not the completed deed is sufficient to attract the operation of this section and entitles the mortgagee to prove execution by evidence other than that of the attesting witnesses: 48 I.C. 724; 5 O.L.J. 667: 48 I.C. 538.

Where an agreement sought to be specifically enforced was attested by two witnesses and registered, it was the duty of its propounder to adduce their evidence in Court; if it was found to be insufficient to prove execution, the propounder could resort to S. 71 to prove it; non-examination of the attesting witnesses and the scribe, when they were available, presumption may be raised that if examined they would have gone against the propounder: (1988-2) 102 Mad.L.W. 292 (D.B.).

Where in a mortgage suit, the plaintiff called one of the attesting witnesses then alive and when that witness resiled, he proceeded to prove the document by other evidence, *held*, that there was compliance with Ss. 68 and 71: (1938-39) 43 Cal.W.N. 1025: A.I.R. 1939 Cal. 688; (1928-29) 33 Cal.W.N. 248: A.I.R. 1929 Cal. 188. Mortgage suit—Two out of four witnesses dead—Third turning hostile—Fourth witness summoned but refusing to depose—Admissibility of other evidence to prove attestation: A.I.R. 1929 Cal. 441.

Under S. 50 of the Indian Succession Act (X of 1865) witnesses must sign their names and not merely set their marks. *See* I.L.R. 3 Bom. 382; I.L.R. 11 Cal. 429; I.L.R. 5 Cal. 738. But initials will be sufficient: I.L.R. 15 Mad. 261. *See* Evidence Act, 1872, S. 68: I.L.R. (1965) 1 All. 483: A.I.R. 1966 All. 570.

Where it was proved by independent witnesses that the attesting witnesses had signed the will in the presence of the attesting witnesses when one of them had denied execution of the will, *held*, the will stood duly proved: 1981 Hindu L.R. 119 (P.&H.).

Where the Sub-Registrar deposed as to the whole process of registering the will as having duly been gone through but did not know the executant, one of the attesting witnesses denied attestation and the son of the other attesting witness merely proved his father's signature on the will, *held*, the will could not be said to have been proved; Ss. 69 and 71 were not attracted: (1978) 91 Mad.L.W. 28: A.I.R. 1978 Mad. 78: 1978 Hindu L.R. 614 (D.B.).

Where the plaintiff had taken steps to examine both the attesting witnesses of the gift deed but could examine only one of the attesting witnesses by resort to coercive measures under O. 16, R. 10 of the C.P.Code, who, however, denied the execution and the trial Court dismissed the plaintiff's plea for more time to find out the whereabout of the other witness who had meanwhile absconded, *held*, the plaintiff was entitled to prove execution by other evidence under S. 71. [A.I.R. 1938 Pat. 301, Foll.; A.I.R. 1949 Bom. 266, Disting.]: A.I.R. 1990 Ori. 232.

Section 72—Notes.

See 1940 Nag.L.J. 70: A.I.R. 1940 Nag. 240. *See* also S. 68, Note 5, *supra*.

In a suit for recovery of the amount due on a bond the defendant totally denied the

73. Comparison of signature, writing or seal with others admitted or proved.— In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

[1][This section applies also, with any necessary modifications, to finger-impressions.]

---

1. Inserted by Act 5 of 1899, S. 3.

---

execution of the bond and alleged that the same was forged. The applicant examined himself and scribe of the bond who deposed about execution and attestation of the said bond. The defendant examined himself and denied execution of the bond. The trial Judge held that the bond remained unproved as no attesting witness was examined.

Held, that in the case of a document which was not required to be registered compulsorily, as provided in S. 72 of the Evidence Act, examination of one of the attesting witnesses at least was not necessary and the execution could as well be proved by the plaintiff himself or by a scribe or any other person who happened to be present at the time of execution. A bond not being compulsorily registrable, did not necessarily require examination of an attesting witness to prove it: 1962 M.P.L.J. (Notes) 62.

Where the execution of a bond sued upon is denied by the executant (defendant), it is for the plaintiff suing on it to prove the bond, by examining one of the several persons who have attested the execution of the bond. The plaintiff's own evidence is not sufficient, when there is an attesting witness alive who can be called. Mere production of evidence that the signature of the executant and of the attesting witnesses on the bond are really their is not sufficient as that cannot amount to proof of execution of the bond by the defendant-executant. Nor would a comparison of the signature of the defendant on the bond with his alleged signatures in the books of accounts be conclusive or decisive for purposes of finding in favour of the plaintiff: A.I.R. 1950 Kutch 17. *See* also A.I.R. 1949 Kutch 3: 50 Cr.L.J. 964.

There is no requirement of law that an attesting witness to a document like an agreement of divorce must be examined to prove its execution: A.I.R. 1985 Del. 14: 1984 Rajdhani L.R. 653: (1985) 1 D.M.C. 35: (1985) 1 Hindu L.R. 369: (1985) 1 Hindu L.R. 442.

There is nothing in S. 54 of the Transfer of Property Act, which requires a sale deed to be attested; thus, a sale deed though attested, does not depend upon attestation for its validity; it would, therefore, be unnecessary to prove it by calling an attesting witness: (1975) 88 Mad.L.W. 6.

The word 'bond' defined in the Indian Limitation Act and the Indian Stamp Act is inconclusive, not exhaustive; the bars contained in the two Acts would not apply to bonds; they are not required by law to be attested; *held*, it is to be proved not under S. 68 but under S. 72: A.I.R. 1982 Gau. 100 (D.B.).

Section 73—Synopsis.

1. Scope.
2. Power of Court with regard to comparison.
3. Evidentiary value of such comparison.
4. Illustrative cases.
5. Direction to give specimen—General.
6. Direction to give specimen—Whether unconstitutional or illegal.
7. Direction to give specimen—To be for Court's purposes only.
8. Direction during investigation—Validity of.
9. Specimen obtained in Court—Sending of, to expert.
10. Direction to "any person".
11. Specimen of hair.
12. Specimen of voice.
13. Specimen of thumb-impression.

---

1. Scope.—There are many factors which have to be taken into consideration in effecting a comparison of the two signatures, and although a Court could apply its own eyes and its own mind to determine whether a particular signature is resembling another, it would be going beyond the ordinary limits of the capacity of a Court to constitute itself as a Handwriting Expert and try to compare the signature without all the gadgets and devices which are available to a Handwriting Expert, besides the lack of expert knowledge which a Handwriting Expert possesses. When oral evidence clearly established that a person executed a certain document, it would be completely unnecessary for the Court to embark upon an investigation into the signatures by comparison: A.I.R. 1960 Andh. Pra. 359.

The Court is competent under law to make the comparison of signatures, but it should exercise this power very sparingly, and with utmost caution, and further, should not make its opinion on the handwriting the sole ground of the decision. If, for example, the parties have adduced expert evidence, or considering the stake in the suit, could be reasonably expected to go through the inconvenience and expense of adducing it, the Court should refuse to make the comparison itself and decide the case on the materials available. On the other hand, if the insistence on an expert would put a disproportionately large burden on the parties then the Court may itself make the comparison. Secondly, the results of such examination can be used only where the evidence is otherwise more or less equally balanced. If within these limits the Court has exercised powers given to it by the law, it cannot be said either that an illegality has been committed: 1962 M.P.L.J. (Notes) 187: 1961 Jab.L.J. 1058.

The Act, as in English Law, recognises two direct methods of proving a questioned handwriting; (*1*) by admission of its writer or (2) by evidence of the person who saw it written. Besides, these best methods of proof, there are three other modes of proof by opinion: (*1*) by evidence of a handwriting expert or (2) by evidence of a witness acquainted with the handwriting of the writer and (3) by the opinion of the Court by comparison of the admitted and questioned documents; these three cognate modes of proof involve the method of comparison. [1975 Cr.L.J. 1756 (Del.) (D.B.), Reversed]: A.I.R. 1979 S.C. 14: (1978) 2 Kam.L.J. (S.N.) 39: (1979) 15 Del.L.T. 217.

History of the section. *See* 1 Mys. H.C.R. 160 at 166, 167. Section based on and follows English Law. *See* 1914 Mad.W.N. 240. Procedure under the section: Rat. 452.

The comparison can be made either by witness acquainted with the hand-writing or by expert witnesses skilled in deciphering hand-writing, or without the intervention of any witnesses at all, by jury themselves, or in the event of there being no jury by the Court: (1990) 1 M.L.J. 428.

Opinion of handwriting expert—Evidentiary value: 1967 Cr.L.J. 1197: A.I.R. 1967 S.C. 1326.

Before invoking S. 73, there must be evidence before the Court that a thumb-impression is that of a party in the litigation: A.I.R. 1976 Ori. 52: (1975) 2 Cut.W.R. 903: I.L.R. (1976) Cut. 28 (D.B.).

Where a signature is denied, the only safe way to prove that the alleged signature is really the signature of the person who denies it, is to produce some signature admittedly made by the same person at about the same time as the disputed signature was allegedly signed: 1940 A.M.L.J. 2. Data for arriving at a conclusion: 66 I.C. 774: A.I.R. 1922 Cal. 12.

A signature made for the occasion *post litem motam* and merely for use at the trial ought not to be taken as a standard as it is likely to be stimulated. It may, however, be compared with the genuine writing for all that it is worth: (1959-60) 64 Cal.W.N. 1067: A.I.R. 1961 Cal. 300.

It is not of much use to compare a signature of a person said to have made in 1950, with that made six years earlier in 1944, as there is likely to be some change in signature. That apart, in the absence of any marked differences between the two signatures, which indicated *prima facie* that the disputed signature could not, in any circumstances, have been that of the same person whose admitted signature had been produced, a Court would not be justified in rejecting the disputed signatures as not genuine: A.I.R. 1960 Andh. Pra. 359.

'Purports' means 'alleged': (1912) 14 Bom. L.R. 310: 15 I.C. 549. *See* also 35 M.L.J. 608: 48 I.C. 68.

2. Power of Court with regard to comparison.—If despite opinion of an expert or a person acquainted with the handwriting, the

Court can, if it so desires, *suo motu* use its own skill in comparing handwritings or signatures under S. 73 to which no party can take exception, the Court may also take extraneous assistance from magnifying glass, enlarged photographs or even by calling experts; and since the section enables the Court to compare even finger-prints which is normally not possible with naked eye, the use of extraneous aid is inherent: A.I.R. 1970 Mad. 85: 1970 Cr.L.J. 254.

If there is no evidence before the Court as regards the genuineness of the signature, the Court cannot, in law, rely on its own examination of the signature to supply the evidence because the Judge cannot treat himself as an expert. There is, however, nothing in principle or authority which bars the Judge of facts from using his own eyes and looking at the admitted signature alongwith the disputed signature in deciding whether the evidence that has been given as regards the genuineness of the document should be believed or not: A.I.R. 1957 Cal. 92. As to thumb-impression, *see* 17 Cr.L.J. 316: 35 I.C. 492; I.L.R. 1 Rang. 759: A.I.R. 1924 Rang. 115 (F.B.).

It is not essential that the handwriting expert must be examined to prove or disprove a handwriting; the Court is competent to itself compare the disputed handwriting with the admitted or proved handwritings; the Court may as well get the writing compared by an expert and examine him if deems fit; but the Court is not bound to do so. [A.I.R. 1967 S.C. 778, Foll.]: (1990-2) 106 Mad.L.W. 15; A.I.R. 1984 Cal. 316; A.I.R. 1981 All. 361.

It is not essential for the Court to get the opinion of handwriting expert; the Court is itself competent to compare the disputed signature with admitted signature; S. 73 absolutely contains no bar on the Court's power to effect such comparison; such procedure is not illegal: (1993-1) 111 Mad.L.W. 186 (D.B.).

Court is entitled to compare for itself the questioned signature of party with that of the admitted signature: (1968-69) 73 Cal.W.N. 877: A.I.R. 1970 Cal. 292.

When the experts differ, ultimately the Court has to form its own opinion on the basis of the entire evidence brought on record. The Court also would be competent to compare the signatures and the writings under S. 73: (1983) 2 Kam.L.J. 135.

Per *Mukharji, J.*—There is no legal bar to the Judge using his own eyes to compare disputed signature with admitted signatures even without the aid of any evidence of any handwriting expert.

Per *Bose, J.*—The procedure of determining the question of genuineness of disputed signatures or writings relying on the eye test of the Judge himself and unaided by evidence of experts or arguments of Counsel has been deprecated: (1959-60) 64 Cal.W.N. 1067: A.I.R. 1961 Cal. 300.

Although S. 73 specifically empowers the Court to compare the disputed writings with the specimen/admitted writings shown to be genuine, prudence demands that the Court should be extremely slow in venturing an opinion on the basis of mere comparison, more so, when the quality of evidence in respect of specimen/admitted writings is not of high standard: A.I.R. 1992 S.C. 2100: 1992 Cr.L.J. 3454: (1992) 3 S.C.C. 700.

It may be a rule of caution and prudence that where the Court considers that the opinion of a handwriting expert would be of assistance to it in coming to a decision it may call for the evidence of an expert. But there is no rule of law that the Court is precluded from coming to its own conclusions in cases where it is fully familiar with the language and script of the documents which is the subject-matter of scrutiny before it and where it has the assistance in such scrutiny of the counsel of the parties. If on the face of it, the Court is able to come to a conclusion that a particular document contains alterations and interpolations it is not bound to seek the assistance of handwriting experts. It cannot, therefore, be said that simply because a handwriting expert is not called to give evidence, the Court is not empowered to come to a conclusion whether a particular pronote and a receipt have been subjected to alterations or interpolation: 1963 All.L.J. 952: A.I.R. 1965 All. 202.

The science of comparison of handwriting is intricate and complex; findings on resemblance or difference of the writings have to be arrived at with respect to the general character of the writing, the forms of the letters and relative numbers of diversified forms of each of the letters, the use of capitals, abbreviations, stops and paragraphs, the mode of effecting erasures or of insertion, interlineation or correction, the adoption of peculiar expressions, the orthography of words, the grammatical construction of sentences and the style and composition of one or more of documents

written in a feigned hand. It is for this reason that even Courts of law with wide experience have been often cautioned against resorting to comparison of handwritings, although S. 73 specifically authorises them to compare the disputed signature or writing with other writings admitted or proved to have been signed or written by that person. The catena of judicial decisions of the highest Court leaves no room for doubt that it is imprudent to base the conclusion of guilt solely on the bare comparison of disputed and admitted writings, especially when made without the aid of evidence of expert opinion or microscopic enlargements or without guidance from some authoritative text book and without any experience and knowledge on the part of the person making the comparison; such inferences would be indecisive, unsatisfactory, dangerous and inadvisable: (1982-1) 23 Guj.L.R. 233: (1982) 2 Guj.L.H. 648 (D.B.).

A Court is competent to compare the disputed writing of a person with others which are admittedly proved to be his writings. It may not be safe for a Court to record a finding about a person's writing in a certain document merely on the basis of comparison, but a Court can itself compare the writings in order to appreciate properly the other evidence produced before it in that regard: (1974) 1 Cut.W.R. 58; 1982 Cr.L.R. 385 (Raj.).

Genuineness of document in question—Court itself can compare unaided by expert evidence handwritings in disputed document and admitted document and hold disputed document to be genuine—Comparison should, however, before and with assistance of lawyers appearing in the case: A.I.R. 1965 Pat. 332.

The Court has power to compare the alleged genuine signature with admittedly genuine signature to come to a conclusion from it: 120 I.C. 335: A.I.R. 1930 Nag. 27. But *see* 152 I.C. 1042.

Even where there is opinion of handwriting expert, the Court must itself compare the two handwritings and with the assistance of the expert must come to its own conclusion whether the two handwritings are of same person. [A.I.R. 1967 S.C. 1326, Applied]: A.I.R. 1984 N.O.C. 77 (All.).

By virtue of the provisions of S. 73, the Court has power to compare the disputed signature with the admittedly genuine signature to come to a conclusion. But the rule of prudence is that comparison of signatures by Courts as a mode of ascertaining the truth should be used with great care and caution: A.I.R. 1960 Mys. 220.

The Court should, as a matter of course and caution, hesitate to base his finding on its own comparison when identity of a handwriting forms the main controversy between the parties: (1992) 1 Cal.L.J. 169: (1992) 1 Cal.H.N. 155. *See* also (1988-89) 93 Cal.W.N. 1115.

S. 73 gives no absolute power to the Court to act as a handwriting expert. Thus, where the handwriting expert had testified that the plaintiff's thumb-impression on the disputed documents was entirely different from his genuine thumb-impression, which was relied upon by the trial Court but the lower appellate Court, without referring to this and other uncontroverted oral evidence discarded the expert evidence, *held*, the lower appellate Court could not act as handwriting expert; the handwriting expert's opinion has to be considered in the light of other evidence: A.I.R. 1992 All. 346: 1992 All.L.J. 1065.

It is not right to say that when there is difference between the two handwriting experts, the Court ought to have sent the matter to some other independent handwriting expert having no concern with either party, instead of himself acting as an expert and coming to a conclusion. Where an expert's opinion is given, the Court must come to its own conclusion, whether it can safely be held that the two writings are by the same person. This is not to say that trial Court must play the role of an expert but to say that the Court may accept the fact proved only when it has satisfied itself on its observation that it is safe to accept the opinion whether of the expert or other witness: A.I.R. 1973 Pat. 215: 1973 Pat.L.J.R. 393 (D.B.).

There may be cases where both sides call experts and the voices of science are heard. There may be cases where neither side calls an expert, being ill able to afford him. In all such cases, it becomes the plain duty of the Court to compare the writings and come to its own conclusion where there are expert opinions, they will aid the Court. Where there is none, the Court will have to seek guidance from some authoritative textbook and the Court's own experience and knowledge. But discharge

it must its plain duty, with or without expert, with or without other evidence: A.I.R. 1980 S.C. 531: 1980 Cr.L.J. 396: (1980) 1 S.C.C. 704: (1980) 2 S.C.R. 249. Court's power to compare when only one party produces handwriting expert. *See* (1984) 26 Del.L.T. 291.

There is nothing wrong in the Court itself comparing signatures to ascertain whether the document is genuine or not. [A.I.R. 1980 S.C. 531, Foll.]: (1989-1) 103 Mad.L.W. 552 (D.B.).

When execution of a document is proved by direct evidence, *held*, the Court cannot undertake the hazardous task of comparing signatures especially when no expert witness is produced: 1984 Raj.L.W. 321.

It cannot be laid down as a general rule that on the defendant choosing to deny his signatures, the plaintiff must examine a handwriting expert; nor is the Court bound to accept the evidence of a handwriting expert as true; the Court has to apply its own mind to the evidence of the expert and either to believe or disbelieve it. [A.I.R. 1957 All. 119, Dissent. from]: A.I.R. 1973 Raj. 12: 1973 Raj.L.W. 182: 1972 W.L.N. 658.

Where in a suit for recovery of money on a promissory note, the defendant disputed his signature and the Munsiff, on comparing disputed and admitted signatures of the defendant on his written statement gave his own finding which was objected to, *held*, there is no legal bar to the Judge using his own eyes to compare disputed and admitted writings under S. 73; the Court, however, as a matter of prudence and caution, should hesitate or be slow to base its findings solely on its own comparison: A.I.R. 1989 Gau. 42: (1987) 2 Gau.L.R. 299.

3. Evidentiary value of such comparison.—Value of evidence afforded by comparison of handwriting: 14 I.C. 741: I.L.R. 10 Cal. 1047; I.L.R. 37 Cal. 467. Question of comparison is different from question of admissibility: I.L.R. 53 Cal. 372: A.I.R. 1926 Cal. 130.

Where the Court rejects the evidence of the experts on both sides regarding the genuineness or otherwise of the signature of a person on a document, it should not convert itself into a handwriting expert and by merely comparing the disputed signature with the admitted signature of the person without the aid of any other expert advice, take a decision on the correct determination of the genuineness of the signature. Conclusion based on mere comparison of handwriting must, at best be indecisive and yield to the positive evidence in the case: A.I.R. 1961 Pat. 76.

A comparison of handwriting as a mode of proof is at all times hazardous and inconclusive, and specially when it is made by any one not conversant with the subject and without such guidance as might be derived from the arguments of Counsel and the evidence of experts.

Where, however, the finding of the Court as to challans being in the handwriting of the accused is not based only upon a comparison of the handwriting but also on the surrounding circumstances and there is also positive evidence of a witness who has proved the handwriting of the accused, the finding is entitled to weight: 1961 B.L.J.R. 411: (1961) 2 Cr.L.J. 677: A.I.R. 1961 Pat. 451.

Opinion formed by Court on comparison of disputed and genuine signatures, in absence of any other positive evidence, *held*, is indecisive: 1980 M.L.J. (Cr.) 301: 1979 Cr.L.J. (N.O.C.) 211 (Karn.) (D.B.).

In the absence of examination of the handwriting expert who gave his report when the necessary material is there, the Court under S. 73 can also examine the disputed handwriting with the specimen handwriting which is taken by the Court and is admitted by the accused to have been written by him: (1972) 2 Sim.L.J. 335: 1973 Cr.L.J. 1030.

Where there is no evidence on the question of the genuineness of the disputed signature in the shape either of direct or circumstantial evidence or of opinions relevant under S. 45 or S. 47, the Court's own opinion arrived at as a result of comparison of signature authorised by S. 73 of the Evidence Act would not be adequate for resting a finding: (1960) 73 Mad.L.W. 19: (1960) 1 M.L.J. 142.

It is no doubt open to a Court to express its own opinion about the identity or otherwise of a disputed handwriting or thumb impression but it would not be safe to base a conclusion entirely on such a comparison. Where in a suit on the basis of a pronote, the defendant denies the execution of the pronote, the onus of proving that the document had been duly executed by the defendant evidently lies upon the plaintiff and the plaintiff ought to lead satisfactory evidence to prove that the signatures were made by the defendant. It is no part

of the duty of the defendant to call an expert to support his contention. It is not desirable that a Judge should take upon himself the task of comparing the signature in order to find out whether the disputed signatures agree with the other admitted signatures and the proper course is to obtain the opinion of an expert. If the Judge after a comparison of the signatures of the defendant comes to the conclusion that the pronote is executed by the defendant solely on the basis of such comparison, the decree passed in plaintiff's favour must be set aside: A.I.R. 1957 All. 119.

In comparing the handwriting upon disputed document with the admitted handwriting, in order to find whether the disputed document is genuine, the true test to be applied in such cases, is to consider the general character of the two writings sought to be compared and not to lose oneself in scrutinising the formation of each individual letter. It is not uncommon to find differences in the writings of one and the same person even after a short interval of time. It all depends upon so many extraneous circumstances, the pen, the ink, the paper, the posture of his hand and the general conditions in which he writes. It is for this reason that the law merely requires a consideration of the general character of the two writings: A.I.R. 1965 Pat. 332.

Genuineness of—Determination—Test. *See* Evidence—Handwriting: (1959-60) 64 Cal.W.N. 1067: A.I.R. 1961 Cal. 300.

Handwriting—Genuineness—Determination—Personal characteristics of writer are unfailing guide: (1959-60) 64 Cal.W.N. 1067: A.I.R. 1961 Cal. 300.

Modes in which handwriting can be proved: I.L.R. 37 Cal. 467: (1909-10) 14 Cal.W.N. 114. An anonymous writing ascribed to a particular person may be compared with a genuine signature: (1912) 14 Bom.L.R. 310: 15 I.C. 649.

Alterations in pronote—Consideration of—Error in such construction amounts to misreading of evidence raising question of law: 1963 All.L.J. 952: A.I.R. 1965 All. 202.

In a case where there is no conflict of evidence, the Court is entitled to form its own opinion after comparing the signatures on the documents produced in Court and the admitted signatures. Such procedure is expressly contemplated by S. 73: I.L.R. 17 Pat. 15: 19 Pat.L.T. 432. But he ought not to attach much weight to such comparison: 1939 A.M.L.J. 34. Danger of resting decision solely on comparison of handwriting. *See* I.L.R. 16 All. 167 (P.C.). *See* also I.L.R. 56 Bom. 304: A.I.R. 1932 Bom. 406.

Where only evidence relied in defence was identity of the handwriting, *held*, in the absence of the handwriting expert's testimony, it is rather too much for the Judge to use his own eyes for comparing the admitted and disputed handwritings. [A.I.R. 1979 S.C. 14, Rel. on]: A.I.R. 1988 Del. 39: (1988-2) 94 Punj.L.R. 1.

It is elementary law that no one in a criminal trial can admit anything on behalf of an accused person except the accused himself. If signatures are going to be taken as admitted signatures they must be admitted by the accused himself or such signatures must be proved. Where there is nothing from the record to show that the accused admitted the signatures with which the signature to be proved is said to have been compared by the Magistrate, the Magistrate's finding as to the proof of the accused's signature is based absolutely on no legal evidence: (1951-52) 56 Cal.W.N. 738: A.I.R. 1953 Cal. 307.

While it is competent on the part of a Judge or a Magistrate to compare the disputed signature with the admitted signatures for himself it is unsafe to rely entirely on such personal comparison: (1961) 2 Cr.L.J. 204: A.I.R. 1961 Cal. 461 (F.B.).

Conviction on evidence relating to identity of accused from similarities in writing—Evidence of Handwriting Expert—Appreciation of—Duty of Court—Tests for piercing disguise in writing—Way to judge honesty of Expert: 1967 Cr.L.J. 134: A.I.R. 1967 All. 64.

Criminal revision—Determining genuineness of signature on document by comparing it with proved signature—Cannot be done in revision—Comparing of signatures amounts to bringing in new evidence: 1968 All.L.J. 466: 1969 Cr.L.J. 1089: A.I.R. 1969 All. 423.

4. Illustrative cases.—Where the genuineness of two letters purported to have been written by the wife to her paramour was in doubt and the husband adduced no direct or circumstantial evidence to prove their authorship and they appealed to the Court on comparison not to tally with the admitted signatures, *held*, the Court need not in appeal

send them for expert opinion; the Court is not bound to accept the expert opinion which may, in turn, require further scrutiny by the Court: (1972) 85 Mad.L.W. 484.

Apart from the fact whether or not the single Judge was familiar with the Modi script in which signatures compared by him were made, and though it was permissible for the Judge under S. 73 to compare the signatures, *held*, such comparison of handwritings as a mode of proof is very hazardous and inconclusive, especially when comparison is made by one not conversant with the subject and without guidance from the experts' evidence: A.I.R. 1973 Bom. 242 (D.B.).

Where the Court trying a summary suit, took upon itself the impermissible exercise of itself comparing the disputed and undisputed signatures, *held*, the result of such comparison is a mere personal belief or opinion of the Judge; the issue of forgery cannot be determined without its trial: (1990-2) 10 Guj.L.H. 438.

Where the execution of pro-notes were clearly proved on other evidence, *held*, the comparison of signatures, even if resorted to, loses all significance. [A.I.R. 1957 All. 119, Disting.]: A.I.R. 1992 Guj. 1.

Where the prosecution did not discharge its basic burden of proving the signature and handwriting on documents to be that of the accused, *held*, such *lacuna* could not be cured by the Court comparing the accused's signature on the *wakalatnama* with the disputed signature and hold that it was that of the accused; conviction set aside as there was still no proof of the handwriting being that of the accused: 1991 Cr.L.J. 3146: 1991 Mah.L.J. 1040.

While considering evidence of the witnesses, the Judge compared the defendant's disputed signature with his admitted signatures, and firmly concluded that the signature in the disputed document was that of the defendant, *held*, the conclusion being not based entirely on his personal comparison, which was made for the purpose of receiving confirmation to his conclusion on that aspect on other evidence on record, the comparison of signature by the Judge called for no comment; calling a handwriting expert may not always be possible or desirable; comparison of signatures by the Court is not, and should not be, dependent on the examination of the handwriting expert; it could not be said that by comparing the signatures the Judge relegated himself to the position of a witness: A.I.R. 1978 Ori. 156: (1978) 1 Cut.W.R. 192: 45 Cut.L.T. 447.

Under S. 73 of the Evidence Act, a Court is competent to compare the disputed writings of a person with other writings which are admitted or proved to be his writings. Such comparison by the Court is with a view to appreciate properly the other evidence available on record on the question of writings. It would, however, be too hazardous for a Court to use his own eyes and merely on the basis of personal comparison decide a very vital issue between the parties centering round the handwriting or signature of a person. Where there was direct ocular evidence indicating that the testatrix signed the Will besides the evidence of the handwriting expert who had opined that the specimen signature and the disputed signature in the Will were of the same person but still the trial Court on personally comparing the disputed handwriting in the Will with the specimen signature of the testatrix and relying entirely on such personal comparison concluded that the impugned Will was not genuine, *held*, the procedure adopted by trial Court was patently wrong: A.I.R. 1995 Ori. 131 (D.B.).

Where the Postman's endorsement of refusal on the postal envelope containing the landlord's quit notice to the addressee—tenant was denied by him as a witness before the Court and the Court compared his writing and signatures on the envelope with his signatures taken at the bottom of his deposition in the Court, *held*, the Court was competent to do so: A.I.R. 1982 Cal. 397: (1982-83) 87 Cal.W.N. 102: (1982) 2 Cal.H.N. 166.

Where a Court notice was sent to a party and its acknowledgment bearing signatures of the addressee was received back and the signature thereon (postal acknowledgment due card) was compared by the Court with her signatures on three letters on the records and found to tally, *held*, the Court was justified: A.I.R. 1973 P.&H. 152: 1972 Cur.L.J. 881.

Where the signature disputed to be the petitioner's in a promissory note is compared by the Court with his signature in the vakalat and petition and those taken in Court from the petitioner knowingly and willingly and the petitioner was admittedly the person described in the promissory note as the person who had taken on the liability under it along with his brother and signed on it, and the Court comes to the conclusion that the disputed signature in the promissory note is really his (Petitioner's), the signature must be held to be properly proved: (1956) 2 M.L.J. 399.

5. Direction to give specimen—General.— A sample writing taken by the Court under

the second para, *held*, is, in substance and reality, the same thing as 'admitted writing' under the first para of the section which provides for comparison of the questioned signature, writing, etc., with other admitted or proved signatures of the writer; the two paras are not mutually exclusive but complementary to each other. Though the section does not say as to who is to make the comparison but construed in the light of English law on the subject, the legislative source of S. 73, it is clear that the comparison is to be made by a handwriting expert (S. 45) or by one familiar with the handwriting of the writer (S. 47) or by the Court itself. [1975 Cr.L.J. 1756 (Del.) (D.B.), Reversed]: A.I.R. 1979 S.C. 14: (1978) 2 Karn.L.J. (S.N.) 39: (1979) 15 Del.L.T. 217.

The occasion for a direction under S. 73 will arise only when the Court feels it necessary in the interest of justice to make comparison with its own eyes, with the help of a magnifying glass for the purpose of coming to a conclusion of fact in the light of other evidence as to the identity of the disputed authorship of the writing: (1972) 2 Cut.W.R. 1557.

For directing a person to write words or figures for the purpose of comparison (*i*) there must be a cause before the Court; (*ii*) the person so directed must be a party or witness to the cause; (*iii*) he must be present in the Court in connection with that cause; and (*iv*) such comparison must be necessary to determine an issue raised in the cause: (1972) 2 Cut.W.R. 1557.

S. 73 read as a whole alongwith Ss. 45 and 47 clearly empowers the Court to direct, in the interest of justice, any person present in Court to give his sample writing being compared by a handwriting expert; even in adopting this course the ultimate purpose is to enable the Court to compare disputed and admitted writings. Thus, where in a claim for maintenance the husband denied marriage and paternity and the Magistrate directed him to give his sample writing for comparison with a letter allegedly written by the husband and having bearing on the question of the paternity and marriage, *held*, the Magistrate was well within his competence. [1979 Cr.L.J. 17 (S.C.) and A.I.R. 1980 S.C. 791, Rel. on]: 1988 Cr.L.J. 1000 (Ker.).

By reason of the provisions contained in Ss. 73 and 45 of the Evidence Act and O. 3, R. 1, C.P.Code, the Court can direct a party to be present in Court to give a signature, handwriting or thumb-impression for the purpose of comparison either by itself or for the purpose of obtaining the opinion of an expert by sending the same to him: A.I.R. 1975 Andh. Pra. 88: (1974) 2 An.W.R. 365: (1974) 2 A.P.L.J. 178; 1976 Rev.L.R. 648 (D.B.); (1988) 2 Hindu L.R. 1: (1987) 2 Cal.H.N. 32.

There is no element of compulsion under S. 73 on a party or any witness; the only consequence of non-compliance of a direction under S. 73 is that it is open to the Court to draw a presumption under S. 114 about the disputed writings which may go against the person or party. [A.I.R. 1975 Andh. Pra. 88 and (1968) 34 Cut.L.T. (Notes) 319, Rel. on]: A.I.R. 1986 Ori. 218: (1985) 60 Cut.L.T. 591.

The Court is entitled to direct the accused to give his specimen handwriting or signature for the purposes enumerated in S. 73; but it can only be a direction within the limits allowed by law; if the direction is disobeyed, a presumption under S. 114 will be the legitimate consequence: 1985 Ker.L.T. 696; (1974) 2 Karn.L.J. (Jr.) 47 (S.N.) 169.

A party cannot be compelled to undergo medical examination: (1972) 1 Mys.L.J. 136.

The ruling in A.I.R. 1955 Cal. 347 was not followed in (1958-59) 63 Cal.W.N. 901 and also in the under-mentioned case. Accused not to be compelled to be witness against himself—Compelled written testimoney obtained prior to trial—Admissibility. *See* A.I.R. 1957 Madh. Pra. 73. This case was dissented from in A.I.R. 1958 All. 119: 1958 Cr.L.J. 134.

A mere direction to write words or give finger impressions does not imply any obligation to comply; the accused had, thus, the right to protest or refuse to comply; and S. 73 does not arm the Court with compulsive power to enforce obedience to its direction; on the accused's declining to comply, the Court is at full liberty to draw an adverse appropriate presumption against him, under S. 114, though not of guilt but in corroboration of other evidence: (1972) 2 Cut.W.R. 1557.

The thumb-impression of an accused, taken forcibly, should not be taken into consideration in determining his guilt.

A thumb-impression or signature given by an accused voluntarily can be used for comparison with the disputed thumb mark or signature and that can be used in evidence. But he cannot be forced to make a statement against himself or to do an act which might be prejudicial to his defence or to give his thumb-impression or signature. S. 73 of the Evidence Act empowers a Court to order an accused to give his thumb-impression, handwriting or signature for comparison. If he refuses to comply with that order, presumption under S. 114 can be drawn but certainly force cannot

be used to compel him to give his thumb-impression or his signature or specimen handwriting. Ordering an accused to give his thumb-impression or specimen writing is different altogether from forcing him to do those things. Thus, a thumb-impression taken forcibly from an accused should not be taken into consideration in deciding his guilt: 1968 All.W.R. (H.C.) 590: 1968 All. Cr.R. 375.

Direction to give specimen handwriting—Effect of—Obtaining of specimen handwriting and obtaining of thumb-impression—Difference: 1960 Cr.L.J. 1000: A.I.R. 1960 Raj. 184.

6. Direction to give specimen—Whether unconstitutional or illegal.—The expression 'for the purpose of enabling the Court to compare' does not admit of a narrow interpretation; thus, where the Court requires to compare the disputed finger-prints with specimen finger-prints, it may direct the accused to give his finger-prints and send them on directly to the expert under its own seal for his opinion and examine him as a Court-witness; it would be deemed to be a comparison by the Court itself, and would not amount to testimonial compulsion on the accused to be a witness against himself in violation of Art. 20(3) of the Constitution. [(1961) 2 Cr.L.J. 856 (S.C.), Rel. on; 1973 Cr.L.J. 1499 (Bom.); 1958 Cr.L.J. 367 (Cal.) and 1958 Cr.L.J. 619 (Bom.), Dissent. from]: 1976 Cr.L.J. 244.

An accused person, when he is giving his specimen handwriting or impressions of his fingers, or palm or foot, does not furnish evidence against himself within the meaning of Art. 20(3) of the Constitution. Thus, obtaining of such specimen writings, signatures, etc. from the accused during investigation by the investigating agency does not amount to testimony on compulsion. [A.I.R. 1961 S.C. 1808: 1961 All.L.J. 936, Foll.]: 1991 Cr.L.J. 462 (Ori.); 1975 All.W.C. 477.

The direction under S. 73, Evidence Act, to take specimen writing of a person who is accused of an offence does not amount to a direction compelling him to give evidence against himself, and hence such direction does not offend Art. 20(3) of the Constitution: 1955 Cr.L.J. 790: A.I.R. 1955 Cal. 247; A.I.R. 1959 Him. Pra. 29: 1959 Cr.L.J. 1165.

Taking of specimen signatures and handwritings of accused, *held*, does not amount to compelling him to be a witness against himself : 1979 Raj.L.W. 453; (1978) 2 M.P.W.N. 51.

Magistrate's power to compel accused to give specimen handwriting—Under Ss. 4 and 5 of Identification of Prisoners Act, accused can be compelled to give his measurements—His refusal or resistance entitles authorities to use reasonable force to get measurements—Word 'measurement' as defined in S. 2(*a*) of that Act does not include 'specimen handwriting' and accused cannot be compelled to give specimen under Ss. 4 and 5—However, a Magistrate has power under S. 73 of the Evidence Act to direct an accused to give finger impressions as well as specimen writing—Refusal will entail in prosecution under S. 186, Penal Code—Giving of thumb mark or specimen handwriting does not offend against Art. 20(3) of the Constitution: 1969 Cr.L.J. 396: A.I.R. 1969 Manipur 22.

Protection against testimonial compulsion—Taking of finger impressions of accused by investigating officer against his will—Taking of specimen writing or signature in Court with consent of accused—Protection under Art. 20(3) not violated: (1962) 1 Cr.L.J. 19: A.I.R. 1962 Cal. 36.

Order directing accused to furnish his fingerprints or specimen of handwriting—Accused giving writing voluntarily without protest—If testimonial compulsion: I.L.R. (1961) 1 All. 851: 1961 All.L.J. 306: A.I.R. 1961 All. 456 (F.B.).

Taking of specimen writings and signatures of accused—Legality: A.I.R. 1960 Cal. 32. *See* also (1987) 32 Del.L.T. (S.N.) 40.

7. Direction to give specimen—To be for Court's purposes only.—The second clause of S. 73 permits the Court to direct any person to write words or figures for the purpose of comparison with a view to enable the Court to form its own conclusion for doing complete justice between the parties; the Court can use this power to assist itself and not to assist any party to the proceedings. [A.I.R. 1958 Bom. 207; A.I.R. 1958 Cal. 123, Rel. on]: A.I.R. 1975 Guj. 95: (1975) 16 Guj.L.R. 66.

S. 73 cannot be construed as an instrument or a device to be used for the advancement of any part either the prosecution or the accused. It is one of those sections where large powers are given to the Court with the obvious object of enabling the Court to find out the truth and to do complete justice between party and party; any other use of it would be wholly unjustified. In so far as the Magistrate wants to be satisfied as to the genuineness or otherwise of certain writings, it is quite open to him to ask the accused to write out certain words and figures in order that a comparison might be made between them and disputed writings; but it is certainly not open to the Magistrate to hand the document over to the

prosecution in order that they might make use of it as a piece of their own evidence nor can he send the document to an Expert who is a prosecution witness. If the Magistrate wants further assistance in the shape of enlargement of the writing, it is perfectly open to the Court to call its own photographer, take the enlargements under its own supervision, study them, and if necessary call its own expert as a Court witness in order that it might be assisted to a proper conclusion: (1956-57) 61 Cal.W.N. 691.

A direction under S. 73 cannot be given for enabling the opposite party to use the handwriting or signature obtained in the Court as evidence against the person who has given the specimen handwriting or signature for it is likely to incriminate him. Such a direction is not permitted by law: 1985 Ker.L.T. 696; (1974) 2 Karn.L.J. (Jr.) 47 (S.N.) 169.

Filing of an application by a party before the Court for a direction under S. 73 does not necessarily mean that the prayer would be allowed; the Court is not just an automation to act; S. 73 of the Evidence Act in this respect is *pari materia* with S. 540, Cr.P.Code: (1972) 2 Cut.W.R. 1557.

A plain reading of S. 73 shows that the Court can direct a person present in the Court to write any words or figures for the purposes of enabling the Court to compare the words and figures so written with any words or figures alleged to have been written by such person; obviously, there must be some proceedings in Court wherein such comparison by the Court is necessary. Such power cannot be used to enable the investigating or any other agency to compare such writings. Thus, no direction can be given under S. 73 to an accused to write any words or figures during the investigation to enable the investigating agency to compare such writing with any words or figures alleged to have been written by the accused. A plain reading of S. 5 of the Identification of Prisoners Act also supports this view: 1980 All.Cr.C. 232: 1980 All.W.C. 36.

The words used are 'for the purpose of enabling the Court'. The occasion for such a direction can arise only when the Court feels that it is necessary for its own use. The section cannot be construed as an instrument or a device to be used for the advancement of any party, either the prosecution or the accused. It is one of those sections where large powers are given to the Court with the obvious object of enabling the Court to find out the truth and to do complete justice between party and party and any other use of it would be wholly unjustified. In terms, S. 73 limits the power of the Court to directing a person present in Court to write any words or figure only where the Court itself is of the view that it is necessary for its own purposes to take such writing in order to compare the words or figures so written with any words or figures alleged to have been written by such person. The power does not extend to permitting one or the other party before the Court to ask the Court to take such writing for the purpose of its evidence or its own case: 1966 M.L.J. (Cr.) 298: 1965 Ker.L.T. 1129: (1965) 2 Ker.L.R. 269; A.I.R. 1958 Bom. 207: (1957) 59 Bom.L.R. 1165. But *see infra*. In a suit based on a pro-note the defendant denied his signature. The plaintiff applied for an order that defendant should attend and write his signature for comparison. It was objected that such an order could not be made under S. 73 of the Evidence Act in the absence of the defendant. *Held*, that the Court has power to direct the defendant to be present in Court and then to write out his signature and other words as may be necessary: 1959 M.P.L.J. (Notes) 108.

See also 1981 Cur.L.J. (Civ.) 475 (Punj.).

8. Direction during investigation—Validity of.—Court has no power under S. 73 to direct accused to give specimen signature or writing during course of investigation. [A.I.R. 1969 Manipur 22 and (1962) 2 Cr.L.J. 84 (Pat.) and 1971 Cr.L.J. 1591 (Andh. Pra.), Dissent. from]: 1979 All.Cr.R. 169: 1979 All.Cr.C 124: 1979 All.W.C. 561. *See* also 1980 All.Cr.C. 232: 1980 All.W.C. 36, cited under Note 7, *supra*.

No provision in the Code of Criminal Procedure empowers a Magistrate in every context or generally to assist the Police investigation to secure evidence; the Identification of Prisoners Act, 1920 is completely silent as to the taking of specimen handwriting or signatures of the accused; it confines itself to the securing of measurements including finger-impressions and foot-prints of an accused or convict; the Court cannot issue a direction to the accused to give his specimen signatures and handwriting at the investigation stage. [A.I.R. 1961 S.C. 1808, explained; Operation of S. 73 considered in the light of Art. 20(3) of the Constitution; A.I.R. 1970 Mad. 85, Foll.]: (1972) 2 Cut.W.R. 1332.

The petitioner was arrested by Police in connection with certain offences of cheating, forgery etc., and subsequently released on bail. Pending the investigation, the Police filed a memo. to Sub-Divisional Magistrate requesting him to direct the petitioner to give specimen signature and hand-writing for purposes of further investigation. On issue of notice by the Magistrate: *Held*, that the Magistrate had no power to direct the accused to give his specimen handwriting or signature in the course of investigation by the Police at their instance.

Court can form opinion in respect of handwriting either (*a*) on the opinion of an expert or (*b*) on the opinion of a person acquainted with the handwriting or (*c*) by comparison by the Court itself. Under S. 73, the Court by its own comparison of writing has to form its opinion. This power under S. 73 can be exercised by the Court without being asked for by any party. While exercising such power, the Court for the purpose of comparison, can take the extraneous aid by using magnifying glass, by obtaining enlargement of photographs or by even calling an expert.

Under S. 73, an additional power is conferred on the Court to direct any person present in Court to write words or figures. But to direct a person to write words or figures for the purpose of comparison, there must be (*i*) a cause before the Court, (*ii*) the person so directed must be a party to the cause, (*iii*) he should be present in Court in respect of the said cause and (*iv*) such comparison must be necessary to determine the issue raised in the said cause. The *sine qua non* of applying the provisions of the Evidence Act is the enquiry by a Court.

The Magistrates cannot take part in the investigation by the Police or aid the Police in any manner except in cases where such assistance is specifically provided in the Cr.P. Code or under any other statute.

Also the contrast between S. 5 of the Identification of Prisoners Act and S. 73, Evidence Act shows that the Court under S. 73, Evidence Act does not have even power to issue summons to the person to be present in Court unless he is already present in Court as a party concerned in the proceeding before it. The Magistrate can direct a person to give his finger prints in the course of investigation by the Police by virtue of S. 5 of the Identification of Prisoners Act but not under S. 73 of the Evidence Act though the finger prints are included therein for the purpose of comparison: 1969 M.L.J. (Cr.) 117: 1970 Cr.L.J. 254: A.I.R. 1970 Mad. 85.

S. 73 does not contemplate that the accused can be asked, persuaded or coerced to give his handwriting or thumb-impressions at the instance of the Police so that they may at a later stage be used against him; such an order on such an application by the Police at the stage of investigation would be illegal and liable to be quashed in revision. [1970 Cr.L.J. 254 (Mad.) and 1966 M.L.J. (Cr.) 298 (Ker.), Foll.; (1962) 2 Cr.L.J. 84 (Pat.) (F.B.), Dissent. from]: 1974 Punj.L.J. (Cr.) 439: 1975 Cur.L.J. 132: 1975 Cr.L.J. 884.

Neither the Evidence Act nor the Code of Criminal Procedure empowers the Court to direct an accused to give his specimen writing or signature to the Police during investigation; S. 73 comes into play when the Court having taken cognizance of the case requires any person present in the Court to give his writing or signature when the Court itself requires such writing or signature to come to its own conclusion; the Court cannot exercise this power for the benefit of either the prosecution or the defence: (1972-73) 77 Cal.W.N. 865 (D.B.).

S. 73 does not enable the Magistrate to direct an accused to give his specimen writing when the case is still under investigation; the direction can be given for 'enabling the Court to compare' and not for enabling the investigating or other agency 'to compare'; at the investigation stage, there is no present proceeding before the Court wherein it might become necessary for the Court to compare the writings. Further, S. 73 makes no distinction between a civil and a criminal Court. None can seek the Court's assistance for directing some other person to give sample writing under S. 73 on the plea that it would help him to decide whether to institute a suit wherein the question might arise whether certain writings were those of the other person or not; that would also apply to the investigating agency seeking the Court's assistance under S. 73 on the plea that a case might be instituted before the Court where it would be necessary to compare the writings. [A.I.R

1970 Mad. 85; A.I.R. 1960 Cal. 32; (1972-73) 77 Cal.W.N. 865 (D.B.); 1975 Cr.L.J. 884 (P.&H.); A.I.R. 1957 Madh. Pra. 106; (1972) 2 Cut.W.R. 1332, Approved; A.I.R. 1962 Pat. 255 and 1971 Cr.L.J. 1591 (Andh. Pra.), Overruled]: A.I.R. 1980 S.C. 791: (1980) 1 Karn.L.J. (S.N.) 82: (1980) 2 S.C.C. 343: 1980 U.J.(S.C.) 386.

Exercise of powers under—Stage for—Warrant for arrest of accused issued under Ss. 60 to 63, Cr.P. Code—Power is not one exercised in course of enquiry or trial—Power under S. 73, Evidence Act could not be exercised: 1969 M.L.J. (Cr.) 117: 1970 Cr.L.J. 254: A.I.R. 1970 Mad. 85.

While there is no dispute regarding the legal position under S. 73 that a Magistrate has no authority to direct an accused to give his specimen writings, signatures, etc. unless the matter is pending before the Court in any proceedings, yet, there is no procedure in law to write off any evidence which has been validly led in a case; thus, where not only the signatures had been obtained, but the expert's opinion had been obtained and he had also appeared as a witness, *held*, it was open to the accused to challenge the Magistrate's orders if he was aggrieved; but whatever illegality might have been committed by the Magistrate during the investigation, yet it would not in any way vitiate the trial or do away with the evidence led before the Court: 1991 Cr.L.J. 462 (Ori.).

Where the direction for taking the thumb-impression and specimen of handwriting was made by the Magistrate before any challan was presented against the accused in the Court, the direction cannot be regarded as having been made under S. 73 of the Evidence Act in judicial proceedings before the Magistrate, but one purported to be under S. 5 of the Madhya Bharat Identification of Prisoners Act: 1957 M.P.L.J. 347: A.I.R. 1957 Madh. Pra. 106.

Specimen of handwriting—Magistrate has no power to compel an accused, let on bail, to give specimen of his handwriting to Police: (1964) 1 Cr.L.J. 94: (1964) 5 Guj.L.R. 298.

Where the accused is not before the Court and is let on bail pending investigation of the case, the Magistrate has no power to ask the accused person to go to the Police and give specimen of his signatures and handwriting. Magistrates and Police Officers can exercise only those powers which are prescribed under various laws and those powers cannot be enlarged. If there is no provision in the law for the exercise of a power that power cannot be exercised by a Police Officer, or by a Magistrate or by a Judge: 1966 M.L.J. (Cr.) 298: 1965 Ker.L.T. 1129: (1965) 2 Ker. L.R. 269.

9. Specimen obtained in Court—Sending of, to expert.—S. 73 does not prohibit sending of writing given by person in Court to handwriting expert for his opinion: (1969) 2 Mys.L.J. 158.

S. 73 read as a whole in the light of S. 45 make it clear that a Court holding an enquiry under the C.P.Code into an offence triable by itself or the Sessions Court has the power to direct the accused, in the interest of justice, to give his sample writing for its comparison with his admitted or proved handwriting by an expert chosen or approved, by the Court irrespective of the fact whether his name was suggested by the prosecution or defence; the Court's purpose for adopting such a course is to enable the Court to make comparison between the admitted and questioned documents by the Court as and when the accused is ultimately put up for trial. [1975 Cr.L.J. 1756 (Del.), Reversed]: A.I.R. 1979 S.C. 14: (1978) 2 Karn.L.J. (S.N.) 39; 1975 All.W.C. 477. *See* also 1988 Cr.L.J. 1000 (Ker.); A.I.R. 1975 Andh. Pra. 88: (1974) 2 An.W.R. 365, cited under Note 5, *supra*.

10. Direction to "any person".—The language of S. 73 is wide enough to empower the Court to give necessary direction to any person present in Court; there does not appear any reason to limit the expression 'any person' to the litigating parties, if the authenticity of a stranger's writing is necessary to be decided in a case, such person would certainly come within the sweep of the section; to interpret it otherwise would be to defeat its object; even if the section is assumed to be ambiguous, the Court must construe it in a way which may advance object of section and interest of justice: A.I.R. 1980 Pat. 253: 1980 B.L.J.R. 398.

The words 'any person' in S. 73 of the Evidence Act are wide enough to cover an accused person also. Taking specimen handwriting would not come under Ss. 5 and 6 of the Identification of Prisoners Act. S. 73 of the Evidence Act is an enabling provision under which the Court may direct any person present in Court to write in his presence: 1966 M.L.J. (Cr.) 298: 1965 Ker.L.T. 1129: (1965) 2 Ker.L.R. 269.

Though the words 'any person' are so wide as to include all persons, the words 'person present in Court' limit only those persons who are before the Court to whom the Court may give a direction, to write any words or figures. Again, those words may not include an on looker or a spectator but refer to persons who are parties to a 'cause' pending before the Court. It may include even the witnesses of the contesting parties in the said cause: 1969 M.L.J. (Cr.) 117: 1970 Cr.L.J. 254: A.I.R. 1970 Mad. 85.

The expression 'any person' in S. 73 may include an accused. This section clearly specifies the purpose for which the Court may issue the direction; the Legislature intended to confine the issue of direction to the purpose specified, which is nothing more than to enable the Court to make a comparison of different words or figures; it necessarily implies that the comparison is to be done by the Court itself, with the assistance of an expert or otherwise. [A.I.R. 1961 S.C. 1808, explained; Operation of S. 73 considered in the light of Art. 20(3) of the Constitution; A.I.R. 1970 Mad. 85, Foll.]: (1972) 2 Cut.W.R. 1332.

'Any person' means and includes a person accused of an offence or a person who is, in exercise of a lawful authority, arrested and brought before the Court for any purpose whatsoever: (1971) 2 A.P.L.J. 174: (1971) 2 An.W.R. 94.

The words 'any person' include a person accused of an offence. There are no words limiting the section to persons other than a person accused of an offence and in the absence of any such limiting words it is not open to the Court to read them into the section: A.I.R. 1955 Cal. 247: 1955 Cr.L.J. 790.

11. Specimen of hair.—An order requiring the accused to give specimen of hair for the purpose of identification is not violative of Art. 20(3) or Art. 21 of the Constitution: 1971 Cr.L.J. 1405 (Raj.).

The prosecution can be granted permission to obtain head hair sample of the accused for the purpose of comparison during investigation: (1993) 52 Del.L.T. 586: 1994 Cr.L.J. (N.O.C.) 430.

12. Specimen of voice.—Nothing in the Evidence Act even remotely suggests that the Court has power to call upon a prosecution witness to get his sample voice recorded for comparison with his disputed tape recorded voice; neither S. 73 nor S. 45 provides for recording of voice for comparison by Court or the expert witness. Even S. 146 which deals with the scope of questions which can be put in cross-examination does not provide for giving any such direction by a Court to the witnesses: (1981) 19 Del.L.T. 390: 1981 Cr.L.J. 927: (1981) 83 Punj.L.R. 154. But *see* (1985-2) 88 Punj.L.R. 41, *infra*.

The Court can direct a party to the suit to give his voice in tape record for comparison. [(1981) 83 Punj.L.R. 154: 1981 Cr.L.J. 927: (1981) 19 Del.L.T. 390, Dissent.; (1969) 71 Punj.L.R. 519, Foll.]: (1985-2) 88 Punj.L.R. 41. *See* also (1983) 1 An.L.T. 438: (1983) 1 A.P.L.J. 197.

13. Specimen of thumb-impression.—The Court can direct any of the parties at the instance of another to give his specimen thumb-impression or handwriting, as the case may be; such request cannot be declined merely because it was made by a litigant and could be used as evidence by him: A.I.R. 1986 P.&H. 174: (1985-1) 87 Punj.L.R. 47: 1984 Rev.L.R. 453: (1984) 2 Ren.L.R. 319.

Taking of thumb-impression of accused in spite of his protests—Use of—Court may however draw presumption against him: 1960 Cr.L.J. 297: A.I.R. 1960 All. 157.

Court ordering accused to make thumb-impression for purpose of comparison—Accused refusing to do—Adverse inference against accused, validity of. *See* I.L.R. 6 Pat. 623: A.I.R. 1928 Pat. 103.

The practice of taking the thumb-impression of the accused in the course of trial and using it against him is inconsistent with the principle of a fair trial and has to be severely condemned. [I.L.R. 1 Pat. 242, Foll.]: A.I.R. 1950 Trav.-Co. 5. But *see infra*. S. 342, Cr.P.Code does not make S. 73 of Evidence Act inapplicable to criminal trials. The taking of specimen thumb-impression of the accused under the direction of the Court is in strict compliance with S. 73 and S. 45 (*iii*)(*c*) of the Evidence Act and also S. 5 of Identification of Prisoners Act XXXIII of 1920. [I.L.R. 1 Pat. 242, Not foll.; I.L.R. 6 Pat. 305; I.L.R. 6 Pat. 623; I.L.R. 50 Mad. 462; I.L.R. 56 Bom. 304; (1925-26) 30 Cal.W.N. 373; I.L.R. 1 Rang. 759 (F.B.), Foll.]: 83 Cal.L.J. 397: A.I.R. 1950 Cal. 66, followed in I.L.R. (1953) Mys. 697: A.I.R. 1954 Mys. 117.

PUBLIC DOCUMENTS

74. Public documents.—The following documents are public documents—

(1) Documents forming the acts or records of the acts—

(*i*) of the sovereign authority,

(*ii*) of official bodies and tribunals, and

(*iii*) of public officers, legislative, judicial and executive, [1][of any part of India or of the Commonwealth,] or of a foreign country;

(2) public records kept [2][in any State] of private documents.

---

1. The original words "whether of British India, or of any other part of Her Majesty's dominions" have successively been amended by the A.O. 1948 and the A.O. 1958 to read as above.

2. Substituted by the A.O. 1950 for "in any Province".

Section 74—Synopsis.

1. Scope.
2. What are public documents.
3. What are not public documents.

---

1. Scope.—A public document has to satisfy the main requirements of S. 74; it must form the acts, or record of the acts of the sovereign authority, official bodies, tribunals, and public officers, legislative, judicial and executive, of any part of India or of the Commonwealth or of a foreign country. Where a document was claimed to be made by a public officer, *viz.*, the Deputy Director of Mines Safety, acting as a statutory authority under the Mines Act, 1952, *held*, being only a report of a statutory authority functioning under S. 23 or S. 24 of the Mines Act, it was not a public document; there was no data on record to support the claim: (1985) 26 Guj.L.R. 1315: (1986) 6 Guj.L.H. 27 (D.B.).

Under S. 74, documents forming the acts and records of official bodies and public offices are pubic documents; their certified copies are admissible in evidence without calling for or proving their originals but opportunity has to be given to the other party to adduce evidence to controvert presumption arising out of such documents admitted in evidence; otherwise the proceedings would be vitiated: (1982-83) 87 Cal.W.N. 294 (D.B.).

Where no attempt was made to establish any ground entitling a party to lead secondary evidence of what is not an original entry but an original document which must be in the custody of either the executant or some other person if proved to have been made over to the latter by the executant, such a document is not admissible in evidence by simply producing its certified copy from the registration office without taking steps for production of the original or laying foundation for leading secondary evidence. [(1966) 32 Cut.L.T. 343, Expl.]: (1970) 36 Cut.L.T. 1211 (D.B.).

Where an entry was made in revenue record in performance of duty but the Revenue Officer had done so under S. 151 of the C.P.Code when there was no such provision in the W.B. Estates Acquisition Act, *held*, the entry not having been made in performance of duty was not relevant under S. 35; it did not fall under S. 74 either: A.I.R. 1982 Cal. 294: (1982) 1 Cal.L.J. 256: (1982) 1 Cal.H.N. 206 (D.B.).

All public documents have this characteristic that they are kept in some special custody and provable by means of a copy without production of the original. Their accessibility to the public and the right to inspect them are their hall marks. It follows that the right to inspect (which is assumed in S. 76) and take copies of public documents are essential qualities of public documents. Every officer appointed by law to keep records ought to deem himself for that purpose (for the production of documents) a trustee: (1981) 83 Punj.L.R. 96: 1981 Cr.L.J. 538: (1981) 19 Del.L.T. 104.

See I.L.R. 20 Mad. 189. Schoolmaster, is an Executive Officer of Government under S. 74(1)(*iii*): I.L.R. 50 Bom. 716: A.I.R. 1927 Bom. 11; 12 Mys.L.J. 133: 39 Mys.H.C.R. 406. A public document is one prepared by a public servant in the discharge of his official duty. The mere fact that it is kept in a public office does not lead to the inference that it is a public document: A.I.R. 1928 Lah. 640.

'Public Officer'—Police officer—Record of facts noted by—If 'public document': 1970 M.L.J. (Cr.) 320.

Records of acts of public officers are public documents, but they do not furnish proof of all facts to which they refer: 105 I.C. 353: A.I.R. 1928 Nag. 93. *See* also I.L.R. (1937) Bom. 464: A.I.R. 1937 Bom. 307; 1941 O.A. (Supp.) 807; 1941 All.W.R. (Rev.) 933 (Certified copies of extracts from patwari's records).

A document which is not a public document or not admitted cannot be exhibited and looked into unless it is proved by oral evidence or otherwise proved: A.I.R. 1986 All. 126: (1985) 11 All.L.R. 566: 1985 All.C.J. 507.

Test for determining whether a document is a public document or not—Certified copy—Issue of—Not a test: (1985) 1 M.L.J. 182: (1985) 98 Mad.L.W. 105 (D.B.).

The mere fact that some documents are forthcoming from the custody of a Government Department, and they happened to bear the seal impression of the said Department, *held*, will not dispense with the necessity of formally proving the same in the Court of law; the documents are certainly not public documents and they are as such needed to be formally proved: A.I.R. 1978 All. 185: 1977 All.W.C. 597: (1977) 3 All.L.R. 707.

S. 74 only deals with public documents; it is S. 76 which actually deals with their certified copies. A copy prepared from the certified copy of the original certified to be true copy by a competent officer when the original was not before him, *held*, cannot be received in evidence: 1990 Punj.L.J. 291: (1990) 1 Rev.L.R. 515.

A person seeking to prove a public document is relieved of the obligation to produce its original; he may prove it by producing its certified copy; it merely proves what the document contains but nothing more. [A.I.R. 1918 Cal. 988, Dissent. from]: A.I.R. 1983 Bom. 1: 1983 Mah.L.J. 339.

Public documents—Consideration of evidence by quasi-judicial authority—Opportunity denied for rebutting—Validity. *See* (1982-83) 87 Cal.W.N. 294 (D.B.).

Though the Register of Baptism does not fall under any of the classes mentioned in S. 74 and it is not a public document, but there is a provision in S. 82 which make applicable in India, the same presumptions which are recognised in England with regard to certain documents. They are declared to be admissible in the same manner as in England. The Register of Baptism will fall under S. 82 and a certified extract therefrom will be admissible in terms of S. 82: (1986) 99 Mad.L.W. 901: (1986) 2 M.L.J. 235.

A document termed as Shajra Sakni having found to be not a copy of any Shajra Sakni prepared by any revenue official, *held*, no presumption of truth could be attached to such a document under S. 44 of the Punjab Land Revenue Act, 1887: A.I.R. 1988 Del. 177: (1987) 33 Del.L.T. 363.

For determining age of a person, the School admission records cannot be brushed aside merely because such records are not maintained by a public officer; under S. 35, all that is necessary is that the documents should have been maintained regularly by a person whose duty it is to maintain the record; there is no legal requirement that they should be maintained by a public officer only; that is a requirement only for public documents. [A.I.R. 1964 S.C. 1625 and A.I.R. 1963 Ker. 18, Rel. on]: A.I.R. 1982 S.C. 1057: 1982 Cr.L.J. 994: (1982) 2 S.C.C. 202: 1982 U.J.(S.C.) 426.

Though S. 139 of the Railways Act, 1890 permits proof of entries in records or other documents of Railway administration by production of a copy of such entries, before, however, such copies can be tendered and accepted as a proof of such entries, a certificate by the officer having custody of the records or other documents under his signature and stating that it is a true copy of the original entries and that such original entries are contained in the records or other documents of the Railway administration in his possession, has to be appended to that copy: A.I.R. 1983 Madh. Pra. 59: 1983 Jab.L.J. 197: 1983 M.P.L.J. 165.

Where R.S. Khatian, a record of rights, prepared in 1964 showed title of one person and the one prepared in 1966 in the name of a different person without any proceedings for correction having been taken, *held*, the second entry being unauthorised had no value in the eyes of law; the normal rule that the later entry should be preferred over the earlier was not attracted: A.I.R. 1982 Cal. 294: (1982) 1 Cal.L.J. 256: (1982) 1 Cal.H.N. 206 (D.B.).

The Orissa Government Land Settlement Act, 1962 did not debar 'any other person' to either apply or be settled with land even if it requires that land can be settled on others only in the absence of persons belonging to specified categories. Once the competent authority has settled land, it can be safely presumed that the authority had taken into account all facts and followed all guidelines and requirements of law. In the absence of any thing on record to show that the facts stated in the applications were disputed before the settlement or that the requirements of the Act and the Rules or the guidelines had not been followed, *held*, there would be no scope for the Board of Revenue to intervene under S. 7-A(3): (1976) 42 Cut.L.T. 251.

The In-door Register, the Out-door Register, the discharge certificate, which are expected to be kept in regular course of business, are more reliable and authentic than a stray piece of paper certifying that some body was under the treatment of a Doctor granting the same for a certain period which can be created at any time: (1972) 38 Cut.L.T. 1044 (D.B.).

Inspection of papers of Bangalore Improvement Board relating to allotment of sites—Right of—Allotment papers—If public documents. *See* (1972) 1 Mys.L.J. 101 (D.B.).

Where inter-departmental communications between the Reserve Bank of India and the Controller of Capital Issues in the custody of the C.B.I. were tendered as evidence in the Court, *held*, are admissible evidence even without being proved by their writers but having very weak probative value, they can be used only for corroboration; but if they are proved by their respective writers they can be taken as independent evidence: A.I.R. 1980 Cal. 83.

Entry in death register—Presumption of correctness attaches: 1965 B.L.J.R. 738: A.I.R. 1966 Pat. 231.

Applicability—Document in custody of accused—Foodgrains Procurement Stock Register—If public document—Order for production—Legality: A.I.R. 1958 Ori. 1: 1958 Cr.L.J. 59.

Ownership—Presumption from entries in survey and settlement registers: A.I.R. 1960 Andh. Pra. 222: (1960) 1 An.W.R. 340.

Private documents (as) Kobalas, conveyances, leases, etc., filed in Courts or public offices, how proved: 22 W.R. 355; 14 I.A. 71: I.L.R. 14 Cal. 486.

Certified copies of confessions by accused would be admissible under S. 74 to prove the act of the Magistrate recording the confession. Where there are no irregularities and the statement was taken in accordance with law, then, under S. 80 there would be a further presumption that the circumstances under which it was stated to have been taken were true. The copies would not be sufficient to prove the identity of the accused: I.L.R. 56 All. 302: 1933 All.L.J. 1551: A.I.R. 1934 All. 81 (F.B.).

A confession recorded by a second class Magistrate not specifically empowered during the investigation of a case, is not admissible in evidence: A.I.R. 1972 S.C. 2077: 1972 Cr.L.J. 1317.

As to report by Magistrate called for by High Court on an application for transfer. *See* 46 Mys.H.C.R. 402.

A certified copy of a registered mortgage deed may be admissible in evidence under S. 65(*e*), Evidence Act, as secondary evidence but that does not dispense with the proof of actual execution. [(1954) 2 M.L.J. (Andhra) 75, Disting.]: I.L.R. (1961) Cut. 249: A.I.R. 1962 Ori. 40.

Private and public documents—Record of the Court and Record of the Act of the Court—Distinction—Only the portion recording the act of the Court is a public document—Compromise by private parties filed in Court—Contents of compromise by itself not a public document and cannot be proved by certified copy: 1966 Cr.L.J. 967 (1) (Guj.).

The certificate of marriage issued by the Devanathaswamy Temple's Executive Officer who is a public servant, *held*, is legal evidence in prosecution for contracting second marriage during the subsistence of the first marriage; its contents stand proved by mere production of its original: (1988) 2 Hindu L.R. 783 (Mad.).

Commissioner's report in an earlier suit is admissible in a subsequent suit: (1993) 2 An.L.T. 471.

Regarding report of Commissioner and sketch marked by consent of parties. *See* (1981) 1 Karn.L.J. 361. *See* also (1981) 7 All.L.R. 293, cited under S. 77, *infra*.

2. What are public documents.—Printed copy of Index Register of lands granted on

lease in city: I.L.R. (1942) Bom. 357: A.I.R. 1942 Bom. 161. Loan register in public debt office in Bank of Bengal: I.L.R. 31 Cal. 284; Foodgrains Procurement Stock Register: A.I.R. 1958 Ori. 1. Orders of Inam Committee: I.L.R. (1937) Bom. 464: A.I.R. 1937 Bom. 307.

Death register is a public document: 1974 B.L.J.R. 16 (Sum.). *See* also S. 35, Note 5, *supra*.

The State Bank of Dholpur Act, 1915 being an Act of the sovereign authority of then State of Dholpur, is a public document; statement contained therein is admissible in evidence without requiring any further proof: A.I.R. 1971 Raj. 6.

An agreement between the erstwhile Ruler of a State and the Government of India regarding setting up a public trust for management of a religious institution, *held*, is a public document: A.I.R. 1986 All. 75.

Parchas distributed to cultivators: 19 Cr.L.J. 886: 47 I.C. 82 (P.).

Items of entry in Register of inventions: 4 All.L.J. 11. District Gazette: 3 U.P.L.R. (B.R) 30. Dakhalnamah is public document: A.I.R. 1927 All. 52; Dakhaldhani (document purporting to transfer possession under orders of Court): 1941 R.D. 867: 1941 All.W.R. (Rev.) 907. Entry in Khewats: (1948) 2 M.L.J. 226. Crop cutting report of Revenue Officer under Bengal Tenancy Act: 8 Pat.L.T. 74: A.I.R. 1927 Pat. 167. *See* also 7 Pat.L.T. 761: A.I.R. 1926 Pat. 436. As to Government Survey plan, *see* 10 I.C. 653; 22 Pat.L.T. 699: A.I.R. 1941 Pat. 260 (survey and settlement report).

An entry in the Dag Chitha maintained under the Manipur Land Revenue and Land Reforms Act showing the nature of the land is admissible in evidence. The Dag Chitha containing entries made according to Rr. 55 (*ii*) and 66 of the 1961. Rules in Form VII is a 'public document' under S. 74 of the Evidence Act forming the act of the record of the act of a public officer. S. 2(17), C.P.Code defines a 'public officer' as a person falling in any one of the categories mentioned therein including an officer, whose duty is to make any survey of Government property, etc. S. 35 of the Evidence Act makes an entry in any public or official record made by a public servant in the discharge of his official duties as a relevant fact. The fact that in a case the survery is said to be still going on and that the record of rights is not finally published may only affect its evidentiary value: A.I.R. 1969 Manipur 79.

Extract from register prescribed under S. 215(10) of Madras Estates Lands Act (I of 1908)—Extract should be deemed to be copy of public document and be admitted in evidence: (1969) 82 Mad.L.W. 571.

Preliminary order under S. 144, Cr.P. Code—Police report and reference from Health Officer referred to therein—Copies of—Right of accused to: 12 Mys.L.J. 197: 39 Mys.H.C.R. 172. Report in form *B* under S. 173, Cr.P.Code, is public document: 7 Mys.L.J. 231. Also deposition of witnesses: I.L.R. 5 Pat. 777: A.I.R. 1927 Pat. 61; A.I.R. 1933 Rang. 212; 14 Cal.L.J. 578. *See* also (1914-15) 19 Cal.W.N. 1068 (Letters of Administration); (1913-14) 18 Cal.W.N. 644: 23 I.C. 529 (notice issued under S. 117, Cr.P.Code); 18 I.C. 250 (pedigree filed before Settlement Court).

Settlement maps, however important they may be, and whatever be their evidentiary value, cannot take the place of documents of title: 1947 O.W.N. 509.

Map prepared in previous suit between defendant and another person—Maker not examined. Value of. *See* I.L.R. (1946) 1 Cal. 149; I.L.R. 35 All. 165 (return of village officer on reference by Political Agent).

A phant which is a statement showing the division of land and filed by a patwari in Court is a public document under S. 74 (1)(*iii*) as it is a record of the act of a public officer and can be admitted in evidence on production of a certified copy thereof under S. 76 of the Act: 1948 R.D. 472. Statements of witnesses recorded by a public officer are public documents and under S. 77, they may be proved by certified copies issued under S. 76: 1948 R.D. 461. *See* also A.I.R. 1946 Nag. 377.

A document containing the sanction given by a District Magistrate under S. 29 of the Arms Act falls within the definition of a 'public document' in S. 74, and its certified copy can be produced in proof of its contents, and it can, therefore, be proved, as provided for in S. 77, Evidence Act, by production of a certified copy or the original. Where, therefore, the original sanction itself is presented with the charge-sheet, no formal proof of it is necessary: I.L.R. (1955) Patiala 715: A.I.R. 1956 Pepsu 11, followed in A.I.R. 1956 Pepsu 12: 1956 Cr.L.J. 103.

Offence under S. 27—Proof of notification under S. 19 necessary—No judicial notice can be taken—Notification is a public document—Proof—Nature of: 1966 Ker.L.J. 76.

Memorandum of Association of Company—Is a public document within S. 74(2)—Admission of secondary evidence of its contents: A.I.R. 1967 Cal. 390.

The Market Committee constituted under the provisions of S. 4(*a*) of the Madras Commercial Crops Markets Act is an official body within the definition of S. 74 of the Evidence Act. The minutes book kept by such committee as per the provisions of R. 18 of the Madras Commercial Crops Markets Rules, 1948 which is a record of the proceeding of the meetings of the Market Committee is a public document which could be proved by production of a copy under S. 65(*e*), Evidence Act: 1961 Ker.L.J. 639: (1961) 2 Ker.L.R. 62: 1961 Ker.L.T. 510: (1962) 2 Cr.L.J. 546.

'Pahanies', prepared by the revenue authorities in the course of their official duties, are public documents: (1974) 1 Karn.L.J. (Jr.) 5 (S.N.) 14.

Village record.—Extracts of village records are public documents and can be taken judicial notice of: 1965 All.W.R. (H.C.) 367: 1965 All.L.J. 677.

Record of Gram Panchayat.—Gram Panchayat being a public body created under the M.P. Gram Panchayats Act, 1962, *held*, is covered by the words 'Official bodies and Tribunal' appearing in S. 74(1)(*ii*); thus, certified copies of the proceedings of Gram Panchayat can be treated as public documents: 1984 M.P.L.J. (N.O.C.) 71.

Pariwarik register.—The Pariwarik register prepared under the provisions of the Bihar Panchayat Election Rules, 1959, is a public document: A.I.R. 1972 Pat. 13: 1971 B.L.J.R. 418 (D.B.).

Adangal.—'Adangal' which is one of the Revenue Accounts maintained by the Karnam, who is a public officer, is a public document within the meaning of S. 74 and the contents of that document can be proved by production of a certified copy of the same: (1971) 1 A.P.L.J. 13.

Settlement record.—Settlement record, with history of district attached to it: A.I.R. 1924 Lah. 639. *See* also A.I.R. 1941 Pat. 260. Canal Jamabandi papers: L.R. 3 A. 386 (Rev.).

Record of rights.—The entries in a later record of rights are presumed to be correct until rebutted by evidence; there is, however, no presumption of correctness in respect of entries in an earlier record of rights. The mere fact that a certain land was recorded as niskar in a record of rights of the year 1893, cannot possibly rebut the presumption or correctness relating to the entry in the current (later) record of rights of the same land as rent-paying land, especially when the former entry was based on a compromise, and entry in the later record has become final and has remained unchallenged: A.I.R. 1949 Cal. 609.

Record of rights—Entries in—Admissible though record not finally published: A.I.R. 1969 Manipur 84.

Post Office record.—Records maintained by the Post Office are public records; the entries in these records, therefore, can be produced in a Court of law as a part of a public record: A.I.R. 1982 All. 44: 1981 All.W.C. 612: 1981 All.C.J. 518: (1982) 8 All.L.R. 70; 1980 All.W.C. 64.

Election record.—The Check Memo which is required to be maintained by the officer-in-charge of the counting table is a document forming record of the acts of a public officer and, therefore, a certified copy thereof given by the Collector in whose custody the document is kept, can be admitted in evidence in proof of the contents of the original document: A.I.R. 1975 S.C. 1863: 1975 U.J.(S.C.) 626.

A confidential report on the method adopted by the Election Officer as to counting of votes at an election by show of hands submitted by the Additional District Panchayat Officer to the Regional Inspector of Municipal Councils and Local Boards, is a public document and is admissible in evidence: 1955 An.L.T. 398: 1955 An.W.R. 471.

Voters' list.—[*See* also S. 35, Note 21, *supra*]. The voters' list prepared under the Representation of the People Act is a public record under S. 35 and a public document under S. 74(1)(*iii*); it is admissible as such; it is not necessary to prove its genuineness by examining its maker or supplier as a witness: A.I.R. 1983 Ori. 279 (D.B.); 1978 B.L.J.R. 165 (D.B.); A.I.R. 1972 Ori. 158: (1972) 1 Cut.W.R. 57: (1972) 38 Cut.L.T. 82; (1973) 2 Cut.W.R. 1108; A.I.R. 1982 N.O.C. 113 (Gau.); A.I.R. 1991 Ori. 166: (1990) 70 Cut.L.T. 510; 1978 Cr.L.J. 752: 1977 Mad.L.W. (Cr.) 217: 1978 M.L.J. (Cr.) 327 [Entries in voters' list of village showing relationship of husband and wife supported by *karnam* of village, *held*, are admissible to prove marriage].

An entry in the voter's list cannot be discarded on the ground that the enumerator who prepared the voter's list has not been examined: (1991) 1 Hindu L.R. 247 (Ori.).

An entry in the electoral rolls, it is true, is not conclusive; but unless proved to be incorrect, they do have evidentiary value as corroborative evidence: A.I.R. 1981 Madh. Pra. 69: 1981 M.P.L.J. 192 (D.B.).

Voters' list—Admissibility and evidentiary value. *See* 1978 B.L.J.R. 165 (Pat.).

The extract from the village electoral roll and family register, proved by a certified copy thereof being public documents, are not required to be proved by evidence *aliunde*; they were presumptive evidence and the burden lay on the other party to rebut truth of the entries: A.I.R. 1980 All. 174.

Where in a suit for partition of ancestral properties belonging to the grand-father, the plaintiff's status as son of the grandfather was impeached who relied, *inter alia*, on the Voters' lists which were rejected by the trial Court on the ground that two of its pages do not bear the seal of the Panchayat or Election Office and there were no signatures on the seal of the Police Station, *held*, the voters' lists prepared under the Representation of the People Act were public record under S. 35 and public document under S.74(1)(*iii*) of the Evidence Act, they were admissible in evidence as such without examining their author or the authority furnishing copy thereof: A.I.R. 1983 Ori. 279 (D.B.). But *see contra* cases under Note 3, *infra*.

Court's record.—Records of acts of public tribunals for example, labour Courts, are public records which the parties to the adjudication are entitled to inspect and of which they will, therefore, be entitled to certified copies under S. 76: A.I.R. 1959 Mys. 180.

Proof of public document—Decree of Court is public document and no formal proof of it is needed: 1969 B.L.J.R. 932.

An order sheet in a case is a public document being the record of an act of a public judicial officer and the presumption is that it is genuine. It would require evidence and not mere suggestion that it has been fabricated to justify its rejection: 1937 Pat.W.N. 119: A.I.R. 1937 Pat. 534. *See* also (1941-42) 46 Cal.W.N. 967.

An order duly numbered, dated and purported to be signed by the A.D.C. for the D.C. and bearing the official seal of that officer: A.I.R. 1959 Manipur 43.

Where the accused remained in abscondence for more than 33 years and meanwhile the eye-witnesses had died and the record of the commitment proceedings was destroyed, but the certified copy of the commitment order showed that an order had been made to record proceedings under S. 512 of the Code of Criminal Procedure, *held*, the statements made by the witnesses in the commitment proceedings were 'public document' as defined in S. 74, Evidence Act; their certified copies could be granted under S. 76, Evidence Act and produced and used in proof of their contents *vide* S. 77, Evidence Act; the presumption of genuineness was also available to the certified copies of depositions under S. 80, Evidence Act. Thus, the depositions of the witnesses recorded under S. 512 against the accused during the commitment proceedings in 1936 stood validly proved: (1974) 76 Punj.L.R. 57 (D.B.). But *see contra* cases under Note 3, *infra*.

Plaint/Written statement.—The plaint and written statement form part of record of the acts of the Judge who is a Judicial Officer and to the extent of its proving the factum of filing a particular suit against a particular person the said document constitutes a public document within the meaning of S. 74; they are admissible by producing the certified copies to the extent of showing the existence and the condition of such documents within the meaning of S. 65: (1987) 2 An.L.T. 597.

The certified copy of the plaint is a public document and is, therefore, also admissible in evidence for the purpose of proving the contents thereof. [(1873) 10 Beng.L.R. (Appendix) 13, Foll.]: 1989 Cr.L.J. 1724: (1989-1) 9 Guj.L.H. 82. But *see contra* case under Note 3, *infra*.

Record of municipality.—Sanctioned plan granted by the Municipality, *held*, is a public document and it can be proved by producing a certified copy thereof: 1981 Mah.L.J. 397.

Municipal proceedings: I.L.R. 19 All. 293. But *see* 30 I.C. 643: 16 Cr.L.J. 659 (C.).

Assessment registers of a Municipality are public documents prepared in performance of public documents; they can be proved by

certified copies: A.I.R. 1982 Cal. 294: (1982) 1 Cal.L.J. 256: (1982) 1 Cal.H.N. 206 (D.B.).

Letter written to the Nazul Department in the Nagar Mahapalika becomes public document and, thus, a photocopy of it is not admissible; it is the certified copy which is admissible: A.I.R. 1989 All. 17: (1988) 14 All.L.R. 814.

Nazul Officer recording statement while preparing record—Nazul Officer acts as public servant—Copy of statement is sufficient to prove it and Nazul Officer need not be summoned to prove: 1963 M.P.L.J. (Notes) 164. But *see contra* cases under Note 3, *infra*.

Record of Registrar.—A certified copy of the entry of registration of a deed is admissible in evidence under Ss. 74 and 77 as proof of the entry but not of the contents of the deed: 177 I.C. 517: A.I.R. 1938 Cal. 120.

The certified copy of the sale deed in respect of disputed land is a 'public document' and is, therefore, admissible for the purpose of proving the contents of the original document: 1989 Cr.L.J. 1724: (1989-1) 9 Guj.L.H. 82; A.I.R. 1979 Gau. 14.

A Book in the registration office where copies of sale deeds admitted to registration are kept is a public document: A.I.R. 1989 Ori. 27: (1988) 65 Cut.L.T. 586.

The register of money-lenders maintained in the office of Sub-Registrar in accordance with the provisions of the Bihar Money-Lenders Act, 1938, is a public document; thus, a certified true copy of the entry in such register is admissible in evidence to show that a person is a professional money-lender: A.I.R. 1974 Pat. 103 (D.B.).

The Registrar's office certainly keeps a public record of the exchange deeds registered in that office. The certified copy of the exchange deed, therefore, is a secondary evidence of the public record kept in the Registrar's Office. It is, therefore, admissible in evidence both under S. 65(*e*) or (*f*): (1991-1) 99 Punj.L.R. 129.

Public record of a wakf deed, which is a private document, kept in the office of the Sub-Registrar is a public document as defined in S. 74(2); its certified copy is admissible in evidence: A.I.R. 1991 Gau. 17.

Entry in register of powers-of-attorney maintained by Registering Officer—Admissibility. *See* (1938-39) 43 Cal.W.N. 907: A.I.R. 1939 Cal. 569.

A registered general power of attorney is a public document within the meaning of S. 74(2); its certified copy can be admitted in evidence to prove contents of the original under S. 77: (1988-2) 94 Punj.L.R. 551: 1989 Punj.L.J. 332; (1994-1) 106 Punj.L.R. 353. But *see contra* cases under Note 3, *infra*.

Assessment record.—Records in the assessment files constitute public documents within the meaning of S. 74 as forming the acts or records of the acts of a public officer or of an official body. The right to obtain copies of public documents still depends on the applicant's right to inspect them, within the meaning of S. 76 of the Indian Evidence Act. [7 M.L.J. 167 (F.B.), Rel. on]. The words 'right to inspect' should not be interpreted in a restricted or narrow sense. The right to inspect under S. 76 is not to be upheld or rejected, depending upon the purpose for which inspection is sought, though the purpose would have a relevance in determining whether the right set up is illusory or not: 1960 Ker.L.J. 1191: I.L.R. (1960) Ker. 1292: A.I.R. 1961 Ker. 32.

Although an income-tax assessment order is a public document within the meaning of S. 74, the assessee has no right to inspect it, and has, therefore, no right to demand a certified copy of it under S. 76. Accordingly, a copy of that order obtained from the Income-tax Department is not under S. 77, a certified copy which may be produced in proof of the contents of the original order of assessment: A.I.R. 1940 Cal. 187: I.L.R. (1939) 2 Cal. 394: (1938-39) 43 Cal.W.N. 1169. But *see* also A.I.R. 1940 Mad. 768: (1940) 2 M.L.J. 257 (F.B.); 50 Mad.L.W. 815: A.I.R. 1940 Mad. 161; A.I.R. 1939 Mad. 546: (1939) 1 M.L.J. 791.

An income-tax assessment order is a public document under S. 74 and a certified copy of it would be admissible under S. 65: 1944 All.L.J. 118: A.I.R. 1944 All. 114.

Assessment order can be produced by an assessee or his representative-in-interest in evidence, and in such a case, the prohibition provided in S. 54 of Income-tax Act, 1922 does not apply. [A.I.R. 1963 Ori. 11, Affirm.]: A.I.R. 1971 S.C. 671: 1971 U.J.(S.C.) 159.

An assessee has a right to inspect statements recorded for orders passed by

Income-tax Officers, and certified copies granted by the Department will, therefore, be admissible in evidence to prove the contents of those documents. There is nothing in S. 54 of the Income-tax Act which prohibits the giving of such evidence. This section merely directs officials of the Department to treat such documents as confidential and it is open to an assessee to waive that right and to give evidence: 1946 Nag.L.J. 406: I.L.R. (1946) Nag. 433: A.I.R. 1946 Nag. 377.

S. 54, Income-tax Act, does not prohibit the assessee or assessees themselves to require the Income-tax Officer to furnish certified copies of the assessment order, or of any statement made therein in the proceedings held before him. Indeed, the Income-tax Manual clearly lays down that a copy of the assessment order will be supplied free of cost to the assessee, and that subsequent copies may be supplied on payment of charges. The returns are public documents within the meaning of S. 74, Evidence Act, and hence the certified copies of the income-tax return are admissible in evidence under S. 76, Evidence Act: A.I.R. 1955 All. 388.

Assessment orders under the Bihar Agricultural Income-tax Act, 1948, are public documents as forming the acts or records of the acts of public officers: A.I.R. 1959 Pat. 515. As to Income-tax returns, *see* A.I.R. 1940 Mad. 768: (1940) 2 M.L.J. 257 (F.B.); I.L.R. (1939) 2 Cal. 394: A.I.R. 1940 Cal. 187; I.L.R. (1940) Mad. 329: A.I.R. 1940 Mad. 161; A.I.R. 1939 Mad. 546: (1939) 1 M.L.J. 791; A.I.R. 1946 Nag. 377.

An income-tax return as well as a statement filed in support of it is a public document within the meaning of S. 74 of the Evidence Act. Certified copies thereof would, therefore, be admissible under S. 65(*e*) of that Act and though a Court is prohibited from requiring a public servant to produce the documents mentioned in S. 54 of the Income-tax Act or to give evidence in support of them, it does not follow that the Court may not admit in evidence a document which falls within S. 54(1). All that S. 54, Income-tax Act means is that the income-tax authorities are to regard communication made to them for the purposes of the Income-tax Act as being confidential, the object being to enable people to feel that they can freely state the facts relating to their income, facts which may often involve confidential matters relating to their business, without fear of the matters being disclosed. If a document can be given in evidence, without requiring a public servant to produce it, there is nothing in the section to prevent that from being done. Certified copies of a public document do not and need not contain any endorsement as to the person who obtained them. If such certified copies are filed, they must be admitted in evidence under the Evidence Act, 'to prove the existence, conditions or contents of such documents' without reference to the person who procured them: (1957) 2 An.W.R. 499: A.I.R. 1958 Andh. Pra. 200.

Income-tax documents—Suit to recover business dues—Plaintiff claiming defendant to have transacted through intermediaries—Income-tax assessment order against a plaintiff's witness produced to show dealings by defendant through intermediary—Such order being a public document within the meaning of S. 74, its certified copy is admissible under S. 65(*e*), yet it cannot be used as evidence against the defendant: 1967 Ker.L.J. 237.

A profit and loss account filed in the Income-tax Office, is a public document. Therefore, a certified copy of it would also be admissible. But where it was not shown that the statement amounted to anything more than an admission in the debtor's favour and was relevant and, besides, the document was filed at a very late stage. *Held*, that the debtor was not entitled as of right to put in the document at that stage and no prejudice would be caused to him by the refusal on the part of the Court to allow him to produce a certified copy of the statement: A.I.R. 1957 Assam 49. But *see contra* case under Note 3, *infra*.

Visa.—The Visa Officer of the Government of India who issues a visa at a place situated in a foreign country is an officer of the Government of India and the visa issued by him is a public document within the meaning of S. 74 of the Evidence Act. Under S. 74 even the record of the acts of the officer of a foreign country would be a public document. Further, each one of the entries in the passport would be a public document under S. 74 of the Evidence Act as constituting an act or the record of the acts of public officers. A residential permit issued in favour of a foreigner is a public document being an act or the record of the acts of the Registration Officer: (1963) 4 Guj.L.R. 1073: (1963) 2 Cr.L.J. 265: A.I.R. 1963 Guj. 226.

First information report.—F.I.R. is a public document and the concerned party is entitled to certified copy thereof under Ss. 74(1)(*iii*) and 76: 1971 Cr.L.J. 875 (Cal.); 1992 Cr.L.J. 2377: (1992) 2 Crimes 252 (Guj.); A.I.R. 1981 P.&H. 119: 1981 Hindu L.R. 16; 1980 Cr.L.J. 1022: (1981) 1 Kam.L.J. 235.

Medical/Post-mortem report.—The injury reports, prepared by a Medical Officer, who is a public officer, in discharge of his public duties on requisitions being sent by the Investigating Officer for examination of the injured, are public documents: 1990 Cr.L.J. 1848: (1990) 70 Cut.L.T. 1 (D.B.).

A medico legal case (MLC) report prepared by a Medical Officer, who is a public servant, is a public document: 1995 Cr.L.J. 1742 (Del.) (D.B.).

Where Motor Accidents Claims Tribunal took into consideration the certified copy of the post-mortem report of the deceased without examining the Doctor who prepared it, *held*, there was nothing wrong in the procedure adopted by the Tribunal: A.I.R. 1991 Raj. 29. But *see contra* cases under Note 3, *infra.*

Warrant.—'Public document'—Warrant is a public document—It can be proved only by production of a certified copy: 1968 Cr.L.J. 758: A.I.R. 1968 Guj. 100.

Letters received from the Controller of Military Accounts in reply to warrant of attachment is a public document: A.I.R. 1928 Oudh 438. But *see contra* case under Note 3, *infra.*

3. What are not public documents.—A letter sent to an Estate Officer intimating the sender's change of address is not a public document; it is a private document to be proved by the sender's evidence: A.I.R. 1977 Del. 73: (1976) 12 Del.L.T. 321.

Manager of a District Co-operative Bank being not a 'public-officer' within the meaning of S. 2(17)(*h*), C.P.Code, *held*, any letter written by him in the form of a certificate to a customer, is not a public document: A.I.R. 1980 Bom. 380.

A book on the Naga Tribes of Manipur being not an official compilation of the custom or the customary laws of the tribe concerned prepared by a public officer in the discharge of his duties under the Government Rules, *held*, is not a public record and, therefore, it can not be relied on to decide the question of the right of inheritance amongst the members of Kabui Tribe of Manipur: A.I.R. 1992 Gau. 66: (1992) 1 Gau.L.R. 299 (D.B.).

A Naib Tehsildar's report of spot inspection made to the Tehsildar, *held*, is only an expression of his own opinion; it is neither a public document under S. 74 nor admissible under S. 35 unless it is proved by proper evidence adduced in the Court: A.I.R. 1990 All. 175.

Returns filed with Registrar of Joint Stock Companies: (1916-17) 21 Cal.W.N. 1161: I.L.R. 45 Cal. 169. Printed proceedings of municipality (by themselves): 30 I.C. 643: 16 Cr.L.J. 659. Letter of an Executive Officer: 1 Punj. Re. 1914 (Cr.): 23 I.C. 696. *See* also 1939 Mad.W.N. 841: A.I.R. 1940 Mad. 273. Notice under S. 107, Cr.P.Code: (1913-14) 18 Cal.W.N. 644. Dakhalnamah: 25 I.C. 529. Teishkhana register: I.L.R. 23 Cal. 366. Document merely with rubber stamp initials of public officer but not signed by him: 3 U.P.L R. (B.R.) 53. *See* also I.L.R. 50 Cal. 135: (1921-22) 26 Cal.W.N. 878: 71 I.C. 239: A.I.R. 1922 Cal. 298.

A report by a village Nikha Khawan to the Mohavir in a central office informing him of the objection to an entry of marriage in the village register by the former husband of the woman is not a public document within S. 74: 1 Punj. Re. (Cr.) 1914: 23 I.C. 696. So also a statement prepared by patwari: A.I.R. 1930 All. 712. Also parcha slip granted in the course of survey proceedings: 19 Cr.L.J. 886: 47 I.C. 82 (P.).

So also a letter to the Collector by the President of a public meeting forwarding the proceedings of that meeting: 55 Cal.L.J. 558: A.I.R. 1933 Cal. 312. As to proof of public documents, *see* 56 P.L.R. 1903: 5 Punj. Re. 1903 (Cr.).

A receipt granted by one private person to another and registered is not a 'public document'. Consequently a certified copy of such a receipt is not admissible in evidence under S. 65 (*e*) without any foundation being laid for the admission of secondary evidence: (1943) 2 M.L.J. 51:(1942-43) 47 Cal.W.N. 607 (P.C.).

A mere record copy of a lease prepared for the private use of Government Officers cannot be admitted as a public document unless it is shown that it was the duty of the Government to maintain such a copy: I.L.R. (1942) Bom. 357: (1942) 44 Bom.L.R. 295: A.I.R. 1942 Bom. 161. As to proof by copy of compromise petition, *see* 25 W.R. 68. As to proof of judgment, plaint and written statement, *see* 10 Beng.L.R. (App.) 31. As to proof of Municipal proceedings, *see* 30 I.C. 643: 16 Cr.L.J. 659.

Civil Surgeon's report to a Magistrate as to the age of a person is not expert opinion and not a record of his 'act': 1 Luck. Cases 733; A.I.R. 1928 Oudh 155. So also a circular issued by Director-General of Posts and Telegraphs as to future issue of certain kind of stamps is neither 'a record of an act' nor 'an act': 115 I.C. 509 (1): 1929 Mad.W.N. 193.

Departmental enquiry by Magistrate in his executive capacity is not judicial inquiry and statements recorded therein are not evidence taken on oath. Such statements, therefore, are not public documents and S. 163 can be applied to such statements: A.I.R. 1930 Cal. 370: I.L.R. 58 Cal. 96.

Translation of private document maintained by Government Office, for its use—Not a public document: A.I.R. 1961 All. 206.

Inspection Book of Lands & Buildings.—The document mentioned as 'Inspection Book of Lands and Buildings' maintained by the Corporation of Calcutta is not a public document within the meaning of S. 74: (1988-89) 93 Cal.W.N. 1045.

Neither the Executive Officer nor the Inspector of Assessment acting under his authority can be said to be an official body or a tribunal when he is making notes of measurement of lands and buildings. These notes, are made by the Inspector of Assessment for the purpose of assisting the Executive Officer in fixing the annual value of the lands and buildings under S. 131 of the Calcutta Municipal Act but they cannot be said to be records of acts of official bodies or tribunals nor can this document be said to be the record of acts of public officer, legislative, judicial and executive of any part of India, because the Executive Officer acting under S. 136 of the Calcutta Municipal Act is neither a legislative nor a judicial nor an Executive Officer. Therefore, Inspection Book of Lands and Buildings, is not a public document within the meaning of S. 74 of the Evidence Act: (1956-57) 61 Cal.W.N. 175.

Assessment order.—Order of assessment is not a public document in view of S. 54 of the Income-tax Act: I.L.R. 56 Bom. 324: A.I.R. 1932 Bom. 291. But *see contra* cases under Note 2, *supra.*

Court's record.—An award which is annexed to a petition cannot be admitted into evidence as a public document: (1959) 61 Bom.L.R. 333: A.I.R. 1959 Bom. 414.

A private document does not become a public document simply because it is filed in the Court. To be a public document, it should be a record of the act of a public officer or Court. There is a distinction between the record of the act of the Court and the record of the Court. A document which forms part of the record of the Court does not necessarily form record of the act of the Court. It may be that upon a private document, which is a record of the act of private parties a second act is done by the public officer or by the Court, namely filing the document or putting a number on the document. Therefore, that part of the document, namely the original part would be a private document forming the record of the act of the private parties and what is subsequently added to that document by the Court would be a public document: 1966 Cr.L.J. 967(1): (1966) 7 Guj.L.R. 23.

Notes of evidence recorded by Court of Small Causes is public documents—Defeated litigant who has initiated proceedings in superior Court is entitled to certified copies thereof—Application by party or his advocate stating reasons for copy is sufficient—In the absence of rules, affidavit is not necessary: 1965 M.L.J. (Cr.) 702.

Discretion under O. 41, R. 27, C.P.Code, is not to be exercised arbitrarily—Admission of documents—Considerations—R. 27 does not alter rules governing admission of additional evidence—High School certificate and birth extract not produced before trial Court—First appellate Court admitting such documents—Explanation of party that such documents were not in his possession accepted by first appellate Court—Documents not proved—Admission of documents is wrong and is vitiated for want of proof—Duty of Court: 1966 All.W.R. (H.C.) 634. But *see contra* cases under Note 2, *supra.*

Plaint/Written statement.—A plaint or written statement is not an act or the record of an act of the Court and cannot, therefore, be treated as a public document merely because of the Court's endorsement thereon: 1945 All.W.R. (Rev.) 13: 1945 R.D. 40. Plaint is not a public document: 7 Pat.L.T. 267: A.I.R. 1926 Pat. 180; 93 I.C. 650: A.I.R. 1926 Nag. 339; 1950 R.D. 71; 1943 O.W.N. 522: A.I.R. 1943 Oudh 54. Written statement not a public document: A.I.R. 1951 Cal. 320.

A certified copy of a written statement could only be admitted as a public document under S. 78. To become a public document, it must under S. 74 be held to be a public record of a private document. A written statement is not a public document and, hence, must be proved by direct evidence. A presumption of genuineness cannot be asked to be raised in the case of certified copies of pleadings, where they are not incorporated in any way in the decree of the Court: 1942 O.W.N. 191: A.I.R. 1942 Oudh 303. *See* also A.I.R. 1943 Oudh 54.

A petition is not the record of a judicial authority. It is neither the act nor the record of the act of a judicial authority. It is really the act of a private party. It is the party who moves the Court by his petition to obtain a certain order, and, therefore, the petition as such would not come within the definition of a public document under S. 74. On the same principle, the affidavit, except formal affidavits of service, would not come within the purview of public document: (1959) 61 Bom.L.R. 333: A.I.R. 1959 Bom. 414. But *see contra* cases under Note 2, *supra*.

Voters' list.—Voters' list unless proved to have been prepared on the application of the voter duly signed by him is an hearsay evidence; in the absence of examination of the author of the voters' list, it cannot be treated as a substantive evidence to prove the relationship: (1990) 1 Hindu L.R. 113 (P.&H.).

It is one thing to say that a document is conclusive evidence and another that it is one of the pieces of evidence; thus, the voters' list by itself is not conclusive or final; but being a public document under S. 74(1)(*iii*), it is admissible in evidence and together with other evidence connecting the list with the person concerned, the two supplement each other and may prove the fact in issue: (1986) 2 M.L.J. 235: (1986) 99 Mad.L.W. 901. But *see contra* cases under Note 2, *supra*.

Record of Registrar.—The original document after registration cannot be kept by the registering authority and has to be returned to the person who had presented it as clearly envisaged by S. 61(2) of the Registration Act. Hence, the original will cannot be considered a public document: 1980 Hindu L.R. 273 (P.&H.) (F.B.).

A will, even after registration, does not become a public document; it remains a private document; its certified copy from the office of Registrar is admissible only for proving the contents of the original, but is not sufficient to dispense with the production and proof of the original document. Thus, a certified copy of the will cannot be produced to prove the document without proving loss of the original document: A.I.R. 1976 P.&H. 235: 1976 Rev.L.R. 93: (1976) 78 Punj.L.R. 21.

A private deed of trust which has been registered cannot be said to be a document of which public record is required to be kept, as the original has to be returned to the party concerned, and, therefore, it cannot be admissible in evidence: A.I.R. 1975 Cal. 381. But *see contra* cases under Note 2, *supra*.

Medical/Post mortem report.—A post mortem or an inquest report is not a public document within the meaning of S. 74, Evidence Act; therefore, an accused is not entitled to inspect or receive its copies during investigation. The opinion of the Medical Officer in the post mortem report is only to aid the Investigating Officer; it is not a record by the Medical Officer of his official 'act' for public use; it is not a substantive evidence; and it has to be proved by its maker. [A.I.R. 1928 Oudh 155, Rel. on]. A bare reading of S. 174 of the Cr.P.Code and Rr. 25, 35, 39 and 47 of the Punjab Police Rules shows that the post mortem report is obtained by the Investigating Officer during investigation to find out the cause of death; the inquiry contemplated under S. 174 of the Code is not to be extended for the purpose of finding out the person who caused the death; the post mortem report is a part of the Police file; though required to be produced before the Magistrate at the time of remand, yet it cannot be made public by the Magistrate; the accused cannot be permitted either to inspect it or receive its copies until the stage of S. 207, Cr.P.Code arrives: 1981 Cr.L.J. 538: (1981) 19 Del.L.T. 104: (1981) 83 Punj.L.R. 96 (D.B.). But *see contra* cases under Note 2, *supra*.

Statement recorded by Police during investigation.—A statement recorded by the Police Officer in the course of investigation is not a public document within the meaning of S. 74 and the question of granting copy thereof does not arise. [A.I.R. 1936 Cal. 431, Foll.]: A.I.R. 1984 Guj. 69: (1984) 4 Guj.L.H. 831 (D.B.); 1977 Mah.L.J. 715.

Warrant.—A search warrant issued by a Magistrate is not a public record mentioned in clause (2) of S. 74. Under clause (1) of the section only 'documents forming the acts or

75. Private documents.—All other documents are private.

76. Certified copies of public documents.—Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies.

Explanation.—Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

---

records of the acts' of the authorities and bodies mentioned therein are public documents. The acts which clause (1) of S. 74 contemplates are final, completed acts as distinguished from acts of a preparatory or tentative character. In the case of a search warrant, the final act would clearly be the order of the Magistrate itself directing the issue of a warrant. The search warrant is only an authority to the officer concerned to effect a search of the person mentioned therein. A search warrant not being a public document could not be proved by a certified copy. Its actual production and proof by the Magistrate issuing it could not be dispensed with in the case: 1961 M.P.L.J. (Notes) 269. But *see contra* cases under Note 2, *supra*.

Section 75—Notes.

A letter sent to an Estate Officer intimating the sender's change of address is not a public document; it is a private document to be proved by the sender's evidence: A.I.R. 1977 Del. 73: (1976) 12 Del.L.T. 321.

A document which is not a public document or not admitted cannot be exhibited and looked into unless it is proved by oral evidence or otherwise proved: A.I.R. 1986 All. 126: (1985) 11 All.L.R. 566: 1985 All.C.J. 507.

Section 76—Notes.

The contents of a document can be satisfactorily established by producing a certified copy: I.L.R. (1938) Nag. 333: A.I.R. 1938 Nag. 162. 'Certified copy'—Meaning of. *See* (1958) 1 An.W.R. 495: A.I.R. 1958 Andh. Pra. 495.

As seen from the definition of 'certified copy' it is clear that it is one issued on payment of the legal fee certifying it to be a true copy and affixing seal of the authorised officer. As a comparative study of sub-R. (14) of R. 70 of the A.P. High Court Appellate Side Rules requires that a carbon copy shall be certified to be true and shall bear the seal and other particulars mentioned by sub-R. (11) of R. 70, there is, therefore virtually no substantial or real difference between a 'certified copy' and 'carbon copy': A.I.R. 1981 Andh. Pra. 316: (1981) 2 An.W.R. 80: (1981) 1 A.P.L.J. (H.C.) 86 (D.B.).

The person purporting to issue certified copy of the public document must mention his official designation: 1985 All.W.C. 470: (1985) 11 All.L.R. 627; his seal and signature: (1988) 3 Karn.L.J. 599.

By long usage, the term 'certified copy' has obtained a special meaning in view of the provision in S. 76 of the Evidence Act, and that term, when used in connection with an appeal and with reference to the order against which the appeal is filed, has always been understood as the copy which the party preferring the appeal obtains under S. 76 of the Evidence Act on payment of the necessary fee: 1958 Ker.L.T. 918: A.I.R. 1959 Ker. 34.

In order that entries in public document are admitted in evidence, they must have been made under some law: (1980) 2 M.P.W.N. 51.

S. 74 only deals with public documents; it is S. 76 which actually deals with their certified copies. A copy prepared from the certified copy of the original certified to be true copy by a competent officer when the original was not before him, *held*, cannot be received in evidence: 1990 Punj.L.J. 291: (1990) 1 Rev.L.R. 515.

Certified copies of public documents are to be issued irrespective of the fact as to whether they are marked or not: (1991) 4 Karn.L.J. 705: I.L.R. (1992) Karn. 2170.

Ss. 63 and 65(*e*) and (*f*) read together permit certified copies and copies made from the original by mechanical process to be tendered as secondary evidence; photocopies thereof prepared by a mechanical process in itself ensure the original's accuracy. Thus, where photostat copies of judicial record of a foreign Court are certified by a public officer having custody of that record as contemplated by S. 76, *held*, it will not be *per se* inadmissible; but if it is not further certified by a representative of the Indian Government in the foreign country it will not be admissible: (1991-2) 108 Mad.L.W. 646 (S.C.).

A copy signed and sealed by the registering officer and given under S. 57 of the Registration Act is no doubt admissible to prove the contents of the original document, but a copy which is not signed and sealed by the registering officer is clearly inadmissible in proof of the contents of the original document: A.I.R. 1976 Raj. 40: 1976 Raj.L.W. 14: 1975 W.L.N. 931.

A statement recorded by the Police Officer in the course of investigation is not a public document within the meaning of S. 74 and the question of granting copy thereof does not arise. [A.I.R. 1936 Cal. 431, Foll.]: A.I.R. 1984 Guj. 69: (1984) 4 Guj.L.H. 831 (D.B.); 1977 Mah.L.J. 715.

Where a carbon copy of the trial Court's order issued as directed by the Court at the instance of the Counsel for the party on payment of requisite charges and complying with all other requirements of a certified copy except for the certificate of being a true copy, *held*, 'duly certified' need not be by express words of certification; the copy on the face of it not being unofficial or informal but an authentic copy issued by the Court under its authority, it could be treated as a duly certified copy; the law under S. 79 has created a legal presumption in favour of its genuineness when it substantially and not strictly complies with the provisions relating to certification of copies; S. 76 prescribes no particular form of authentication; the carbon copy tantamounts to a certified copy of the order: A.I.R. 1986 Ker. 196: 1985 Ker.L.J. 1069.

The combined effect of Ss. 35, 65(*e*), 76, 77 and 79 is to enable the proof of public documents by the certified copies of the extracts therefrom: A.I.R. 1982 Ker. 232.

The primary evidence of a document is the document produced for inspection of the Court; its secondary evidence means and includes certified copies given under S. 76; under S. 64, documents must be proved by primary evidence, except in cases mentioned in S. 65. Under S. 65(*e*), only a certified copy of the public document and no other kind of secondary evidence is admissible to prove the original. [A.I.R. 1952 Nag. 57, Rel. on]: (1971) 1 Cut.W.R. 29.

Though necessary Court-fees have to be ordinarily paid on applications for certified copies of a judgment under S. 76 read with relevant provisions of the Court-fees Act, but such a certified copy is required to be furnished to the accused free of cost under S. 371 of the Code of Criminal Procedure, *held*, clearly, no Court-fees are to be charged therefor: A.I.R. 1971 Assam 55: 1971 Cr.L.J. 591 (F.B.).

The test prescribed by S. 76 of the Evidence Act is whether the person who applies for a copy of a document has a right to inspect it. An assessee has a right to inspect the order passed on appeal by the Appellate Assistant Commissioner. Whether any other person has a right to inspect that document is irrelevant. It is the person who has a right to inspect that is given the right to obtain a copy. That is the scheme of S. 76 of the Evidence Act. S. 54 of the Income-tax Act does not bar this right of inspection and obtaining its copy: I.L.R. (1957) Mad. 557: (1956) 2 M.L.J. 604: A.I.R. 1957 Mad. 151.

Suit for money claimed as due from defendant—Income-tax return of defendant showing payment of interest by him to plaintiff—Section does not preclude Court from admitting certified copy of return in evidence in support of plaintiff's claim: A.I.R. 1962 Punj. 27.

If a person not really entitled to inspect the document under S. 54(1) of the Income-tax Act has still managed to get a certified copy of it, he cannot be prevented under the provisions of Evidence Act from tendering it in evidence. The Court should decide admissibility of such document in accordance with the Evidence Act: 1961 M.P.L.J. 28: 1960

Jab.L.J. 785: (1963) 47 I.T.R. 44: A.I.R. 1961 Madh. Pra. 21.

If the person seeking to obtain a copy has got no right to inspect that document, he cannot have a copy thereof under S. 76; a copy obtained by such a person is a copy obtained illegally and is, therefore, inadmissible in evidence. On the principle underlying the provisions of S. 54 of the Income-tax Act making documents confidential as between the maker thereof and the Income-tax Department, it is obvious that apart from the maker thereof no one has got a right to inspect the same and that being the position certified copies obtained thereof on behalf of a person other than the maker thereof cannot be treated as certified copies within the meaning of S. 76, Evidence Act, and will not, therefore, be admissible in evidence. [A.I.R. 1944 All. 114 and A.I.R. 1946 Nag. 377, Doubted]: 1958 Pat.L.R. 300: A.I.R. 1959 Pat. 172.

Income-tax return—Right of third party to obtain certified copy and produce it in evidence: I.L.R. (1960) 10 Raj. 1219.

Copy of copy: A.I.R. 1957 Cal. 59.

First information report is a public document; the Magistrate is bound to grant a copy of it to the accused produced before him: 1980 Cr.L.J. 1022: (1981) 1 Karn.L.J. 235.

While seeking remand of an accused under S. 167 or S. 344 of the Code of Criminal Procedure, the Police submits no 'remand report' but only a copy of 'entries in the case diary'; the accused's application for a copy of 'remand report' is virtually for the certified copy of the 'entries' furnished to the Court by the Police Officer for obtaining remand; that being a judicial function, those 'entries' cannot but be a public document under S. 74. The accused, having tangible interest in the matter has the right to know the reason for the remand order; the Court being duty bound to jealously guard the citizens' liberty against abuse of power by the Police, the Court has to apply its mind to satisfy itself on the materials placed before it, before it decides to commit the accused to custody or to extend the remand; the accused has the right to move for bail for which he is interested in knowing the grounds for his remand for he might challenge it in revision; the revisional Court has to consider whether the remand order could be sustained on the materials placed before the Court. S. 76, no doubt, does not define or specify the 'person entitled to inspect' the document but it is well settleld that the Legislature intended to recognise the right generally for all persons who can show that they have an interest to protect which necessitates inspection of such documents; the requirements of S. 76 are satisfied and there is no other statutory bar or prohibition against the grant of the certified copy. The prohibition in S. 172(2) of the Code of Criminal Procedure against the accused's right to inspect the case diary does not extend to the 'remand report'; S. 173(4), mandatory in character, directs the prosecution to furnish to the accused, free of charge, copies of the documents, statements etc. intended to be used against him in the trial; it does not expressly or even impliedly mean that the accused is prevented from applying for or obtaining certified copies of those documents on his own accord on payment of legal fee. The accused must be presumed to have a right in common law to know the reasons urged in support of his detention; refusal to grant of certified copy of the remand report may amount to denial of natural justice and adequate opportunity to protect his liberty, particularly in the context that no specific statutory inhibition in that behalf has been brought to the Court's notice; the accused is entitled to apply for and obtain the certified copy: 1972 Ker.L.T. 922 (D.B.).

Where the accused remained in abscondence for more than 33 years and meanwhile the eye-witnesses had died and the record of the commitment proceedings was destroyed, but the certified copy of the commitment order showed that an order had been made to record proceedings under S. 512 of the Code of Criminal Procedure, *held*, the statements made by the witnesses in the commitment proceedings were 'public document' as defined in S. 74; their certified copies could be granted under S. 76: (1974) 76 Punj.L.R. 57 (D.B.).

See I.L.R. 30 Mad. 466: 17 M.L.J. 471. In order to be admissible copies must be duly certified. *See* 4 I.C. 929: 87 P.L.R. 1909. The Khasra Girdawaris are public documents: 151 I.C. 786 (1): (1933) 35 Punj.L.R. 405: A.I.R. 1934 Lah. 698. Where a document purports to be a copy given by a Public Officer having the custody of a public document, but does not bear a certificate as required by S. 76 and is not supported by the evidence of the person who prepared it, it is inadmissible in evidence

77. Proof of documents by production of certified copies.—Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

A.I.R. 1941 Oudh 77: 1940 O.W.N. 999: I.L.R. 16 Luck. 230.

Undoubtedly under S. 76, a copy of a talukdari sanad to be certified should be sealed whenever the keeper of the records of the Government of India is authorised by law to make use of a seal. But if there is no evidence to the effect that he is so authorised, the Court cannot make such a presumption when other necessary formalities have been duly carried out. Accordingly, a copy of a sanad which complies with other formalities but is not sealed cannot be treated as uncertified and is admissible in evidence: I.L.R. 13 Luck. 723: A.I.R. 1938 Oudh 69.

Where at the time when a town plan was marked, no objection was taken either as regards its admissibility or the mode of proof, but at the time of arguments it was contended that the said document having not been certified as required by S. 76, was not admissible in evidence, *held*, such a belated objection could not be taken: (1973) 86 Mad.L.W. 388.

The Check Memo which is required to be maintained by the officer in charge of the counting table is a document forming record of the acts of a public officer and therefore, a certified copy thereof given by the Collector in whose custody the document is kept, can be admitted in evidence in proof of the contents of the original document: A.I.R. 1975 S.C. 1863: 1975 U.J.(S.C.) 626.

Test for determining whether a document is a public document or not—Certified copy—Issue of—Not a test: (1985) 1 M.L.J. 182: (1985) 98 Mad.L.W. 105.

Where the facts relating to the pedigree in question was contained in a plaint of a suit filed in 1914 which was part of the public record, *held*, a certified copy of the plaint would be admissible evidence of its contents: 1979 All.L.J. (N.O.C.) 45.

Suit for fixation of reasonable rent—Entries in assessment notice book and assessment list register—Value of: 1965 M.P.L.J. 238: A.I.R. 1965 Madh. Pra. 237 (F.B.).

Dispute as to date of death of person—Extract from register of deaths under Madras Act (III of 1899), is bound to be accepted as conclusive of the matter when there is no controversy that the extract did not relate to the person, the date of whose death is in question—Death register is covered by language of S. 35: (1964) 77 Mad.L.W. 679: I.L.R. (1965) 2 Mad. 556: A.I.R. 1965 Mad. 205.

Notes of evidence recorded by Court of Small Causes is public document—Defeated litigant who has initiated proceedings in superior Court is entitled to certified copies thereof—Application by party or his advocate stating reasons for copy is sufficient—In the absence of rules, affidavit is not necessary: 1965 M.L.J. (Cr.) 702. *See* 1966 Cr.L.J. 967 (1) (Guj.).

"Public Officer having Custody of public document"—Royal order of Maharaja of one of Covenanting States—Copy issued under signature of officer in personal staff of Rajpramukh after integration is one issued by a "public officer" within the meaning of the section and as such admissible in evidence as a certified copy of a public document: 1969 Ker.L.R. 326: 1969 Ker.L.T. 110.

Section 77—Notes.

[*See* also Notes under S. 74, *supra*].

S. 77 seems to have been enacted to obviate the production of the original public documents for evidentiary purposes; but this section cannot be read in isolation and, therefore, mere production of a certified copy of a public document does not prove the same, as the question of its admissibility involves that the contents must relate to a fact in issue or a fact relevant under the various sections of the Evidence Act: A.I.R. 1977 Del. 73: (1976) 12 Del.L.T. 321.

In view of S. 57(5) of the Indian Registration Act, contents of a registered public document are duly proved the moment certified copy thereof is produced: (1979-2) 20 Guj.L.R. 390.

In proof of the fact of a statement made in a correction of papers case and an application made in execution no better evidence could be produced than the production of certified copies taken from the judicial files. Formal proof of signatures on the application is not

necessary still less is any further proof necessary in case of the statements: 1941 R.D. 793. A certified copy of a decree of a Court at Agra can now be admitted into evidence in a Court in Rajasthan according to S. 77: 1953 Raj.L.W. 202: A.I.R. 1953 Raj. 216.

Certified copy of public document—Admissible in evidence without being proved by calling witness—No objection raised to mode of proof either in trial Court or in appellate Court—High Court commits error of law in rejecting such document on ground that it had not been proved: (1964) 2 S.C.R. 673: 1964 S.C.D. 358: (1964) 1 An.L.T. 1: A.I.R. 1963 S.C. 1633.

Though the public documents are not required to be proved by calling witness, they should be marked or numbered as exhibits: A.I.R. 1990 Gau. 7.

The combined effect of Ss. 35, 65(*e*), 76, 77 and 79 is to enable the proof of public documents by the certified copies of the extracts therefrom: A.I.R. 1982 Ker. 232.

Where a carbon copy of the trial Court's order issued as directed by the Court at the instance of the Counsel for the party on payment of requisite charges and complying with all other requirements of a certified copy except for the certificate of being a true copy, *held*, 'duly certified' need not be by express words of certification; the copy on the face of it not being unofficial or informal but an authentic copy issued by the Court under its authority, it could be treated as a duly certified copy; the law under S. 79 has created a legal presumption in favour of its genuineness when it substantially and not strictly complies with the provisions relating to certification of copies; S. 76 prescribes no particular form of authentication; the carbon copy tantamounts to a certified copy of the order: A.I.R. 1986 Ker. 196: 1985 Ker.L.J. 1069.

Decree of Court—No formal proof is needed: 1969 B.L.J.R. 932.

Photostat copies of judicial record of a foreign Court, certified by a public officer having custody of that record as contemplated by S. 76, *held*, are *per se* not inadmissible; but if not further certified by a representative of the Indian Government in the foreign country, they will not be admissible: (1991-2) 108 Mad.L.W. 646 (S.C.).

The certified copy of the plaint is a public document and is, therefore, also admissible in evidence for the purpose of proving the contents thereof. [(1873) 10 Beng.L.R. (Appendix) 13, Foll.]: 1989 Cr.L.J. 1724: (1989-1) 9 Guj.L.H. 82. But *see* Notes 2 and 3, under S. 73, *supra*.

Where the facts relating to the pedigree in question was contained in a plaint of a suit filed in 1914 which was part of the public record, *held*, a certified copy of the plaint would be admissible in evidence of its contents: 1979 All.L.J. (N.O.C.) 45.

Certified copy of translation of judgment: 4 I.C. 579.

A printed copy of an order signed by the President of the Indian Union, which does not purport to be printed or published by Order of Government, is no proof of the order of the President. Such an order, when not proved thus under S. 78, Evidence Act, can of course be proved by the production of the original or by production of a certified copy under S. 77 of the Act, or possibly even by an affidavit of a responsible official. But if none of these courses are adopted, the order cannot be held to be proved: I.L.R. 29 Pat. 335: A.I.R. 1950 Pat. 265.

Birth certificate—Certified copy—Certified copy signed by Chief Executive Officer of Municipal Corporation—It is conclusive evidence unless disproved: A.I.R. 1970 Cal. 292: (1968-69) 73 Cal.W.N. 877.

Public document—Register of births maintained by municipality is a public document—Certified copy of extract is admissible to prove contents of such public document: A.I.R. 1970 Mys. 305: (1970) 2 Mys.L.J. 15: 1970 Cr.L.J. 1584.

Sanctioned plan granted by the Municipality, *held* is a public document and it can be proved by producing a certified copy thereof: 1981 Mah.L.J. 397.

Certified true copies of the entries of the Public Hospital register, maintained in regular course of business as required by rules and regulations of medical department, *held*, are admissible: 1972 Mah.L.J. 710: A.I.R. 1971 Bom 304 (D.B.).

The certified copy of an Electoral Roll which is a public document is admissible in evidence under S. 77. [A.I.R. 1972 Ori. 158, Foll.]: A.I.R 1991 Ori. 166: (1990) 70 Cut.L.T. 510.

A copy signed and sealed by the registering officer and given under S. 57 of the Registration Act is no doubt admissible to prove the

contents of the original document, but a copy which is not signed and sealed by the registering officer is clearly inadmissible in proof of the contents of the original document: A.I.R. 1976 Raj. 40: 1976 Raj.L.W. 14: 1975 W.L.N. 931.

The certified copy of the sale deed in respect of disputed land is a 'public document' and is, therefore, also admissible for the purpose of proving the contents of the original document: 1989 Cr.L.J. 1724: (1989-1) 9 Guj.L.H. 82; A.I.R. 1979 Gau. 14.

The register of money-lenders maintained in the office of Sub-Registrar in accordance with the provisions of the Bihar Money-Lenders Act, 1938, is a public document; thus, a certified true copy of the entry in such register is admissible in evidence to show that a person is a professional money-lender: A.I.R. 1974 Pat. 103 (D.B.).

The Registrar's office certainly keeps a public record of the exchange deeds registered in that office. The certified copy of the exchange deed, therefore, is a secondary evidence of the public record kept in the Registrar's Office. It is, therefore, admissible in evidence both under S. 65(*e*) or (*f*): (1991-1) 99 Punj.L.R. 129.

A certified copy of a registered copy is admissible to prove the contents of the original document only when conditions for the introduction of the secondary evidence are fulfilled: A.I.R. 1976 Raj. 40: 1976 RaJ.L.W. 14: 1975 W.L.N. 931.

Though the Register of Baptism does not fall under any of the classes mentioned in S. 74 and it is not a public document. But there is a provision in S. 82 which make applicable in India, the same presumptions which are recognised in England with regard to certain documents. They are declared to be admissible in the same manner as in England. The Register of Baptism will fall under S. 82 and a certified extract therefrom will be admissible in terms of S. 82: (1986) 99 Mad.L.W. 901: (1986) 2 M.L.J. 235.

A will, even after registration, does not become a public document; it remains a private document; its certified copy from the office of Registrar is admissible only for proving the contents of the original, but is not sufficient to dispense with the production and proof of the original document. Thus, a certified copy of the will cannot be produced to prove the document without proving loss of the original document: A.I.R. 1976 P.&H. 235: 1976 Rev.L.R. 93: (1976) 78 Punj.L.R. 21.

It is undoubtedly true that if a certified copy has been admitted into evidence without any objection having been raised by the other party that no case is made out for the introduction of the secondary evidence, the appellate Court would not permit its admissibility to be questioned before it on that ground. [A.I.R. 1963 Raj. 234 and 1969 Raj.L.W. 107, Rel. on]: A.I.R. 1976 Raj. 40: 1976 Raj.L.W. 14: 1975 W.L.N. 931.

No objection can be taken to the admissibility of uncertified copies of revenue records in second appeal, when such documents had been received without objection before the first appellate Court: A.I.R. 1971 P.&H. 355.

Letter written to the Nazul Department in the Nagar Mahapalika becomes public document and, thus, a photocopy of it is not admissible; it is the certified copy which is admissible: A.I.R. 1989 All. 17: (1988) 14 All.L.R. 814.

Though S. 139 of the Railways Act, 1890 permits proof of entries in records or other documents of Railway administration by production of a copy of such entries, before, however, such copies can be tendered and accepted as a proof of such entries, a certificate by the officer having custody of the records or other documents under his signature and stating that it is a true copy of the original entries and that such original entries are contained in the records or other documents of the Railway administration in his possession, has to be appended to that copy: A.I.R. 1983 Madh. Pra. 59: 1983 Jab.L.J. 197: 1983 M.P.L.J. 165.

Public record of a wakf deed, which is a private document, kept in the office of the Sub-Registrar is a public document as defined in S. 74(2); its certified copy is admissible in evidence: A.I.R. 1991 Gau. 17.

The Check Memo which is required to be maintained by the officer in charge of the counting table is a document forming record of the acts of a public officer and, therefore, a certified copy thereof given by the Collector in whose custody the document is kept, can be admitted in evidence in proof of the contents of the original document: A.I.R. 1975 S.C. 1863: 1975 U.J.(S.C.) 626.

A registered general power of attorney is a public document under S. 74(2); its certified

78. Proof of other official documents.—The following public documents may be proved as follows:—

(1) Acts, orders or notifications of [1][the Central Government] in any of its departments, [2][or of the Crown Representative] or of any [3][State Government] or any department of any [3][State Government],—

1. Substituted by the A.O. 1937, for "the Executive Government of British India".
2. Inserted, *ibid*.
3. Substituted by the A.O. 1950, for "Provincial Government".

---

copy is *per se* admissible; it is not necessary to prove its existence by secondary evidence; no notice envisaged under S. 66 is, thus, necessary to be given to the party in whose possession or power the original power of attorney is: (1994-1) 106 Punj.L.R. 353; (1988-2) 94 Punj.L.R. 551: 1989 Punj.L.J. 332: (1988) 2 Rev.L.R. 488.

Where Motor Accidents claims tribunal took into consideration the certified copy of the post mortem report of the deceased without examining the Doctor who prepared it, *held*, there was nothing wrong in the procedure adopted by the tribunal: A.I.R. 1991 Raj. 29.

There is no illegality where reliance is placed upon certified copies of the statements of witnesses recorded in criminal cases in separate proceeding in the motor accident claim case relating to the same accident. [(1966) 68 Punj.L.R. (Supp.) 101, Rel. on]: (1983) 85 Punj.L.R. 584.

There is no doubt that being public documents, certified copies of the Commissioner's report and inspection note in the earlier suit are admissible in evidence without further proof under S. 77 as proof of their contents; however, if the Commissioner's report was not confirmed in the earlier suit, it would be of no evidentiary value; and even if it was confirmed in the earlier suit, it might have been open to the parties who contested that report to call for the Commissioner for cross-examination in order to test its correctness, or to show that it was incorrect by some other evidence; it could not be brushed aside out of hand simply because it was a report made in an earlier suit and the party who relied upon it did not produce the Commissioner to prove that report in the present suit. As to the inspection note of the Presiding Officer, the report could be used to judge the reliability of evidence of witnesses in the subsequent case. Even the Commissioner's report could be primarily used for the same purpose; but none of them were substantive evidence on which plaintiff's case could be based: (1981) 7 All.L.R. 293. *See* also (1993) 2 An.L.T. 471, cited under S. 74, Note 1, *supra*.

A notification issued under the Travancore Forest Act is a public document and under S. 77, a certified copy may be produced in proof of it. The Chief Conservator of Forests as the Head of the Department is an officer competent to certify to the correctness of the copy in view of Ss. 78 and 79. [1966 Ker.L.T. 102 and 638, Disting.]: 1975 Ker.L.T. 839.

Where the accused remained in abscondence for more than 33 years and meanwhile the eye-witnesses had died and the record of the commitment proceedings was destroyed, but the certified copy of the commitment order showed that an order had been made to record proceedings under S. 512 of the Cr.P.Code, *held*, the statements made by the witnesses in the commitment proceedings were 'public document' as defined in S. 74; their certified copies could be granted under S. 76 and produced and used in proof of their contents *vide* S. 77: (1974) 76 Punj.L.R. 57 (D.B.).

The precise object of R. 260 of the Allahabad High Court Rules in prescribing that every certified copy shall indicate the date of application, the date of posting the notice and the date of delivery in words as well as in figures is to exclude all possibilities of tampering with these dates which play a crucial role in computing the period of limitation: A.I.R. 1991 All. 317: 1991 All.W.C. 800 (D.B.).

Warrant is a public document—It can be proved only by production of a certified copy: 1968 Cr.L.J. 758: A.I.R. 1968 Guj. 100.

Section 78—Synopsis.

1. Scope.
2. Sub-section (1).
3. Sub-section (2).
4. Sub-section (5).
5. Sub-section (6).

---

by the records of the departments, certified by the heads of those departments respectively,

or by any document purporting to be printed by order of any such Government [1][or, as the case may be, of the Crown Representative];

(2) the proceedings of the Legislatures,—

by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed [2][by order of the Government concerned];

(3) proclamations, orders or regulations issued by [3][Her Majesty] or by the Privy Council, or by any department of [3][Her Majesty's] Government,—

by copies or extracts contained in the London Gazette, or purporting to be printed by the Queen's Printer;

(4) the Acts of the Executive or the proceedings of the Legislature of a foreign country,—

by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country of sovereign, or by a recognition thereof in some [4][Central Act];

(5) the proceedings of a municipal body in [5][a State,]—

by a copy of such proceedings, certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body;

(6) public documents of any other class in a foreign country,—

by the original, or by a copy certified by the legal keeper thereof with a certificate under seal of a Notary Public, or of [6][an Indian Consul] or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

---

1. Inserted by the A.O. 1937.
2. Substituted by the A.O. 1937, for "by order of Government".
3. The words "Her Majesty" stand unmodified. *See* the A.O. 1950.
4. Substituted by the A.O. 1937, for "public Act of the Governor-General of India in Council".
5. Substituted by the A.O. 1950, for "a Province".
6. Substituted by the A.O. 1950, for "a British Consul".

---

1. Scope.—Section not exhaustive. *See* A.I.R. 1936 Cal. 316.

Reference to the District Gazetteer, in order to elucidate the history of a family, is admissible under S. 78: 3 U.P.L.R. (B.R.) 30. *See* also 170 I.C. 392: 39 P.L.R. 491 (*Wajib-ul-arz*).

The presumption attached to the correctness of official records cannot be taken away merely by assumptions or suggestions raising doubts: (1981) 51 Cut.L.T. 540.

Where the sanction for the prosecution for an offence under S. 19(*f*), Arms Act, purported to have been given by the District Magistrate was signed by him but the seal of the District Magistrate was not affixed to the document; *Held*, that mere production of the document was not sufficient but it was necessary to prove the sanction by examining the sanctioning authority: A.I.R. 1956 Madh. Bh. 50: 1956 Cr.L.J. 226.

With respect to the existence of certain tauzi numbers, reliance was placed on a report published by Government and this report was filed by the party relying on it but was returned by the Court thinking that it was a matter of which it was entitled to take judicial notice under Ss. 56 and 57. There was a reference to this report in the judgement of the Court, *held*, that the Court should have regarded the report as a public document under S. 78 and admitted informally in evidence and marked it as an exhibit: A.I.R. 1937 Pat. 334: 170 I.C. 61.

State Amendment—[West Bengal].—After S. 78, insert the following new section:—

"78-A. Copies of public documents, to be as good as original documents in certain cases.—Notwithstanding anything contained in this Act or any other law for the time being in force, where any public documents concerning any areas within West Bengal have been kept in Pakistan, then copies of such public documents shall, on being authenticated in such manner as may be prescribed from time to time by the State Government by notification in the Official Gazette, be deemed to have taken the place of, and to be, the original documents from which such copies were made and all references to the original documents shall be construed as including references to such copies"—Act 20 of 1960, S. 3 (w.e.f. 5-1-1961).

---

2. Sub-section (1).—Presumption as to authorised text of Indian Acts, *see* A.I.R. 1927 P.. 142: 97 I.C. 316; as to Government order nd notification in Official Gazette, *see* A.I.R. 1927 Mad. 980: 53 M.L.J. 603.

Notification not published in Government Gazette as required by law cannot be proved under this section: A.I.R. 1937 Pesh. 52: 170 I.C. 772. Proof of Acts of the Indian Legislature: 93 I.C. 566: A.I.R. 1926 Mad. 65: 49 M.L.J. 363.

A mere production of a notification issued by a proper authority of Government is sufficient to prove it under S. 78: I.L.R. (1953) Madh. Bh. 67: A.I.R. 1953 Madh. Bh. 84.

A comparison of S. 57 and S. 78 goes to show that acts, orders or notifications of the Central or any State Government require proof in the manner prescribed by S. 78, unless they amount to law in force and can be taken judicial notice of under S. 57. [A.I.R. 1954 Nag. 296, Overruled]: A.I.R. 1977 Madh. Pra. 68: 1977 Jab.L.J. 124: 1977 M.P.L.J. 176: 1977 Cr.L.J. 597 (F.B.).

A Court is not entitled to take notice of a notification published in a Gazette unless the fact of its publication is proved in the manner prescribed by S. 78, Evidence Act. In a suit against the Union of India owning the South Eastern Railway, the written statement was signed by the Deputy General Manager. Private copies of the Gazette notification authorising the Deputy General Manager to sign were produced in Court but the Court did not accept them and the written statement was thrown out. The original notifications were produced in the High Court in revision. *Held*, that the view of the trial Court that the private copies could not be accepted was correct; that the High Court could take notice of it on production of the original notification in the Gazette authorising the Deputy Manager to sign and verify written statements and act in all judicial proceedings on behalf of defendant Railway: 1958 Nag.L.J. (Notes) 64.

The specific mode for proving public documents like any Government Act, order or notification laid down in S. 78 is either by a copy certified by Head of the Department or by a publication printed under the authority of such Government; thus, a mere cyclostyled covering letter accompanied by a similar copy of the Rules by itself is no proof. [A.I.R. 1953 Mad. 780, Rel. on]: A.I.R. 1987 All. 83: 1986 All.W.C. 692: (1986) 12 All.L.R. 343: 1987 All.C.J. 35.

It clearly follows from Ss. 37, 78, 81 and 114(*e*) that the issuance of a notification is in the eye of law either notice or imputed knowledge of its contents to the citizens in general. This obviously cannot be so in the case of a mere order. The line which divides a mere order or decision of the Government or authority from formal notification is sharp and the dividing point thereof would be the publication or the formal declaration to the public or otherwise of the same. An order derives its sanction or source when the authority vested with the lawful power to pass the same appends its signature thereto and it is only the factum of proclamation or publication in the gazette or other prescribed modes of publicity which alone would give such an order or decision, the indicia or the necessary stamping of a notification. Till then it would remain merely an order or decision and it may not travel beyond the knowledge of its author and might well remain completely cloistered: A.I.R. 1984 P.&H. 87: (1983) 85 Punj.L.R. 741: 1983 Punj.L.J. 549: 1984 Rev.L.R. 1: I.L.R. (1984) 1 P.&H. 78 (F.B.).

Judicial notice can be taken of a notification issued by the Central Government under S. 7(1) of the Telegraph Wires (Unlawful Possession) Act, 1950, empowering certain officers to make complaints in respect of offences under the Act, when a book published under

the authority of the Central Government which contains the said notification as well as the relevant Gazette in which the notification was printed were produced in the Court. [A.I.R. 1954 Nag. 296, Overruled]: A.I.R. 1977 Madh. Pra. 68: 1977 Jab.L.J. 124: 1977 M.P.L.J. 176: 1977 Cr.L.J. 597 (F.B.).

A notification which is issued by the Central Government or the State Government or by a department of the Government is a public document and a certified copy of it may be produced in order to prove the existence, conditions or contents of that document under S. 65 of the Evidence Act. Under S. 78 such a copy has to be certified by the head of the department which issued the notification. It can also be taken into evidence if the official gazette in which the notification purported to have been printed by order of the Government has been produced for inspection of the Court: 1960 B.L.J.R. 12: 1960 Cr.L.J. 634: A.I.R. 1960 Pat. 213.

Kerala Forest Act (IV of 1962)—Offence under S. 27—Proof of notification under S. 19 necessary—No judicial notice can be taken—Notification is public document—Proof—Nature of: 1966 Ker.L.J. 76.

A notification issued under the Travancore Forest Act is a public document and under S. 77, a certified copy may be produced in proof of it. The Chief Conservator of Forests as the Head of the Department is an officer competent to certify to the correctness of the copy in view of Ss. 78 and 79. [1966 Ker.L.T. 102 and 638, Disting.]: 1975 Ker.L.T. 839.

Reserve Forest—Notification as to—Genuineness—Presumption. *See* 1983 M.L.J. (Cr.) 295 (Ker.).

A cyclostyled copy of a typed notification issued under Orissa Forest Act, 1972 attested as true copy by the Divisional Forest Officer cannot be said to be a document properly authenticated as required by S. 21(3) of that Act; 'Authentication' is not mere attestation of a copy as true copy: 1993 Cr.L.J. 2128 (Ori.).

An extract from a newspaper about a Government notification is inadmissible. A copy of the Government Gazette should be produced: 1930 All.L.J. 1535: A.I.R. 1931 All. 12.

Authentication of the publication of an Act or Ordinance is not an authentication of the publication of rules made under the Act or Ordinance and published in a Gazette of subsequent date: A.I.R. 1953 Raj. 145: I.L.R. (1953) 3 Raj. 128.

Order of Government affixed with Government seal, *see* A.I.R. 1936 Cal. 316.

3. Sub-section (2).—A report in a newspaper being only hearsay evidence and a newspaper being not one of the documents referred to in S. 78(2) by which an allegation of fact can be proved, a statement of fact contained in a newspaper is inadmissible in evidence in the absence of the maker of the statement appearing in Court and deposing to have perceived the fact reported: A.I.R. 1988 S.C. 1274: 1988 Cr.L.J. 1783: (1988) 2 Crimes 107.

Reports of the proceedings of a State Legislative Assembly during the passage of impugned statutes are admissible as public documents under S. 78(2) of the Evidence Act. It is true that reports and speeches in Parliament are generally inadmissible. But the legal position may be different if the *bona fides* of the Parliament can be and is challenged: I.L.R. (1953) Cut. 71: A.I.R. 1953 Ori. 185. *See* also A.I.R. 1953 Him. Pra. 41.

See also A.I.R. 1988 S.C. 440: 1988 (Supp.) S.C.C. 401, cited under S. 57, Note 3, *supra*.

Resolutions of Parliament—Mode of proof—The Volumes of the Official 'Parliamentary Debates' which show that certain resolutions were passed by the Parliament are adequate legal proof of the resolutions by the Parliament. The proceedings of Parliament fall under either the second or the fourth of the categories of public documents mentioned in S. 78. The expression 'Journals' in S. 78 is to be given a broad and general meaning and in its application to Parliament it should not necessarily be confined to the Journals published by the two Houses which contain a formal record of the business. The official Parliamentary Debates are also 'Journals' within S. 78: I.L.R. (1942) Kar. (F.C.) 56: (1941-42) 46 Cal.W.N. (F.R.) 9: A.I.R. 1942 F.C. 22.

4. Sub-section (5).—Printed proceedings of a Municipality themselves would not be sufficient legal proof unless they answer the description of a printed book purporting to be published under the authority of the committee as required by S. 78: 30 I.C. 643: 16 Cr.L.J. 659 (C.). *See* also (1912-13) 17 Cal.W.N. 531: 18 I.C. 651.

PRESUMPTIONS AS TO DOCUMENTS

79. Presumption as to genuineness of certified copies.—The Court shall presume [1][to be genuine] every document purporting to be a certificate, certified

1. Inserted by the A.O. 1948.

---

5. Sub-section (6).—Per *Subha Rao, J.* (Majority expressing no opinion).—S. 78(6) of the Evidence Act makes it clear that apart from the two certificates—One by the legal keeper of the original document and the other by the Council General—There shall also be proof of the character of the foreign judgment according to the law of the foreign country before it can be admitted. It is a condition precedent. Proof of this condition can be by direct or circumstantial evidence. Proof can also be given by placing before the Court facts giving rise to presumption rebuttable or irrebuttable. S. 86 of the Evidence Act lays down that a Court may presume the genuineness and accuracy of any document purporting to be a certified copy of any judicial record of any foreign country, if such a copy is duly certified in the manner and according to the rules in use in the country for certification of copies of judicial records. To give rise to this presumption it is not necessary that the judicial record of the foreign country should have already been admitted in evidence. While S. 78(6) lays down three conditions for admitting a foreign judgment in evidence, the admission of the judgment is not a condition precedent for drawing the requisite presumption under S. 86. The presumption may be drawn before the said judgment is admitted and by virtue of presumption of genuineness of the copy of the judgment arising under S. 86 the third condition under S. 78(6), *viz.*, the character of the document according to the law of the foreign country may be said to have been proved and the judgment may be admitted: (1964) 66 Bom.L.R. 402: (1964) 2 S.C.A. 1: A.I.R. 1964 S.C. 538.

All the three conditions mentioned in the sub-section have to be satisfied, before a foreign judgment is admitted in evidence: I.L.R. (1991) 2 Ker. 231.

As to records of a German Court, *see* 14 Cal.L.J. 375; (1910-11) 15 Cal.W.N. 1053. The proof required by S. 78(6) is for the purpose of the Court being in a position to decide whether a document is a document which falls within the definition of 'public documents' in S. 74, because unless the character of the document is that it is an act of a public officer, legislative, judicial or executive, it would not be a public document. The Court should not insist upon proof of a matter which is self-evident: (1959) 61 Bom.L.R. 333: A.I.R. 1959 Bom. 414.

Copy of birth entry in record of Town Committee of a town situated in Pakistan, is not admissible in evidence, in absence of attestation by High Commissioner for India in Pakistan, to prove date of birth before Court in India—Unproved copy is not admissible even for granting temporary injunction: I.L.R. (1962) 2 Punj. 597: A.I.R. 1963 Punj. 104.

O. 13 of the High Court (Punjab) Order, 1947 clearly takes the judgment and decree of the Lahore High Court passed before 15-8-1947, out of the purview of S. 86 and for this very reason the rigors of S. 78(6) shall not apply to the same. Thus, where a certified copy was originally prepared and certified by the supervisor copying agency of the Lahore High Court and was then certified to be a true copy by the examiner copy supply section and later attested by the First Secretary to Deputy High Commission for India in Pakistan at Lahore, *held*, same were admissible even if they did not fulfil the requirements of Ss. 78(6) and 86. [A.I.R. 1957 Punj. 86, Disting.]: (1988-2) 94 Punj.L.R. 118: 1987 Rev.L.R. 449.

Proceedings before Rehabilitation Authorities—Even if strict rules of evidence may be deemed to apply to proceedings, authorities have no jurisdiction to ask for any other mode of proof for proving public document of a foreign country than one prescribed by S.78(6) of Evidence Act, 1872: 1967 Cur.L.J. 836 (Punj.).

Section 79—Notes.

[*See* also Notes under S. 76, *supra*].

Under S. 79 a Court is bound to draw the presumption that a certified copy of a document is genuine and also that the officer signed it in the official character which he claimed in the said document. But such a presumption is permissible only if the certified copy is substantially in the form and purported to be

copy, or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer [1][of the Central Government or of a State Government, or by any officer [2][in the State of Jammu and Kashmir] who is duly authorized thereto by the Central Government]:

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.

---

1. The original words beginning from "in British India" and ending with the words "to be genuine" have been successively amended by the A.O. 1937, A.O. 1948 and A.O. 1950 to read as above.

2. Substituted by Act 3 of 1951, S. 3 and Sch., for "in a Part B State".

---

executed in the manner provided by law in that behalf. To put it differently if a certified copy was executed substantially in the form and in the manner provided by law, the Court raises a rebuttable presumption in regard to its genuineness. Where, therefore, a Patwari issues a certified copy of Khatauni without complying with the provisions of law governing its issue, the Court is not bound to draw the presumption in regard to its genuineness: 1959 All.L.J. 557: 1959 Cr.L.J. 1223: A.I.R. 1959 S.C. 960.

Before raising the presumption of the certified copy's genuineness, the certified copy must be shown to have been executed substantially in the form and manner provided by law; that would be a check on the officer certifying it to be a true copy to satisfy himself about the original's authenticity and accuracy of the copy he certifies to be true. [A.I.R. 1951 All. 816, Dissent. from; A.I.R. 1947 Cal. 318, Rel. on]: A.I.R. 1973 Bom. 14: (1972) 74 Bom.L.R. 505: 1972 Mah.L.J. 816.

As regards a certified copy, the statutory presumption of its correctness must be drawn under S. 79 of the evidence Act. It is open to the other party either to prove by summoning the original document that the copy was incorrect or to show that copy was not issued by a competent authority or was issued without complying with the provisions of law governing its issue. It is only then that the Court will not be bound to draw the presumption in regard to its genuineness: 1960 Jab.L.J. 122: 1960 M.P.C. 45: 1960 M.P.L.J. 424.

Certified copy of document can be admitted without any formal proof: 1970 All.W.R. (H.C.) 69.

The combined effect of Ss. 35, 65(*e*), 76, 77 and 79 is to enable the proof of public documents by the certified copies of the extracts therefrom: A.I.R. 1982 Ker. 232.

A certified copy of the statement of a witness is to be presumed under Ss. 79 and 80 to be correct and genuine unless rebutted by the other party: 1981 R.D. 126(2).

The original of a public document is also required to be proved; otherwise there would be no check whatever, by scrutiny or examination, of its authenticity either by the Court or its officers; neither S. 67 nor S. 68 make any exception in favour of public documents. [A.I.R. 1951 All. 816, Dissent. from; A.I.R. 1947 Cal. 318, Rel. on]: A.I.R. 1973 Bom. 14: (1972) 74 Bom.L.R. 505: 1972 Mah.L.J. 816.

Ceiling case—Certified copy of Kutumbh register—S. 79, in terms, does not apply to such copy: 1979 All.L.J. 963.

Where the defendant resisted a suit for permanent injunction to restrain him from interfering with the plaintiff's possession over agricultural land by claiming to be a sub-tenant substantiated by the Patwari's entries in the revenue records, effected after the *lis, held*, though S. 117 of the M.P. Land Revenue Code, 1959 raises a presumption of correctness of land records entries unless the contrary was proved, but that presumption is confined only to the land records prepared in the manner prescribed, that after inviting objections and disposing them off before finalising the entries. Entries based on the Patwari's observations at site or information have a weak presumption and are rebuttable; in such cases it has to be proved that the Patwari had signed the copy in his official capacity and issued it in the prescribed manner; it is only then that S. 79 of the Evidence Act would have been attracted and a presumption drawn about its being a genuine and not a spurious document: A.I.R. 1995 Madh. Pra. 134.

A copy of a letter of sanction, headed from the Chief Secretary to the Government of Bengal and signed by an officer for the Chief

Secretary, cannot be regarded as a certified copy under S. 76: I.L.R. 50 Cal. 135: A.I.R. 1922 Cal. 298. As to proof of certificate of visitors of lunatic asylum, *see* I.L.R. 63 Cal. 425.

Execution and authorship of document proof of—Registration Act, 1908, S. 60(2)—Certificate of registration—Genuineness must be presumed under S. 79 of Evidence Act—Suit for eviction by vendee of suit house—Plaintiff held succeeded in proving the sale: I.L.R. (1963) 13 Raj. 954: A.I.R. 1963 Raj. 234.

Entry in death register—Register is a public document—Presumption of correctness attaches—Heavy onus lies on party who wants to displace the presumption—*Held*, on review of evidence, that the onus was not discharged: 1965 B.L.J.R. 738: A.I.R. 1966 Pat. 231.

Original sale deed said to have been eaten away by white ants—Certified copy of sale deed marked as exhibit in trial Court—No objection raised by the other side. Witness deposing as to the fact of sale—Question, *held*, could not be agitated as to the mode of proof in appeal: A.I.R. 1970 Pat. 209: 1970 B.L.J.R. 8 (D.B.).

Where a carbon copy of the trial Court's order is issued as directed by the Court at the instance of the Counsel for the party on payment of requisite charges and complying with all other requirements of a certified copy except for the certificate of being a true copy, *held*, 'duly certified' need not be by express words of certification; the copy on the face of it not being unofficial or informal but an authentic copy issued by the Court under its authority, it could be treated as a duly certified copy; the law under S. 79 has created a legal presumption in favour of its genuineness when it substantially and not strictly complies with the provisions relating to certification of copies; S. 76 prescribes no particular form of authentication; the carbon copy tantamounts to a certified copy of the order: A.I.R. 1986 Ker. 196: 1986 Ker.L.J. 1069.

Official records like an order of the Court are much too sacrosanct to be brought into controversy by adducing evidence pro and con as to what they mean: 1953 Nag.L.J. 367: A.I.R. 1953 Nag. 288: I.L.R. (1953) Nag. 787.

R. 260 of the Allahabad High Court Rules requires, with a view to eliminate the possibility of interpolation, that every certified copy shall indicate the date of application, the date of posting the notice and the date of delivery in words as well as in figures; where certified copies of the judgement and the formal order were issued in utter disregard of this rule as they did not contain the dates in words, *held*, the lack of supervision and control of the copying section was obvious; the District Judge directed to take necessary steps for ensuring effective supervision: A.I.R. 1991 All. 317: 1991 All.W.C. 800.

Minutes of a meeting recorded by the company—Whether evidence of the proceedings. *See* (1973) 86 Mad.L.W. 531.

First information report is a public document and in view of S. 79, a presumption has to be raised that the Police official who had recorded the first information report had done so in a regular manner in due performance of his duty: A.I.R. 1981 P.&H. 119: 1981 Hindu L.R. 16.

Where documents had been filed in the Nazul Department of the Nagar Mahapalika, *held*, they became public documents; they can be proved by their certified copy and not by a photocopy; the photocopy is inadmissible in evidence: A.I.R. 1989 All. 17: (1988) 14 All.L.R. 814.

Where in a land acquisition reference for enhancement of compensation, the Court below took the view that the copies of those sale deeds (exemplars) of which the vendors or vendees had not been examined as witness in Court were inadmissible in evidence, *held*, in view of S. 51-A of the Land Acquisition Act, 1894 as inserted by the Land Acquisition (Amendment) Act, 1984, certified copies of the sale deeds filed by the parties were admissible in evidence. [A.I.R. 1973 Gau. 114, Disting.]: A.I.R. 1994 All. 66.

A notification issued under the Travancore Forest Act is a public document and under S. 77, a certified copy may be produced in proof of it. The Chief Conservator of Forests as the Head of the Department is an officer competent to certify to the correctness of the copy in view of Ss. 78 and 79. [1966 Ker.L.T. 102 and 638, Disting.]: 1975 Ker.L.T. 839.

Petitioner appeared in interview for the Post of District Munsif-cum-Judicial Magistrate—His result was withheld on the ground that the date of birth given in the S.S.L.C. as 29-2-1954 was not correct as the year 1954 was not a leap year—The petitioner made efforts to verify his correct date of birth and found from the horoscope and Baptism certificate that he was born on 9-12-1954 and, accordingly, filed an application before the concerned Judicial Magistrate under the Registration of Birth and Death Act, 1969 and an order was passed by the Judicial Magistrate that his correct date of birth was 9-12-1954—*Held*, in view of said certificate, the Public Service Commission was not justified in

80. Presumption as to documents produced as record of evidence.—Whenever any document is produced before any Court purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume—

that the document is genuine; that any statement as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

---

withholding his result on the ground that the S.S.L.C. book be first corrected: (1993-1) 111 Mad.L.W. 645.

See also 1977 All.W.C. (Rev.) 114; 1977 All.W.C. (Rev.) 143.

Section 80—Synopsis.

1. Scope.

2. Deposition of a witness given in judicial proceeding.

3. Confessional statement [*See* also Ss. 24, 25 and 26, *supra*].

4. Identification memorandum [*See* also S. 9, *supra*].

5. Dying declaration [*See* also S. 32, *supra*].

---

1. Scope.—Presumption of genuineness when raised, *see* I.L.R. 10 All. 174; I.L.R. 15 Mad. 63: 2 Weir 794; (1907-08) 12 Cal.W.N. 845; I.L.R. 18 Cal. 129. As to the nature and extent of presumption under the section, *see* 93 I.C. 978: A.I.R. 1925 Lah. 605; 94 I.C. 985: A.I.R. 1926 Oudh 489.

S. 80 gives legal sanction to the maxim *'Omnia presumuntur rite esse acta'* with regard to documents taken in the course of a judicial proceeding. The presumptions to be raised under this section, which deals with the subject of deposition of witnesses and confessions of prisoners and accused persons, are considerably wider than those under S. 79 of the Evidence Act. Where O. 18, R. 5, C.P.Code, has been complied with in recording the evidence of a defence witness, the Court of appeal is bound to accept the evidence of the witness as recorded as correct under S. 80, Evidence Act, until it is proved to be untrue. Where there was never any challenge by the defendants either in the Court of appeal or any affidavit filed disclosing where the inaccuracy lay, the Court of appeal is bound to accept the statement of the witness and it commits a grave error of procedure in taking upon itself the duty to examine the correctness or otherwise of the statement of the witness in the absence of any challenge by the defendants: 1956 B.L.J.R. 197: A.I.R. 1957 Pat. 293.

S. 80 applies to: (*i*) any document produced before any Court, purporting to be a record or memoranda of evidence or of any part of the evidence given by witness in judicial proceedings, or (*ii*) to a document produced before any officer authorized by law to take such evidence, or (*iii*) to a statement or confession by any prisoner or accused person, taken in accordance with law and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid. Thus, a statement made under the proviso to Cl. 2 of the Goa, Daman and Diu (Citizenship) Order, 1962 of his intention to retain Portuguese citizenship / nationality, *held*, is not a document produced in Court as required by (*i*); it is not evidence within the meaning of S. 3 of the Evidence Act nor is it evidence taken by any officer authorized to take evidence spoken of by (*ii*); neither is it a statement of a prisoner nor an accused person so as to be covered by (*iii*) above; S. 80 is not at all attracted: A.I.R. 1972 Goa 25.

Presumption of genuineness of a document does not include the presumption that the document was printed or published by the particular person by whom it purports to have been published: I.L.R. 36 Mad. 457: 22 M.L.J. 73.

S. 80 does not deal with the questions of the admissibility of documents referred to therein but simply dispenses with the necessity of there formal proof by raising the presumption that everything in connection with them had been legally and correctly done: (1928-29) 33 Cal.W.N. 1121: 50 Cal.L.J. 106: A.I.R. 1929 Cal. 617 (F.B.).

A document not admitted in evidence is not to be relied on: (1982) 54 Cut.L.T. 399.

The presumption of correctness under S. 80, cannot attach to the record of a Court which was not competent to try the case.

When the Court was not competent to try the case, it was really not functioning as a Court at all and the Court in the subsequent proceeding before which the record is sought to be produced must proceed on the basis, that the Judge presiding over the incompetent Court was recording statements of witnesses not as a Court the functions of which he could not, in law, perform. That, however, does not mean that there is no other means of proving that such statements were made. In every case where a statement is said to have been made on a previous occasion, the Court has to look to the evidence that had been given to see whether that previous statement is proved to have been made: A.I.R. 1955 Cal. 535: 1955 Cr.L.J. 1348.

Conviction based on statement made under S. 171-A of Sea Customs Act—Recording of statement in English—Failure to interpret it to illiterate accused—Conviction improper: 1969 Cr.L.J. 311: A.I.R. 1969 Raj. 48.

Report of ruling appearing in Newspaper not relevant and no presumption can arise: 1969 Cr.L.J. 1120: A.I.R. 1969 Cal. 451.

When the signature on the postal acknowledgment supposed to be that of the defendant was found by the Court to be not of the defendant and the defendant had denied having been served with the summons, *held*, the presumption arising under the Evidence Act stood rebutted and thereafter it was for the plaintiff to prove by leading evidence that the letter containing summons was in fact tendered to and received by the defendant; such evidence may take any form, either by examining the postman or an expert or otherwise. However, in the absence of any such evidence, it would not be said that the plaintiff had proved that the summons was served on the defendant. [A.I.R. 1968 Bom. 367, Rel. on]: (1983) 2 Bom.C.R. 480.

Where in the record-of-rights, opposite party No. 2 stands recorded, under the law, a presumption of correctness of the entry arises and, therefore, until the contrary is established, it must be assumed on the basis of the statutory presumption that opposite party No. 2 was the purchaser: (1975) 41 Cut.L.T. 177: (1975) 1 Cut.W.R. 198 (D.B.).

2. Deposition of a witness given in judicial proceeding.—A certified copy of the statement of a witness is to be presumed under Ss. 79 and 80 to be correct and genuine unle rebutted by the other party: 1981 R.D. 126(2

The recital in a judgment of a statemer made by the witness is not the same thing a record of the deposition of the witness. No can such recital be accepted as evidence unde S. 80: 2 Cr.L.J. 500: 56 I.C. 660 (P.).

There is no illegality where reliance placed upon certified copies of the statemen of witnesses recorded in criminal cases i separate proceeding in the motor accider claim case relating to the same accident. [(196 68 Punj.L.R. (Supp.) 101, Rel. on]: (1983) 8 Punj.L.R. 584.

Statements recorded under S. 164, Cr.I Code are admissible in evidence and pr sumption of genuineness under S. 80 of th Evidence Act attaches to such statements: 199 Cr.L.J. 372 (Cal.) (D.B.).

Where there is substantial compliance wit the requirements of S. 164(3) of the Cr.P.Cod reliance can be placed on the provisions Ss. 29 and 80 of the Evidence Act and any no compliance with the provisions of S. 164 of th Cr.P.Code may be regularised by applicatio of S. 533 of that Code. [I.L.R. (1970) Cut. 64 Overruled, Observation of *Mohanti, J.* in I.L. (1975) Cut. 1557 held not good law; 1977 Cr.L 1018 (Ori.), Approved]: A.I.R. 1978 Ori. 1 1977 Cr.L.J. 2053: I.L.R. (1977) Cut. 719 (F.B

The statement of an accused person r corded by a Magistrate in a Native State inadmissible unless the Magistrate himse deposes to it in person: 24 I.C. 169: (1914) Bom.L.R. 261.

The absence of a certificate by the Judge the foot of the deposition of its having bee read over, etc., does not deprive it of th presumption under S. 80: I.L.R. 46 Cal. 895: I.C. 660.

Presumption under S. 80 can be raised the deposition is read over by the witne himself in Court: I.L.R. 46 Cal. 895: (1918-1 23 Cal.W.N. 661; A.I.R. 1925 Lah. 605: I.L.R Lah. 415. (*See* also C.P.Code, O. 18, R. 5).

A statement not read over to or correct by the witness in accordance with law is n admissible against the person making t same: 13 Cr.L.J. 569: 15 I.C. 985. *See* also Cr.L.J. 500: 56 I.C. 660; 142 I.C. 653: A.I.R. 19 Cal. 190; 18 Nag.L.R. 192: 68 I.C. 36: A.I.R. 19 Nag. 39. As to depositions before Comm sioner, *see* 63 P.L.R. 1900 (Cr.).

Deposition of witness taken by special Judge appointed under ordinance which is *ultra vires* is not one recorded by an officer authorised by law to take evidence; nor can it be said that the deposition was one taken in judicial proceeding within the meaning of S. 80. *See* A.I.R. 1945 Cal. 159. *See* also 46 Cr.L.J. 692; I.L.R. (1945) 1 Cal. 326.

The evidentiary value of the statement of a witness in another judicial proceeding as to the age of a person is very little. A.I.R. 1929 Cal. 617. Before a previous admission can be used against a party it must be put to him and an opportunity afforded to him to explain if it is capable of explanation: 12 L.L.J. 161.

Under S. 80 of the Evidence Act, the presumption can be made only as to the genuineness of the statement recorded in a deposition. But no presumption can be made regarding the identity of the deponent. But if the deponent admits that on a particular date in a particular suit his deposition had been recorded and a true copy of such statement is produced in that Court, then no further proof of identity is needed. The Court can turn to the deposition itself to find out whether there is inherent evidence of the identity of the deponent: A.I.R. 1951 Madh. Bh. 92.

Signature of Judge—Depositions of witnesses not signed by Judge—Record of those depositions not denied—Depositions signed by witnesses themselves—Deposition not invalid due to omission of Judge's signature: (1967) 2 An.W.R. 66.

Deposition of witnesses not signed by Judge—Presumption under S. 80 that he signed it cannot be raised: (1967) 2 An.W.R. 66.

Where the accused remained in abscondence for more than 33 years and meanwhile the eye-witnesses had died and the record of the commitment proceedings was destroyed, but the certified copy of the commitment order showed that an order had been made to record proceedings under S. 512 of the Cr.P.Code, *held*, the statements made by the witnesses in the commitment proceedings were 'public document' as defined in S. 74; the presumption of genuineness was available to the certified copies of depositions under S. 80: (1974) 76 Punj.L.R. 57 (D.B.).

3. Confessional statement.—[*See* also Ss. 24, 25 and 26, *supra*]. S. 80 provides that a document purporting to be a confession by a prisoner or accused taken in accordance with law and purporting to be signed by a Judge or Magistrate, or by any officer authorised by law to take evidence, the Court shall presume that it is genuine; that the statement as to the circumstances under which it was taken, purporting to be made by the person signing it, is true and that such statement or confession was duly taken: (1975) 41 Cut.L.T. 961: 1976 Cr.L.J. 325 (D.B.).

S. 80 merely says that the Court will presume that the confession was duly recorded and that the circumstances under which the confession was recorded are such as have been set down in the record made by the Magistrate. It says nothing about there being any presumption regarding the voluntariness of the confession. The fact that the accused pleads not guilty and retracts his confession is a circumstance to indicate that the case of the accused was that his confession was not a voluntary one: I.L.R. (1943) 1 Cal. 487: A.I.R. 1943 Cal. 625.

Under S. 80, confession by any prisoner or by any accused taken in accordance with law and purporting to be signed by the examining Magistrate shall be presumed to be so made. The officer who recorded the confession may be examined as a witness: 38 I.C. 1005: 2 P.L.R. 80: 18 Cr.L.J. 445.

A Magistrate recording a confession under S. 164 of the Cr.P.Code or holding an identification parade does so as a matter of duty and discretion; he does not act as a Court; and where the identification memo prepared by the Magistrate had been lost and identification was sought to be proved by its copy prepared by the Investigating Officer, *held*, it could not be so proved; it had to be proved by the Magistrate from the original: 1974 Raj.L.W. 192: 1974 W.L.N. 78.

Though a confession duly recorded by a Magistrate may be presumed to be voluntary and as such admissible, such admissibility is subject to the restrictions imposed by S. 24: I.L.R. 61 Cal. 399: A.I.R. 1934 Cal. 636.

Where a Judge is of opinion, having regard to all the evidence, that a confession recorded by a Magistrate had been induced by torture, his duty is not to leave the confession to the jury but to exclude it entirely from the evidence. There is a patent error of law in his procedure in leaving the confession for consideration of the Jury, although he does his

best to tell them that it is worthless: 85 Cal.L.J. 93: A.I.R. 1950 Cal. 331.

Where a confession was recorded during investigation by a second class Magistrate not specifically empowered under S. 164 of the Cr.P.Code, *held*, the confession was not admissible; no oral evidence in respect thereof can be led either. [A.I.R. 1936 P.C. 253 and A.I.R. 1964 S.C. 358, Rel. on]: A.I.R. 1972 S.C. 2077: 1972 Cr.L.J. 1317.

If the Magistrate has put to the accused all the necessary questions to satisfy himself that the confession was voluntary and also appended the necessary certificate, *held*, it was not necessary to examine the Magistrate as a witness, in absence of anything justifying his examination: A.I.R. 1981 S.C. 1165: 1981 Cr.L.J. 628: (1981) 2 S.C.C. 224.

Confessions recorded in Indian Native State can be used in British India under the provisions of S. 80, and they may be accepted as admissible for prosecution in British India: I.L.R. (1938) All. 875: A.I.R. 1938 All. 625.

4. Identification memorandum.—[*See* also S. 9, *supra*]. An identification memo, is not a record of evidence of a witness within the meaning of S. 80 and, consequently, does not prove itself. A presumption under S. 80 could only arise if the memorandum of identification amounted to 'evidence' within the meaning of S. 3 of the Evidence Act. Statements recorded by a Magistrate in the identification memo, under S. 164, Cr.P.Code, are neither made by witnesses in judicial proceeding nor are they made on oath or affirmation, in order to amount to 'evidence' within S. 3. The use of the expression 'statement' or 'confession' in S. 80 in juxtaposition to a prisoner of an accused person, and the context in which those words occur, point to the conclusion that it was intended that a statement as well as a confession of a prisoner or an accused person duly taken by a Magistrate was to be presumed to be genuine. It is not correct to say that the word 'statement' occurring in S. 80 has reference to a statement made by a witness as distinguished from a 'confession' made by a prisoner or an accused person: 1963 All.L.J. 61: 1963 All.W.R. (H.C.) 42: 1963 All. Cr. R. 31: (1963) 2 Cr. L.J. 1: A.I.R. 1963 All. 308.

Test identification parade—Who can hold—Legal effect of identification memo: 1960 All.L.J. 595: (1961) 1 Cr.L.J. 340: A.I.R. 1961 All. 153.

Presumption under S. 80 arises only in case of evidence; a memorandum of identification is not evidence under S. 3; the identification memo would be inadmissible in evidence unless proved by the Magistrate. [A.I.R. 1961 All. 153, Dissent. from]: A.I.R. 1971 Raj. 184: I.L.R. (1970) 20 Raj. 439: 1971 Cr.L.J. 974.

Memorandum of identification proceedings held by Magistrate acting under S. 164, Cr.P.Code—S. 80 does not apply—Not admissible without proof: (1964) 2 Cr.L.J. 1: I.L.R. (1964) 1 All. 405: A.I.R. 1964 All. 290 (F.B.).

Memorandum of identification proceeding cannot be accepted without proof. [A.I.R. 1963 All. 308 and A.I.R. 1964 All. 290 (F.B.), Foll.]: 1984 Cr.L.J. 527.

5. Dying declaration.—[*See* also S. 32, *supra*]. The presumption under S. 80 that the circumstances under which a document appears to be taken are true applies to a dying declaration to which a certificate is appended by the Magistrate who recorded it, that it was read over to him and declared to be correct: I.L.R. 40 Bom. 97: (1915) 17 Bom.L.R. 881. *See* also 17 Cr.L.J. 23; 9 Punj. Re. 1900 (Cr.); 11 Bom. H.C.R. 247; I.L.R. 56 All. 750: A.I.R. 1934 All. 340.

The presumption mentioned in S. 80 could not arise in a case where the statement of a person as to the cause of his death is recorded by a Magistrate not authorised by law to record it, and it has to be proved. But where it is recorded as authorised by law, it is not necessary that it should be proved by the Magistrate who recorded it, when the statement is not made in the presence of the accused. All that is required is that there must be proof of the identity of the person who made the statement: 1941 Rang.L.R. 258: A.I.R. 1941 Rang. 301.

If a person whose dying declaration is recorded by a Magistrate in hospital dies subsequently, the statement made by him in hospital can only be proved by the Magistrate who has recorded it or some one else who heard that statement. But when that person survives and gives evidence at the trial, his statement is admissible in evidence for the purpose of corroborating or contradicting him. It is not necessary that the recording Magistrate should be called as a 'witness to prove the statement'. A statement recorded by a Magistrate under S. 164, Cr.P.Code, in the course of an investigation is evidence in a judicial proceeding, which under S. 80 of the Evidence Act can be proved without calling the person recording the same: 1941 Pat.W.N. 622.

81. Presumption as to Gazettes, newspapers, private Acts of Parliament and other documents.—The Court shall presume the genuineness of every document purporting to be the London Gazette or [1][any Official Gazette, or the Government Gazette] of any colony, dependency or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament [2][of the United Kingdom] printed by the Queen's Printer and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

---

1. Substituted by the A.O. 1937, for "for Gazette of India, or the Government Gazette of any local Government or".

2. Inserted by the A.O. 1950.

Section 81—Notes.

See A.I.R. 1984 P.&H. 87, cited under S. 78, *supra*.

The reports of debates in the Legislative Assembly can only be evidence of what was stated by the speakers in that Assembly, and are not evidence of any facts contained in the speeches: 41 Mad.L.W. 665: A.I.R. 1935 P.C. 34 (P.C.).

Reports and Gazetteers are not strictly evidence of the truth of all the statements contained in them although they may be read for what they are worth: (1939-40) 44 Cal.W.N. 873. Presumption as to genuineness does not include presumption that it was printed and published by the person mentioned in it: I.L.R. 36 Mad. 457: 12 I.C. 961. Presumption as to genuineness of the specimen, *see* 120 I.C. 798: A.I.R. 1930 Lah. 371.

Question whether math is 'public' or 'private' within the meaning of S. 6(7)—Gazetteer can be consulted on matters of public history—Statements in such Gazetteer can be relied on as providing historical material, practice followed by math and its head: A.I.R. 1967 S.C. 256.

Quarry—Granite hillock within patta land of claimant—Subsisting right to minerals under—Perishability of that right by Nizam's Firman—Relevant Firman not produced—Government circulars—On construction, *held* that there was no abrogation of aforesaid right and no repeal of S. 63—Claimant entitled to compensation in respect of granite: (1967) 1 Mys.L.J. 159.

Presumption under Ss. 81 and 114(*e*), Evidence Act apply to publication—S. 5(2) of Madras General Clauses Act complied—Effect of—Gazette held published on date it bore—Assuming publication sometime later—Act not rendered unconstitutional or invalid: I.L.R. (1961) 1 Andh. Pra. 296.

There is no presumption that whatever is published in an Official Gazette is known to citizens or members of public right from the date of publication: (1990) 1 Karn.L.J. (S.N.) 67: I.L.R. (1989) Karn. 920.

The Gazette of the Bombay Presidency, Vol. III published in 1879, is admissible under S. 35 read with S. 81 of the Evidence Act, 1872. The Gazette is admissible being official record evidencing public affairs and the Court may presume their contents as genuine. The statement contained therein can be taken into account to discover the historical material contained therein and the facts stated therein is evidence under S. 45 and the Court may in conjunction with other evidence and circumstances take into consideration in adjudging the dispute in question, namely, whether Kalika Mataji temple was a public trust, though it may not be treated as conclusive evidence: A.I.R. 1995 S.C. 167.

There must be an assumption that whatever is published in the Government owned paper correctly represents the actual state of affairs relating to Governmental business until the same is successfully challenged and the real state of affairs is shown to be different from what is stated in the Government publication: A.I.R. 1986 S.C. 2045: 1986 Cr.L.J. 1922: (1986) 2 S.C.C. 716.

Newspaper reports.—The words 'printed by Queen's Printer' qualify not only the expression 'private act of Parliament' but also the 'news paper and journal'; thus, presumption of genuineness of S. 81 is extended to newspaper and journals if they are printed by Queen's printer: (1988) 2 Cal.L.J. 184.

Though genuineness of a newspaper is presumed under S. 81, it is settled law that a newspaper is no proof of the facts reported therein; a news item is based on borrowed information. Before a fact can be proved in a Court in a legal manner the person who perceived that fact personally must come into the witness-box to depose about it; in the absence of the source and persons to whom those news are attributed, they are merely hearsay and cannot be relied upon: (1985) 87 Punj.L.R. 1.

The presumption of genuineness attached under S. 81, Evidence Act to a newspaper

82. Presumption as to document admissible in England without proof of seal or signature.—When any document is produced before any Court, purporting to be a document which, by the law in force for the time being in England or Ireland,

cannot be treated as proof of the fact reported therein, as a statement of a fact contained in a newspaper is merely hearsay and therefore inadmissible in evidence in the absence of the maker of the statement appearing in Court and deposing to have perceived the fact reported: (1961) 1 Cr.L.J. 710: (1961) 63 Punj.L.R. 794: A.I.R. 1961 Punj. 215; A.I.R. 1971 Cal. 53: 1971 Cr.L.J. 208; (1988) 2 Cal.L.J. 184; A.I.R. 1988 S.C. 1274: 1988 Cr.L.J. 1783: (1988) 2 Crimes 107.

Newspaper report of speeches—Evidentiary value: A.I.R. 1959 Raj. 280.

Newspaper reports by themselves cannot constitute evidence unless the authors thereof are examined. Newspaper reports without examination of the correspondence or publishers deposing to the truth and reliability thereof cannot be taken into consideration: (1971) 1 Cut.W.R. 760 (D.B.).

Translated copy of a news item cannot be taken into consideration in absence of filing of the newspaper as a whole: A.I.R. 1994 Gau. 96 (D.B.).

Newspaper reports by themselves are not evidence of the contents thereof. Those reports are only hearsay evidence which have to be proved. Where neither the reporter who heard the speech and sent the report was examined nor even his reports produced, *held*, the production of the newspaper by the editor and the publisher could not amount to proving the contents of the newspaper reports: A.I.R. 1994 S.C. 1733.

A news item published in newspaper and which is made basis for the complaint, *held*, cannot be acted upon without taking into consideration the intention of the accused, the circumstances and the context in which the statement was made and without considering as to whether the news item was admissible in evidence: 1992 Cr.L.J. 3788: (1992) 3 Crimes 1120 (Karn.).

Publication of defamatory matter in newspaper—Copy of newspaper—Shifting of onus on production of newspaper report which is presumed to be true—The burden shifts to the accused to disprove it. [1971 Cr.L.J. 208 (Cal.) and (1961) 1 Cr.L.J. 710 (Punj.), Disting.]: 1976 Cr.L.J. 1300: (1976-77) 81 Cal.W.N. 125 (D.B.). *See* also S. 3, Note 17.

Other documents.—The statement in the Final Report on the Settlement operations stating on what basis entries were made in the record-of-rights is more authentic and reliable than the statement in the District Gazettes: A.I.R. 1973 Pat. 206: 1973 Pat.L.J.R. 153 (D.B.).

There is no presumption of correctness attached to a copy of mutation as to the date of death of the last holder: (1953) 55 Punj.L.R. 468: A.I.R. 1954 Punj. 33.

Report of Court of Enquiry appointed under R. 75 of Indian Aircraft Rules—S. 35 of Evidence Act not applicable—Report admissible under Ss. 5, 7, 9—Proof of report: A.I.R. 1965 Cal. 252.

Trunk-call tickets prepared under Rr. 49 and 50 of Posts and Telegraphs Financial Rules, Hand-book, Vol. 5—Relevancy and admissibility in evidence—Presumption as to genuineness: (1965) 1 Cr.L.J. 393 (Punj.).

Electoral rolls are public records made in performance of duty specifically enjoined by the Representation of the People Act; it directly comes under S. 35 as well as S. 74(1)(*iii*); the presumption under S. 81 being available to it, the Court has to (shall) presume its genuineness and regard the entry in the roll proved unless it is disproved: A.I.R. 1972 Ori. 158: (1972) 1 Cut.W.R. 57: (1972) 38 Cut.L.T. 82: I.L.R. (1972) Cut. 161 (F.B.).

Entry in register relating to births, deaths and marriages—Presumption of genuineness—If can be challenged. *See* (1977) 2 Cut.W.R. 775.

Section 82—Notes.

As to presumption in case of printing and publishing a newspaper, *see* I.L.R. 36 Mad. 457: 12 I.C. 961.

Documents admissible under English Law in English Court are relevant. *See* I.L.R. 22 Cal. 491. The probate which are certified copies of the probate granted by the Probate Division of the High Court of England are admissible in evidence under S. 82: A.I.R. 1959 Mad. 410.

would be admissible in proof of any particular in any Court of Justice in England or Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims,

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

83. Presumption as to maps, or plans made by authority of Government.—The Court shall presume that maps or plans purporting to be made by the authority of [1][the Central Government or any State Government] were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

---

1. The original word "Government" has successively been amended by the A.O. 1937, A.O. 1948, Act 40 of 1949 and the A.O. 1950 to read as above.

Chittas. *See* 2 I.C. 513: (1914-15) 19 Cal.W.N. 1068: 31 I.C. 41.

Affidavits sworn in before a Notary Public in U.S.A.—Admissibility in evidence: A.I.R. 1967 Cal. 636.

Though the Register of Baptism does not fall under any of the classes mentioned in S. 74 and it is not a public document. But there is a provision in S. 82 which make applicable in India, the same presumptions which are recognised in England with regard to certain documents. They are declared to be admissible in the same manner as in England. The Register of Baptism will fall under S. 82 and a certified extract therefrom will be admissible in terms of S. 82: (1986) 99 Mad.L.W. 901: (1986) 2 M.L.J. 235.

Section 83—Notes.

See 22 W.R. 519; I.L.R. 5 Cal. 287; I.L.R. 5 Cal. 822: 6 C.L.R. 519; I.L.R. 9 Cal. 741; I.L.R. 23 Cal. 335; I.L.R. 18 Cal. 224; 25 W.R. 179. Chittas made by Government for private use in connection with resumption proceedings are not covered by S. 83—Maps and plans prepared by patwaris are not in discharge of their official duty—Accuracy—Presumption—Statements contained in—Relevancy: 16 P.R. 1913: 18 I.C. 799.

Maps or plans made for the purposes of any cause must be proved to be accurate. They must be proved by the persons who made them. They are post *litem motam* and lack the necessary trustworthiness. Where maps are made for the purposes of a suit, there is even apart from fraud, which may exist, a tendency to colour, exaggerate, and favour which can only be counteracted by swearing the maker to the truth of his plan. The rights of property as between two parties cannot be affected by a map drawn for a totally different purposes and a purpose totally irrelevant to the subject of the dispute between them. Trustworthiness and accuracy of such a map must be proved. Otherwise requirements of S. 83 are not satisfied: 1959 Ker.L.J. 372: A.I.R. 1959 Ker. 358.

A plan, the accuracy of which has not been established by evidence in accordance with S. 83, can be admitted in evidence when both parties had relied on it before the local Commissioner and no objection was taken that it had not been proved to be accurate: (1940) 42 Punj.L.R. 247: A.I.R. 1940 Lah. 309.

Mere fact that formal proof of site plan had been dispensed with under S. 294(1), Code of Criminal Procedure, would not mean that its accuracy is proved; the prosecution is bound to prove its accuracy: (1984) 3 Crimes 254 (All.).

A map prepared by private arrangement by a District Collector for the settlement of the silted bed of a river does not fall within purview of this section: 19 I.C. 572; 17 Cal.L.J. 642: 16 I.C. 747.

Maps and survey plans prepared by Government—Admissibility of in evidence: 10 I.C. 653: (1911) 1 Mad.W.N. 213; 18 Pat.L.T. 464: A.I.R. 1937 Pat. 567 (Municipal Survey Map). *See* also (1942) 44 Bom.L.R. 295: A.I.R. 1942 Bom. 161: I.L.R. (1942) Bom. 357.

84. Presumption as to collections of laws and reports of decisions.— The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country,

and of every book purporting to contain reports of decisions of the Courts of such country.

85. Presumption as to powers-of-attorney.—The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, [1][Indian] Consul or Vice-Consul, or representative [2][***] of the [3][Central Government,] was so executed and authenticated.

---

1. Substituted by the A.O. 1950, for "British".

2. The words "of Her Majesty, or" repealed by the A.O. 1950.

3. Substituted by the A.O. 1937, for "Government of India".

Maps prepared by private persons and not under authority of Government—No presumption in favour of the accuracy of such maps can be drawn under S. 83: A.I.R. 1966 S.C. 644.

Maps printed and expressly bearing endorsement of Government—Presumption of accuracy arises:(1965-66) 70 Cal.W.N. 266.

Village shown as located in a particular district in the maps prepared under authority of Government—Recitals in private documents to the contrary cannot be given any importance: A.I.R. 1966 S.C. 644.

Relevancy and accuracy of maps—Distinction: A.I.R. 1965 Cal. 282.

Official maps generally unobtainable—Government producing most of the maps relied upon—Maps directed to be kept on record for inspection of parties—No suppression of evidence and no adverse inference can be drawn: A.I.R. 1965 Cal. 282.

Thak maps—Evidentiary value of maps more than 30 years old—Presumption—Map prepared by Collector in private capacity. *See* (1911-12) 16 Cal.W.N. 317: 10 I.C. 376. The Thakbust map which preceded the revenue survey was intended to guide the revenue surveyor who was supposed to put in the estate boundaries to be found in the Thakbust maps. The value of the records of the Thak survey and of the revenue survey and also of the collectorate papers is not uniform: 67 Cal.L.J. 495. *See* also 21 Pat.L.T. 873: A.I.R. 1941 Pat. 118.

Value of survey map as evidence pointed out. Boundaries in cadastral survey taken into account in determining a question of title: I.L.R. 13 Pat. 51: A.I.R. 1933 Pat. 671. Great weight should always be given to the accuracy of survey maps. They are not conclusive but in the absence of evidence to the contrary, they will be presumed to be accurate: I.L.R. 44 Cal. 328: 43 I.A. 303 (P.C.). *See* also A.I.R. 1933 Pat. 555. Survey maps are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and would be valuable evidence as to the state of things at the time they were prepared: 44 I.C. 247.

Section 84—Note.

Judicial precedents—Laws declared by High Court—Binding nature: A.I.R. 1967 All. 414.

Section 85—Notes.

A power-of-attorney bearing authentication of a notary public or other authority mentioned in S. 85 is taken as sufficient evidence of its execution by the person who appears to be the executant on its face; the presumption is rebuttable but unless rebutted it stands; and the document can be admitted in evidence without any furhter proof: 1983 Ker.L.T. 1013.

A presumption of correctness arises in respect of a power-of-attorney attested in a foreign country under Ss. 57 and 85 regarding the genuineness of the seal of the said Notary; no proof is required from that country as to whether the person attesting was in fact a duly appointed Notary or not: A.I.R. 1989 Del. 144: (1989) 37 Del.L.T. 88: (1988) 2 Ren.C.J. 698: (1989) 1 Ren.L.R. 39; (1990) 2 Ker.L.T. 318.

Power-of-attorney, alongwith verifications are to be presumed to be true under S. 85: [A.I.R. 1950 All. 524, Rel. on]: A.I.R. 1972 All. 219 (D.B.).

The purpose of Ss. 57 and 85 is to cut down recording of evidence; for such matters, like the due execution of a power-of-attorney in the present day of international commerce,

there is no reason to limit the words 'Notary Public' in S. 85 or S. 57 to Notaries appointed in India; they include the Notary Public of foreign countries also: A.I.R. 1976 Del. 263: (1976) 78 Punj.L.R. (Del.) 71: 1976 Rajdhani L.R. 356: (1976) 12 Del.L.T. 69: I.L.R. (1976) 1 Del. 559; (1992) 47 Del.L.T. 659.

There are no grounds for importing the provisions of Notaries Act into the interpretation of S. 85; it applies equally to documents authenticated by Notaries Public of other countries. Thus, documents which purport to be executed before or authenticated by Notaries Public, bearing proper seals, of other countries ought to be presumed to have been duly notorised within the meaning of S. 85: A.I.R. 1980 All. 369.

Section is mandatory. *See* I.L.R. 33 Cal. 625: (1904-05) 9 Cal.W.N. 980; I.L.R. 16 Cal. 776.

The provisions of S. 85 are mandatory and it is open to the Court to presume that all the necessary requirements for the proper execution of the power of attorney have been duly fulfilled: But S. 85 is not exhaustive for there are different legal modes of executing a power-of-attorney. Under S. 57(6) the Court shall take judicial notice of *inter alia* all seals of notaries public. Where a power-of-attorney is given under the seal of a notary public, the Court must presume its proper execution before and authentication by the notary public: I.L.R. (1939) Bom 295: A.I.R. 1939 Bom. 347. *See* also I.L.R. (1980) Raj. 30.

There being a presumption of valid execution and authentication of the power-of-attorney, the person objecting to the power-of-attorney is required to allege and prove that it was not duly executed or authenticated: A.I.R. 1981 Del. 222: 1981 Rajdhani L.R. 434: (1981) 20 Del. L.T. 264. *See* also 1972 Mys.L.J. (S.N.) 196.

Authentication is not merely attestation but something more; it connotes an attestation made by the Notary after satisfying himself about the competence of the executant to grant the power-of-attorney; the purpose of S. 85 is to eliminate the otherwise cumbersome evidence of proving the execution and contents of the power and competence of its executant to confer it; however, presumption under S. 85 is rebuttable: A.I.R. 1982 Del. 487.

Authentication is not merely attestation, but something more. It means that the person authenticating has assured himself of the identity of the person who has signed the instrument as well as the fact of execution: It is for this reason that a power of attorney bearing the authentication of a notary public is taken as sufficient evidence of the execution of the instrument by the person who appears to be the executant on the face of it. The presumption, no doubt, is rebuttable. But unless rebutted, the presumption stands and the document can be admitted in evidence as a document executed by the person alleged to have executed it without further proof: 1950 All.L.J. 466: A.I.R. 1950 All. 524.

Authentication is more than mere execution before one of the persons designated in S. 85; for the purpose of presumption to operate, the authentication must be clear, specific and more decisive. Thus, where the Magistrate in fact indicated that he was personally unaware of the executant but put his signature on the basis of identification made by an advocate, *held*, this will not amount to an authentication by the Magistrate; no presumption under S. 85 could be raised: A.I.R. 1979 Bom. 202.

Power-of-Attorney—Presumption—Authentication by Notary Public—Procedure—No particular form of authentication by Notary Public is given under S. 85—Notary Public need not use the word 'authentication' in the attestation made by him on the document—Attestation by Notary Public stating 'subscribed and sworn to before me' is valid authentication: I.L.R. (1967) 2 Punj. 402: A.I.R. 1967 Punj. 345.

S. 85 raises a presumption about the execution of a power-of-attorney provided two conditions are satisfied. Firstly, it must be executed before a Notary Public and secondly, it must be authenticated by a Notary Public. Thus, where neither of the said conditions was satisfied and there was merely an attestation by Notary Public, *held*, no presumption under S. 85 in favour of that power-of-attorney could be raised: A.I.R. 1984 Del. 363: 1984 Rajdhani L.R. 549: (1986) 30 Del.L.T. 525 (D.B.). *See* also A.I.R. 1979 N.O.C. 199 (Del.).

S. 85 does not make any distinction between natural or artificial persons; the word 'person' comprehends both: A.I.R. 1982 Del. 487.

S. 85 does not draw any distinction between the two kinds of documents, *viz.*, power-of-attorney executed by an individual and the one executed on behalf of a Company. Authentication of any of these instruments by a Notary Public raises a legal presumption that the same has been duly executed and the person or persons, who had executed it had the authority to do so. Undoubtedly, such a presumption is not conclusive, being rebuttable. The other party is, therefore, legally entitled to disprove such a presumption: A.I.R. 1978 N.O.C. 254 (Del.).

86. Presumption as to certified copies of foreign judicial records.—The Court may presume that any document purporting to be a certified copy of any judicial record of [1][2][* * *] any country not forming part of India or] of Her Majesty's Dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of [3][* *] the [4][Central Government] [5][in or for] [6][such country] to be the manner commonly in use in [7][that country] for the certification of copies of judicial records.

---

1. Substituted by the A.O. 1950, for "any country not forming part".

2. The words "a Part B State or of" omitted by Act 3 of 1951, S. 3 and Sch.

3. The words "Her Majesty or of" repealed by the A.O. 1950.

4. Substituted by the A.O. 1937, for "Government of India".

5. Substituted by the Indian Evidence (Amendment) Act, 1891 (3 of 1891), S. 8, for "resident in".

6. Substituted by the A.O. 1950, for "such country".

7. Substituted by the A.O. 1950, for "that country".

There is no prescribed or established form of nature and manner of authentication by a Notary Public. The same has to be gathered from the tenor, facts and circumstances of the power-of-attorney and its authentication by a Notary Public. The fact that the power of attorney was executed by a Director of the plaintiff-Bank duly authorised by a resolution of the Board of Directors to execute the same and its execution and attestation by a Notary Public was also done on the same day clearly indicated that the power-of-attorney was executed before the Notary Public: A.I.R. 1986 P.&H. 214: 1986 Rev.L.R. 19: (1985) 87 Punj.L.R. 708.

Where the power-of-attorney granted to the plaintiff company's permanent delegate in Delhi was executed by its Director General before, and authenticated by, the Judge at Belgrade, *held*, requirements of S. 85 having been satisfied, the Court has to presume its due execution and authentication; and since it is also attested by the Indian Consulate in Belgrade, its genuineness is beyond doubt: A.I.R. 1984 Del. 20.

Mere registration is not in itself evidence of execution: I.L.R. 17 Cal. 903. But *see* I.L.R. 14 Cal. 176. As to what is sufficient proof of power of attorney, *see* I.L.R. 21 Mad. 492; 1936 All.L.J. 684: A.I.R. 1936 All. 475.

Registrar of Assurances being not one of the persons named in S. 85, presumption regarding due execution of the power-of-attorney registered at the office of Sub-Registrar could not be raised: (1990) 42 Del.L.T. 446.

Endorsement by the Notary Public 'document subscribed and sworn before him' raises a presumption of regularity of official acts, that he must have satisfied himself in the discharge of his duties that the person who was executing it was the proper person: A.I.R. 1971 S.C. 761: 1971 U.J.(S.C.) 379: (1971) 1 S.C.R. 38: (1970) 2 S.C.C. 386.

Where a certificate appended to the impugned document showed that it was presented by the executant before the Notary Public and its contents were read over and explained to the executant which he admitted to be correct and thereafter it had been attested by the Notary Public, *held*, the mere fact that the document had not been drafted or typed out by the executant before the Notary Public, did not in any way, militate the presumption as to the execution and authentication of the power-of-attorney: A.I.R. 1995 Him. Pra. 107.

Where Deputy General Manager of the plaintiff-Bank executed a power-of-attorney in favour of Senior Branch Manager which was duly authenticated by a Notary Public, *held*, the Court was bound to presume that the power-of-attorney was duly executed and authenticated. And as no evidence in rebutting aforesaid presumption was produced before the Court, it could be said that Senior Branch Manager was authorised to sign and verify the plaint on behalf of the plaintiff-Bank: A.I.R. 1994 All. 381.

Where a power-of-attorney was registered in Pakistan and bore an endorsement by Registrar in that country, presumption under S. 69, Hyderabad Evidence Act (corresponding to S. 85 of Indian Evidence Act) cannot arise: (1957) 2 An.W.R. 342.

Section 86—Notes.

Scope of section—*See* I.L.R. 27 Cal. 639: 27 I.A. 1 (P.C.). Section mandatory. *See* I.L.R. 5 Lah. 105: A.I.R. 1924 Lah. 493. The provisions of S. 86 are imperative and must be complied with, and in the absence of the certificate referred to in the section, a foreign judgment is not admissible in evidence: (1957) 59 Punj. L.R. 282: A.I.R. 1957 Punj. 86.

S. 86 is not exhaustive of the modes of proof of foreign judicial records: (1957) 59

[1][An officer who, with respect to [2][* *] any territory or place not forming part of [3][India or] Her Majesty's Dominions, is a Political Agent therefor, as defined in section 3, [4][clause (43)], of the General Clauses Act, 1897, shall, for the purposes of this section, be deemed to be a representative of the [5][Central Government] [6][in and for the country] comprising that territory or place.]

87. Presumption as to books, maps and charts.—The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts and which is produced for its inspection, was written and published by the person and at the time and place, by whom or at which it purports to have been written or published.

---

1. Substituted by Act 5 of 1899, S. 4, for the former paragraph which had been inserted by Act 3 of 1891, S. 3.

2. The words "a Part B State of" which were inserted by the A.O. 1950, repealed by Act 3 of 1951, S. 3 and Sch.

3. Inserted by the A.O. 1950.

4. Substituted *ibid*, for "clause (40)".

5. Substituted by the A.O. 1937, for "Government of India".

6. Substituted by Act 3 of 1951 for "in and for that Part B State or country".

Punj.L.R. 282: A.I.R. 1957 Punj. 86. S. 86 does not exclude other proof. So, a document purporting to be a copy of a deposition in a Court in Cutch was admissible in evidence though not certified by the Political Agent of Cutch in a manner which fully satisfied the requirements of Ss. 76 and 86. *Held*, that the fact that the certificate as to the document being a 'true copy' was given by a higher officer than the trial Judge was really an additional reason for accepting its authenticity. [I.L.R. 27 Cal. 639, Foll.]: (1928) 30 Bom.L.R. 1519: A.I.R. 1929 Bom. 24.

'Certified copy' of a foreign judgment as embodied in S. 14 of the C.P.Code has to be construed consistent with the requirements of S. 86 of the Evidence Act: (1991-2) 108 Mad.L.W. 646: (1991) 2 Crimes 855: (1991) 3 S.C.C. 451.

Presumption of certified copies of German Court: I.L.R. 39 Cal. 164: (1910-11) 15 Cal.W.N. 1053: 14 Cal.L.J. 375.

Presumption of certified copies of other foreign States. *See* I.L.R. 14 Cal. 546; I.L.R. 27 Cal. 639.

Where a certified copy of a judgment of the Supreme Court of New York, authenticated by the Indian Consulate there, could not be produced for insufficiency of time and its fax copy was instead produced in the Court, *held*, the fax copy was admissible. [(1991) 3 S.C.C. 451: (1991) 2 Crimes 855: (1991-2) 108 Mad.L.W. 646, Rel. on]: (1993) 2 Ker.L.J. 565 (D.B.).

Ss. 63 and 65(*e*) and (*f*) read together permit certified copies and copies made from the original by mechanical process to be tendered as secondary evidence; photocopies thereof prepared by a mechanical process in itself ensure the original's accuracy. Thus, where photostat copies of judicial record of a foreign Court are certified by a public officer having custody of that record as contemplated by S. 76, *held*, it will not be *per se* inadmissible; but if it is not further certified by a representative of the Indian Government in the foreign country, it will not be admissible: (1991-2) 108 Mad.L.W. 646: (1991) 2 Crimes 855: (1991) 3 S.C.C. 451.

O. 13 of the High Court (Punjab) Order, 1947 clearly takes the judgment and decree of the Lahore High Court passed before 15-8-1947, out of the purview of S. 86 and for this very reason the rigors of S. 78(6) shall not apply to the same. Thus, where a certified copy was originally prepared and certified by the supervisor copying agency of the Lahore High Court and was then certified to be a true copy by the examiner copy supply section and later attested by the First Secretary to Deputy High Commission for India in Pakistan at Lahore, *held*, same were admissible even if they did not fulfil the requirements of Ss. 78(6) and 86. [A.I.R. 1957 Punj. 86, Disting.]: (1988-2) 94 Punj.L.R. 118: 1987 Rev.L.R. 449.

Section 87—Notes.

See 21 Cal.L.J. 637. Under S. 87 of the Act the Court can only presume that the History was written or published by the person and at the time and the place by whom or at which it purports to have been written or published.

88. Presumption as to telegraphic messages.—The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

The presumption is with regard to publication or authorship but not with respect to its accuracy: A.I.R. 1951 Madh. Bh. 146.

A history of a particular sect prepared by an Extra Assistant Settlement Officer during the second settlement, does not form part of the settlement record and has no presumption of truth attached to it, but may be of some value if it was prepared when there was no dispute: A.I.R. 1934 Lah. 1: 154 I.C. 375.

Pamphlet on Schizophrenia published by charitable society in England interested in collecting fund for treating Schizophrenia—Authorship of pamphlet not established—Pamphlet cannot be treated as authoritative on Schizophrenia: (1969) 71 Bom.L.R. 569: I.L.R. (1969) Bom. 1024: A.I.R. 1970 Bom. 312.

Section 88—Notes.

It is true that under S. 88 there is a presumption only that the message received by the addressee corresponds with the message delivered for transmission at the office of origin. There is no presumption as to the person who delivered such a massage for transmission. But proof of authorship of the message need not be direct and may be circumstantial. The contents of the message received, in the context of the chain of correspondence, may well furnish proof of the authorship of the messages at the dispatching end: A.I.R. 1957 S.C. 857: 1958 M.L.J. (Cr.) 42.

Under S. 88, the presumption is limited to what is expressly provided in the section. The form handed over into the Post Office by the sender (and not the form delivered by the Post Office) is the original of a telegram and either this must be produced by an official from the post office or proof of its destruction be given before a copy can be admitted as secondary evidence: (1966) 1 An. L.T. 21: (1966) 1 An.W.R. 209.

The contents of telegrams are not evidence of the facts stated in them: A.I.R. 1945 P.C. 174: I.L.R. (1945) Kar. 35. Probative value of telegram. *See* A.I.R. 1954 Raj. 285. Proof of telegraphic message. *See* (1954) 1 M.L.J. 622: A.I.R. 1954 S.C. 316.

The lower Court's finding in the absence of the original that the copy of the telegram was not proved, set aside; there is presumption under S. 88 that a telegraphic message, forwarded from a telegraph office to the addressee corresponds with the message delivered for transmission to the originating office: 1984 Raj.L.W. 349.

Telegram constitutes primary evidence of the fact that the same was delivered to addressee on the date indicated therein; proof of authorship can be established by circumstantial evidence. [A.I.R. 1957 S.C. 857, Rel. on]: 1984 Hindu L.R. 74: (1983) 2 D.M.C. 77 (Del.).

Telegraph massage—No presumption as to person who delivered message for transmission—Proof of authorship of message—Proof need not be direct but may be circumstantial—Contents of message in context of chain of correspondence may furnish proof of authorship: (1966) 8 Ori.J.D. 249: A.I.R. 1966 Ori. 150.

A telegram by itself is not an authentic document. It is like an unsigned/anonymous communication. Unless a telegram is confirmed by a subsequent signed application, representation or an affidavit, the contents of the telegrams have no authenticity at all and the same cannot be taken into consideration for assessing the value of the other authentic documents on the record: A.I.R. 1993 S.C. 2633.

Presumption as to telegraph message—Presumption would apply to Radio messages (Per *Das, J.*): (1966) 8 Ori.J.D. 249: A.I.R. 1966 Ori. 150.

The sanction of Local Government to prosecute a person for an offence under S. 134-A, Penal Code, communicated by telegram, must be proved to have emanated from the Government. The Court is forbidden by the express provisions of S. 88 to make any presumption as to the person by whom the telegram was sent: I.L.R. 42 Mad. 885: 37 M.L.J. 81. *See* also

89. Presumption as to due execution, etc., of documents not produced.— The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.

---

4 I.C. 240: 10 Cr.L.J. 520; 21 I.C. 274; I.L.R. 49 Bom. 878: A.I.R. 1926 Bom. 71; 13 Pat.L.T. 802: A.I.R. 1933 Pat. 96.

Where though the telegram was purported to have been sent by a person bearing same name as that of the accused, no particulars were mentioned in that telegram of that person, nor was there any evidence that the signature thereon were that of the accused, *held*, the trial Court was clearly wrong in treating the telegram as constituting a piece of circumstantial evidence indicating the culpability of the accused: A.I.R. 1971 Tripura 8.

Where the defendants in suit for specific performance had denied the receipt of telegrams purportedly sent to them by the plaintiff and the transmission of the telegrams by their certified copies and destruction of the original transcript was proved by official witnesses from the Telegraph Department, *held*, in the absence of the defendants' plea or proof of their not residing at the address given in the certified copies and the cause title of the suit, the Court could draw the presumption that the telegraphic messages as contained in the certified copies were received by them: A.I.R. 1988 Karn. 221: I.L.R. (1987) 1 Karn. 3568 (D.B.).

Section 89—Notes.

[*See* also S. 66, *supra*].

The condition precedent for the application of S. 89 is that the original document must have been called for and has not been produced after notice to produce it is given, and these conditions unequivocally suggest that the cases in which the statutory presumption under S. 89 can be raised are cases which fall under S. 65(*a*) and S. 66, Evidence Act. The principle underlying the provisions of S. 89 is sometimes described as the 'necessity' principle. If a party is in possession of a document, or it is shown that the document is in his power, and despite the notice given to him to produce that document, he refuses to produce that document, law provides that the conduct of the party justifies an inference being drawn against him, and in that sense the principle of necessity is invoked and Courts are authorised to assume that the document which has not been produced must have been properly attested, stamped and executed in the manner required by law. While considering the presumption which arises under S. 89, it may be relevant to remember that once a presumption is drawn under S. 89, it cannot be easily rebutted by the production of the original document at a later stage: A.I.R. 1956 Bom. 65: I.L.R. (1955) Bom. 999; A.I.R. 1976 Bom. 38.

As the wordings of S. 89 clearly indicate, its operation is restricted to cases where a notice to produce the document has been given to the opposite party; thus, where the defendants were not given notice to produce the document, *held*, S. 89 cannot come to the plaintiff's aid: AI.R. 1971 Raj. 303: 1971 Raj.L.W. 319.

Once the plaintiff excuses himself from the production of the original documents on the plea that they are not traced or are lost, the question of giving notice for production does not arise: A.I.R. 1978 Guj. 193: (1978) 19 Guj.L.R. 412.

Plaintiff's allegation that document had been effected and was in defendant's possession found to be correct—Defendant cannot, without producing document, contend that it was not stamped according to law: A.I.R. 1953 Him. Pra. 52. Where a party produces an unstamped copy of an instrument by way of secondary evidence, the Court may, in the absence of contrary evidence, presume that the original was stamped: 1932 Mad.W.N. 432.

Merely summons issued to adversary to appear for giving evidence with the document—Document not produced—Presumption under S. 89 of the Evidence Act cannot be drawn: 1961 M.P.L.J. (Notes) 305.

Power-of-attorney registered in Pakistan—Originals not produced—Presumption of their genuineness cannot be drawn. [A.I.R. 1958 Andh. Pra. 107, Rel. on]: A.I.R. 1970 Manipur 57.

Statements in power-of-attorney—Proof—They have to be proved like any other

90. Presumption as to documents thirty years old.—Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This *Explanation* applies also to section 81.

Illustrations

(*a*) *A* has been in possession of landed property for a long time. He produces from his custody deeds relating to the land showing his titles to it. The custody is proper.

(*b*) *A* produces deed relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(*c*) *A*, a connection of *B*, produces deeds relating to lands in *B*'s possession, which were deposited with him by *B* for safe custody. The custody is proper.

---

statements: [A.I.R. 1924 Mad. 880 and (1890) I.L.R. 17 Cal. 903, Rel. on]: A.I.R. 1970 Manipur 57.

In a suit for redemption, the question was whether the plaintiff was the mortgagor and the defendant the mortgagee. The plaintiff alleged that the mortgage was executed 50 years ago and that the entry as regards mortgage was made in the mortgagee's bahi and called upon the defendant to produce it. The defendant denied that he possessed any such bahi. The plaintiff's evidence showed that the entry was made in ordinary bahi and not on stamped paper though required by law as such. Moreover there was no evidence by plaintiff to show that the defendant was in possession of the bahi and was withholding it though called upon to produce it. *Held*, that no presumption under S. 89 could be drawn under the circumstances and as the entry was made in the ordinary bahi and not on stamped paper, no question of presumption arose in such case: A.I.R. 1938 Lah. 90.

It is true that the onus to prove the fact that the document in question is in the possession or in the power of the opponent is initially on the party seeking to ask for permission to lead secondary evidence. But in the case of a registered mortgage, in the ordinary course, the deed of mortgage would be with the mortgagee and as soon as it is shown that the execution of the mortgage was admitted by the executant before the Sub-Registrar, the mortgagee or his heirs would be required to lead some evidence to show that the document was not with them nor was it in their power: A.I.R. 1956 Bom. 65: (1955) 57 Bom.L.R. 918.

Where in a suit for redemption of mortgage, the defendant denied the alleged mortgage and there were circumstances to show that the transaction of mortgage was evidenced by a document, *held*, from the nature of the case, the defendants must have known that they would be required to produce the original mortgage deed which presumably was in their possession. In these circumstances, it would be idle and a useless formality for the plaintiffs to have given notice to the defendants for production of the original mortgage deed: A.I.R. 1971 Raj. 303: 1971 Raj.L.W. 319; A.I.R. 1994 N.O.C. 182 (Raj.); (1979-2) 20 Guj.L.R. 390

Section 90—Synopsis.

1. Applicability and scope.
2. Presumption in respect of documents bearing only mark or seal.
3. Anonymous documents.
4. Discretion of Court to draw presumption.
5. Nature and extent of presumption.
6. Presumption in case of copies.
7. Presumption in case of will.

State Amendment—[Uttar Pradesh].—In its application to the State of Uttar Pradesh in S. 90,—

(1) The existing section shall be renumbered as section 90(1), and

(2) For the words "thirty years" the words "twenty years" shall be substituted, and

(3) Insert the following as a new sub-S. (2):—

"(2) Where any such document as is referred to in sub-section (1) was registered in accordance with the law relating to registration of documents and a duly certified copy thereof is produced, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was duly executed and attested by the person by whom it purports to have been executed or attested".—U.P. Act XXIV of 1954, S. 2 (w.e.f. 30-11-1954).

Section 90-A

State Amendment—[Uttar Pradesh].—In its application to the State of Uttar Pradesh, after S. 90, add the following as new S. 90-A:—

"*90-A. (1)* Where any registered document or a duly certified copy thereof or any certified copy of a document which is part of the record of a Court of justice, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the original was executed by the person by whom it purports to have been executed.

(2)This presumption shall not be made in respect of any document which is the basis of a suit or of a defence or is relied upon in the plaint or written statement.

The *Explanation* to sub-section (1) of section 90 will also apply to the section".—U.P. Act XXIV of 1954, S. 2 (w.e.f. 30-11-1954).

---

8. "Duly executed and attested".
9. Proper custody.
10. Computation of thirty years.
11. Objection to admissibility of document.
12. Evidentiary value of recitals in document.
13. U.P. Amendment.

---

1. Applicability and scope.—*See* (1953) 2 M.L.J. 717: A.I.R. 1954 Mad. 486.

If a document purports to be 30 years old, there is no alternative but to raise presumption under S. 90: (1988) 2 Karn.L.J. 33.

This section does away with the strict rules of proof enforceable in the case of private documents by giving rise to a presumption of genuineness with regard to documents more than thirty years old. The rule is founded on necessity and convenience as it is extremely difficult and sometimes impossible to prove the handwriting or signature or execution of ancient documents after a lapse of many years. Although such documents are rendered admissible without proof if produced from proper custody, the credit to be given to them depends on the discretion of the Court and the circumstances of each case. The presumption is permissive and it is a matter of judicial discretion whether the Court would make the presumption or call upon the party to offer other proof: A.I.R. 1984 Ori. 88: (1984) 57 Cut.L.T. 249 (D.B.).

The principle that a document 30 years or more old produced in the Court from proper custody and *ex facie* free from suspicion may be presumed to be duly executed and attested is founded on necessity and convenience; it is extremely difficult and sometimes impossible after lapse of many years to prove handwriting, signature, execution and attestation of ancient documents; besides, if requirements of S. 90 are fulfilled and execution and attestation of the document is not denied, their formal proof is waived and the Court's time is saved: A.I.R. 1993 Pat. 129: 1993 B.B.C.J. 355: (1993) 2 B.L.J. 289: (1993) 2 Pat.L.J.R. 1 (D.B.).

S. 90 is incorporated in the Statute for the obvious reason that it would be difficult to adduce evidence as time passed by. In due course of time, the witnesses and the attestors may die or become unable to give their evidence. It is in order to get over this difficulty that S. 90 is incorporated. Hence, on the same reason, it may be proper to hold that it would

not be possible to adduce evidence of the person concerned in the case of any ancient document to prove the contents and that the circumstances probabilising the contents brought on record would be sufficient to prove the contents and the fact that it was acted upon: (1983) 1 Karn.L.J. 344.

The words 'purporting' and 'proved' must be read in sequence; the section cannot in the same breath insist on proof of the document's age and also rest content with its mere appearance; the presumptions under S. 90 would arise only if the document is proved, or purports, to be 30 years old; merely because the document carries a date on it, is not sufficient to show that it purports to be 30 years old; there must be some evidence, though not a clear proof, to show that the document is 30 years old; at least a *prima facie* case must be made out of the document being 30 years old: A.I.R. 1977 Andh. Pra. 301: (1977) 1 A.P.L.J. (H.C.) 205: (1977) 2 An.W.R. 157: 1977 Hindu L.R. 651 (D.B.).

In order to attract S. 90, of the Evidence Act, the document must be 30 years old. This period is to be counted from the date of the document. Secondly, the document must come from proper custody. If these two things exist, then the Court has a discretion to presume that the signature is of the person who has purported to sign it and the document is duly executed and attested. This discretion, like any other discretion has to be exercised in accordance with the well-recognised principles of the exercise of judicial discretion. If the document is suspicious then the Court may refuse to draw any presumption and direct the party on whom the burden to prove the document lies, to prove it like any other document. [I.L.R. 47 All. 31 (F.B.); I.L.R. 24 All. 319; A.I.R. 1961 Ori. 180, Rel. on; A.I.R. 1956 S.C. 305; (1897) 1 Chancery 194, Disting.]: (1971) 1 A.P.L.J. 350 (D.B.).

Propositions deducible from S. 90 are: (1) the presumption applies to documents proved to be thirty or more years old; (2) coming from proper custody; (3) the presumption is discretionary and cannot extend to an *ex facie* suspicious document in which case the Court may require the party to offer other proof forthwith; (4) the presumption applies only to documents bearing the writer's or the witnesses' signature and not to unsigned or anonymous papers; (5) the presumption is confined only to the signatures, execution and attestation, that is, genuineness of the documents and not to the truth of their contents or having been acted upon; and (6) the presumption applies to original documents, and not to their copies, certified or otherwise: A.I.R. 1994 Him. Pra. 144; A.I.R. 1973 Andh. Pra. 149: (1972) 2 An.W.R. 346 (D.B.).

For the application of S. 90, firstly, the document must the thirty years old; secondly, it must be produced from proper custody; and thirdly, this document must be purported to be in the handwriting of any particular person or it must be purported to be executed or attested by certain persons: (1971) 1 A.P.L.J. 61.

The rule of presumption of the genuineness of ancient documents must be applied with exceeding caution and where circumstances throw suspicion on genuineness of document, no presumption under S. 90 can be drawn: A.I.R. 1952 Trav.-Co. 438.

S. 90 of the Evidence Act does not apply and is of no help in a case where the signature of a particular person is not in question or sought to be established: 17 Cut.L.T. 73: A.I.R. 1953 S.C. 431.

Whether a document is admissible in evidence or not is one thing and whether the presumption under S. 90 could be raised in respect thereof is totally different. A document may yet be admissible in evidence although the presumption may not be raised under S. 90: (1971) 1 A.P.L.J. 61.

Notwithstanding S. 68, the Court in a proper case can raise a presumption under S. 90; Ss. 68 and 90 do not militate against each other; the Court's power to raise presumptions under S. 90 is not controlled or curtailed by S. 68; whether or not the presumption should be made would depend upon the facts and circumstances of the case: A.I.R. 1989 Cal. 202 (D.B.).

The documents satisfying the conditions laid down in S. 90, can be read in evidence without any formal proof: A.I.R. 1976 All. 213: 1976 All.W.C. 64.

Recitals in an unregistered document 30 years old—Proof—Presumption arises: A.I.R. 1968 Andh. Pra. 276.

Recitals, in the documents more than 30 years old, regarding passing of consideration. *See* (1990) 1 An.W.R. 190: (1992) 1 An.L.T. 340.

Registered document sixty-five years old—It can be presumed to be genuine under section:(1966-67) 71 Cal.W.N. 362. *See* also 1977 Mah.L.J. (Notes) 43 [Lists of partition of property prepared more than fifty years ago cannot be ignored on the ground of non-registration].

Where a document is written 55 years ago by a licensed stamp-vendor and comes out from proper custody it can claim the benefit of S. 90: A.I.R. 1934 Lah. 885.

Presumption of genuineness includes presumption of executant's authority: I.L.R. 58 Cal. 686. But *see* also 1936 All.L.J. 161: A.I.R. 1936 All. 298; A.I.R. 1927 All. 231: I.L.R. 47 All. 55; A.I.R. 1927 All. 765; A.I.R. 1925 All. 1: I.L.R. 47 All. 1 (F.B.).

Presumption of genuineness only dispenses with proof, but the question of evidence is not affected thereby : 95 I.C. 261: A.I.R. 1926 All. 537.

Irrespective of the fact as to whether the witnesses to the document are alive or dead, statutory presumption does arise; if witnesses are available, their evidence may be useful in rebutting the presumption: I.L.R. (1985) Karn. 1440.

A Court is not debarred from raising the presumption under S. 90, Evidence Act, simply because evidence has been called in support of the execution of the deed, which it finds insufficient. A party leading evidence to prove its execution may still rely upon the presumption. There is nothing in law that prevents a Court from presuming a deed to be genuine, even though it is not satisfied with the evidence tendered to prove its execution: A.I.R. 1951 Pepsu 87. It is the trial Court that should be asked to presume a document to be genuine under S. 90 of the Evidence Act. Where no such request has been made to the trial Court, it is too late in the day to ask the High Court to presume the document to be genuine: 1950 Raj.L.W. 199: A.I.R. 1950 Raj. 47.

Once the party has made it known that he wants to rely on the presumption under S. 90 and the document and the surrounding circumstances are such that a presumption under S. 90 may justifiably be raised then the mere fact that the party has a witness or two in addition for proving the signature or the writing of the alleged executant will not always be a sufficient reason for not drawing the presumption. [A.I.R. 1950 Raj. 47 and 1953 Raj.L.W. 153, Disting.]: A.I.R. 1972 Raj. 191: 1972 Raj.L.W. 133. But *see* 1983 M.P.W.N. 43.

Where rent receipts, over twenty years old, in the proper custody of the plaintiff were produced by him in the Court, *held*, they had to be presumed to be genuine unless they were disproved; merely because the plaintiff was fool enough to seek to prove them in the ordinary mode, it would not detract from their evidentiary value under S. 90. [A.I.R. 1957 All. 1, Rel. on]: A.I.R. 1982 N.O.C. 32 (All.). But *see* 1982 W.L.N. (U.C.) 224 (Raj.).

When a document is cited on the side of a party, definite proof of its genuineness has to be given. Merely because the document is written on a very antique paper in Mahajani ink, it does not show that the document is old. For the paper may be old and not the writing. Where the erasures on such a document coincide with the date of the document which was mentioned at no less than 4 places, the document is suspicious: 1958 M.P.L.J. 198: A.I.R. 1958 Madh. Pra. 246.

The document's age, its unsuspicious character, its production from proper custody and other circumstances constitute the foundation for the presumption of genuineness under S. 90; on these requirements being satisfied, documents thirty years old prove themselves. However, if the genuineness of such a document is disputed, the Court should consider the evidence, both external and internal, appearing on the document's face to decide whether or not it should presume proper execution of the document. [A.I.R. 1930 Bom. 39; I.L.R. (1904) 26 All. 581 (P.C.), Foll.]: A.I.R. 1975 Raj. 178: 1974 Raj.L.W. 579.

The question whether the presumption of due execution provided for in S. 90 of the Evidence Act should be raised in a case where the ministerial act of physically signing the document has been left to another person, should really be decided on a consideration of all the facts and circumstances. Thus, where there exists signatures of all executants though under the pens of others and at the behest of each one of the executants and there is also attestation by witnesses, though at the behest of executants, presumption can be raised that every other part of document purported to be in the handwriting of those persons who wrote it and signed it: 1968 Raj.L.W 501: I.L.R. (1968) 18 Raj. 481: A.I.R. 1969 Raj. 11.

Where the document is not executed by the executant himself but by some one authorised by the executant, S. 90 does not authorise the drawing of presumption in regard to the authorisation as well: (1971) 1 A.P.L.J. 61.

Presumption under S. 90—When open: A.I.R. 1968 All. 363.

The mere fact that a document is registered cannot go to prove that it was duly executed. But that would be a circumstance which will definitely have to be taken into account by the Court in deciding how far the presumption under S. 90 should be raised: (1971) 1 A.P.L.J. 61.

Ancient documents may be admissible by aid of S. 90, however, its value, as evidence, depends upon corroboration derived from external and internal circumstances. Production of the document on previous occasions is one of the external circumstance corroborating the existence of the document: (1987) 1 Hindu L.R. 2 (Madh. Pra.) (D.B.).

Where genuineness of a document is disputed but neither its executant nor attesting witnesses are alive and available, *held*, it should be proved in the manner prescribed under S. 69; the Court should not raise the presumption under S. 90 but admit the document and direct the parties to adduce evidence to prove it: A.I.R. 1993 Pat. 129: 1993 B.B.C.J. 355: (1993) 2 B.L.J. 289: (1993) 2 Pat.L.J.R. 1 (D.B.).

A copy of an order, dated 25 September 1941, of the Rent Controller bearing his signatures which was addressed to the father of the party was produced by that party in the Court, *held*, the document being 30 years old and coming from proper custody, the presumption may be drawn that the signatures of the Rent Controller on the document are indeed that of the Controller: A.I.R. 1975 Del. 236: (1976) 78 Punj.L.R. (Del.) 27: I.L.R. (1975) 2 Del. 765 (F.B.).

Where the manner of the document's writing, the spreading of ink on its back side and the condition of the two thumb-impressions thereon and absence of any explanation in the document as to why its executant or her ancestors had allowed to the purported grantees, when the executant herself was not in affluent circumstances, not only the right of free residence in the house but also the right to realise and appropriate rent from its tenants as well, *held*, the document obviously was not beyond suspicion; its genuineness could not be presumed: A.I.R. 1975 Raj. 178: 1974 Raj.L.W. 579.

In respect of a compromise petition, proved to be 30 years old, produced from the Record room where it had been kept as a part of the decree and which contained the thumb-impression and the signatures of the parties, the scribe and the attestators, *held*, presumption under S. 90 can be drawn: A.I.R. 1972 Ori. 148: (1971) 2 Cut.W.R. 814 (D.B.).

To prove that a registered gift deed which was 50 years old was a fraud on registration, *held*, is on the person who so alleges: A.I.R. 1980 All. 394.

Where a document, 30 years old, was acted upon throughout and, presumably, with the plaintiff's knowledge, *held*, testimony of a witness that the signatures thereon were not those of the deceased was not sufficient to throw overboard the ancient document and subsequent events emanating from it; it is a fit case for raising the presumption under S. 90, notwithstanding S. 68: A.I.R. 1989 Cal. 202 (D.B.).

2. Presumption in respect of documents bearing only mark or seal.—The presumption of execution of a document extends also to the mark put on the document indicating that the document was signed by the executant by a sort of symbolic writing which is to be taken to be the signature in the absence of proof to the contrary: I.L.R. 58 Cal. 686: A.I.R. 1931 Cal. 596; 148 I.C. 1172: A.I.R. 1934 All. 529.

A seal does not amount to a signature and S. 90, Evidence Act is not applicable to prove unsigned documents which bear the seal of the executant for it does not make any provision for presumption in regard to seals. The mutation entries are admissible as evidence under S. 35 of the Evidence Act, inasmuch as, these entries were made in an official record by a public servant in the discharge of his official duties, and S. 90, Evidence Act, cannot be invoked as a mode of their proof: 1962 Raj.L.W. 478: I.L.R. (1962) 12 Raj. 83.

As to presumption of genuineness of seal affixed to old document, *see* A.I.R. 1937 Oudh 194: 1936 O.W.N. 768.

3. Anonymous documents.—S. 90 cannot be relied upon for the proof of a document which does not purport to be in any person's

handwriting or to be signed by any known person: (1941) 1 M.L.J. 759: A.I.R. 1941 Mad. 602.

An anonymous document is not within S. 90. Evidence *aliunde* cannot be availed of. If the proof so adduced to establish the handwriting of a particular person is inadequate, the presumption cannot be invoked. A person can either seek to establish the handwriting to be in a particular person's hand by adducing proof or invoke a presumption permissible under S. 90 in his favour. If he seeks to prove it and fails, there can be no question of invoking the presumption under S. 90: A.I.R. 1956 Andhra 1: 1955 An.W.R. 783.

S. 90 does not provide for any presumption regarding anonymous documents, the writer of whom is not known. But an objection that the document should not be admitted without proof as to the writer of the document must be raised at the earliest stage and cannot be permitted to be raised for the first time in second appeal: A.I.R. 1939 Mad. 926: (1939) 2 M.L.J. 593.

A bald document which is 30 years old and which is produced from proper custody does not attract the presumption under S. 90 if it is unsigned, unattested and if it does not bear the name even of its scribe. S. 90 does not contemplate such documents and does not empower the Court to raise any presumption in respect of them: A.I.R. 1974 Guj. 74: (1973) 14 Guj.L.R. 523.

According to S. 90 of the Evidence Act, the presumption of genuineness can be raised if the document itself shows in whose handwriting the contents are which are being relied upon. It follows that no presumption can be made in the case of an anonymous document: 1950 Raj.L.W. 199: A.I.R. 1950 Raj. 47.

In order to attract the provisions of S. 90, the document must have been signed, which most of the entries in the account books are not. They could not, therefore, be brought within the purview of this section: (1943) 45 Punj.L.R. 441: A.I.R. 1944 Lah. 58. (*Obiter*).—Only in such documents as bear the signature of the writer or of witnesses to the document that the presumption can arise. Account papers though more than thirty years old which do not bear on their face the signature of the writer are not admissible in evidence on the presumption available under S. 90: (1955-56) 60 Cal.W.N. 821: A.I.R. 1956 Cal. 205.

Where the deed did not even purport to be signed by the executant and his mark was not proved by the person attesting the same, *held*, that the Court could refuse to presume that the document, was genuine: 110 I.C. 415: 5 O.W.N. 424.

Where a party tendering a document is unable to say who prepared or signed it or where the document itself does not purport to show who prepared or signed it, the mere fact of the document being more than thirty years old does not make it admissible without proof: 1937 R.D. 88: A.I.R. 1937 Oudh 353.

No presumption of genuineness in case of document bearing no signature: A.I.R. 1937 Oudh 194: I.L.R. 12 Luck. 400; 166 I.C. 930: A.I.R. 1937 Oudh 353; (1939) 41 Punj.L.R. 108: A.I.R. 1939 Lah. 285.

Where though the document was more than 30 years old but identity of its executant was not established nor the document came from proper custody and its genuineness was also not corroborated by surrounding circumstances, *held*, presumption under S. 90 could not be raised: (1987) 1 Hindu L.R. 2 (Madh. Pra.) (D.B.).

4. Discretion of Court to draw presumption.—The Court is not bound to make the presumption merely because of the alleged age of the document: (1929) 31 Bom.L.R. 1279: A.I.R. 1930 Bom. 39; 110 I.C. 415: 5 O.W.N. 424.

The Court 'may presume'. The section does not say that the Court must presume the document to be genuine: 7 Mys.L.J. 57. *See* also 175 I.C. 594: A.I.R. 1938 All. 345; (1938) 40 P.L.R. (J.&K.) 51; (1938) 40 Bom.L.R. 202: A.I.R. 1938 Bom. 257; 1958 An.L.T. 561.

The language used in S. 90 indicates that the presumption raised is a permissive one. Though it is not obligatory on a Court to raise the presumption, it is a matter of judicial discretion whether the Court will make a presumption or call upon the party to offer other proof: (1955-56) 60 Cal.W.N. 821: A.I.R. 1956 Cal. 205; (1980) 2 Karn.L.J. 380.

S. 90 does away with the strict rules of proof required for private documents by giving rise to the presumption of their genuineness if they are 30 or more than 30 years old and come from proper custody and are free from suspicion; however, presumption is permissive and may or may not be raised, depending upon facts of each case: A.I.R. 1977 Ker. 41: I.L.R. (1976) 2 Ker. 678 (D.B.).

The rule in S. 90 is not absolute; even when the document is 30 years or more old and comes from proper custody, the Court has the discretion to draw the presumption under the section or require proof of the document's execution; the section itself provides that the Court 'may' draw the presumption and not that it must draw it; as pointed out in A.I.R. 1948 Mad. 388, it would be most dangerous to draw the presumption of a document being genuine merely because it was 30 years old and came from proper custody. Thus, where there had been litigation based on such a document without a finding that it was genuine, *held*, no presumption under S. 90 could be drawn in a subsequent litigation: A.I.R. 1975 Mad. 88: (1974) 87 Mad.L.W. 799 (D.B.).

S. 90 gives an option to a Court to presume or not to presume. Of course, the Court is normally to presume due execution of a document purporting to be thirty years old, but it is not obliged to presume, if it has reasons not to presume. Thus, where the Court had given reasons for not raising such presumption, *held*, no fault could be found with its order: A.I.R. 1976 All. 251.

The question as to whether the presumption under S. 90 arises or not, in the circumstances of the case, must be decided on the evidence adduced. The parties are, therefore, left with the option of leading such evidence as they like for the proof or disproof of the presumption. [1975 Jab.L.J. (Notes) 38, Foll.]. Besides, the presumption is permissive; a party leading evidence to prove a document, cannot rely on such presumption. (*See* 1983 M.P.W.N. 43). Thus, where the plaintiff himself led evidence to prove the document and signatures on it, *held*, he could not be heard to say that as the document was 30 years' old and there was presumption about its execution and signatures and every other part thereof, the defendants could not be allowed to lead evidence in rebuttal: 1991 M.P.L.J. 768.

The Court should be very careful about raising any presumption under S. 90 in favour of old deeds of shankalap which never saw the light of day until they were produced during the trial of the suits in which under-proprietary rights are set up on the basis of those deeds: (1926-27) 31 Cal.W.N. 215: A.I.R. 1927 Cal. 102; I.L.R. 12 Luck. 400: A.I.R. 1937 Oudh 194. *See* also 166 I.C. 930: 1937 O.W.N. 179; I.L.R. 11 Cal. 539; I.L.R. 18 Lah. 732: A.I.R. 1937 Lah. 599; I.L.R. 29 Cal.740; 98 I.C. 1021: A.I.R. 1927 Cal. 229; A.I.R. 1929 All. 561; I.L.R. 8 Luck. 11: A.I.R. 1932 Oudh 227. *See* also A.I.R. 1940 Lah. 245 (Pondah's bahis).

The presumption under S. 90 is a rebuttable one to be made at the discretion of the Court. It is based on the rule of expediency, and unless the surrounding circumstances satisfy the Court that the document tendered has been produced from proper custody it would be unsound to admit the document. The Court must insist on a satisfactory account of the origin of the possession being given by the party relying upon the document. The custody may not be in the strictest sense legal custody, but, whether it originated in right or wrong, the origin must be explained. The soundest policy even upon the rule of expediency necessitates circumspection and scrutiny in the examination of the surrounding circumstances before raising the presumption. The Court must, therefore, examine the surrounding circumstances tending to establish the connection of the party producing the document with the person with whom the document should naturally have been: (1938) 40 Bom.L.R. 202: A.I.R. 1938 Bom. 257.

S. 90 is not mandatory; it gives discretion to the Court to raise the presumption or not to raise the presumption. But the discretion should be used judicially and when the trial Court has used the discretion in a judicial manner, the appellate Court should be slow in interfering with the discretion so used in all cases of exercise of judicial discretion by the trial Court. [A.I.R. 1935 Oudh 482, Rel. on]: A.I.R. 1982 Karn. 314: (1982) 1 Karn.L.J. 394.

When a document is suspicious on the face of it when an important word is erased and rewritten, presumption under S. 90 does not arise: 95 I.C. 261: A.I.R. 1926 All. 537.

The Court is not bound to raise all or any of the presumptions with respect to every document that is said to be more than 30 years old. The Court may refuse to raise a presumption if it has reason to believe the document to be a fabrication, or where a grave suspicion attaches to it. The suspicion may be due to erasures or overwritings in the document itself, or to circumstnaces which tend to raise doubts as to its authenticity; on the other hand, if no suspicious circumstances exist and the document is also found to be acted upon, there is a strong presumption of the genuineness of an old document: A.I.R. 1951 Pepsu 87.

Though a Court is not bound to presume that the recital in an ancient document is correct, yet where a khatta over thirty years old signed by several witnesses is sued upon, the Court cannot lightly disregard the recitals in it in the absence of anything to prove that the creditor is putting forward a false claim: A.I.R. 1951 Kutch 4.

Whether a presumption under S. 90 should or should not be raised, is a matter for the discretion of the Court. It is not obligatory on a Court to raise any presumption under that section in favour of a person who desires to prove a fact. Of course, if the plaintiffs ask the Court to make a presumption in their favour in accordance with the provisions of that section, it would be necessary for the Court to deal with that matter. Failure to draw the presumption by the Courts below cannot be attacked in second appeal, when it is clear that the Courts were not asked to draw it. High Court in second appeal refused to draw the presumption in the circumstance of the case: 1953 Raj.L.W. 153.

It is well settled that the presumption is permisive and according to the circumstances of each case the Court may or may not raise it. The High Court has no jurisdiction in Second Appeal to interfere with the discretion of the trial Court to refrain from drawing the presumption drawable under S. 90, when the trial Court assigned some reasons for the same: (1972) 1 Cut.W.R. 49.

When once it is held by the Court that the document has come from proper custody and the document is an ancient document, the presumption under S. 90 of the Evidence Act may be raised holding that the signature is of the person mentioned in the document: A.I.R. 1982 Karn. 314: (1982) 1 Karn.L.J. 394.

The raising of presumption under S. 90 as to the genuineness of a document is a matter which is eminently within the discretion of the trial Court and where a document bore only the seal and there was no signature and where there were strong reasons to doubt its genuineness the appellate Court held that it was not prepared to draw a presumption about its genuineness which the lower Court had refused to do: I.L.R. 17 Luck. 805: 1942 O.W.N. 225: A.I.R. 1942 Oudh 374; 104 I.C. 219: A.I.R. 1927 Cal. 870; I.L.R. 51 Cal. 135: A.I.R. 1924 Cal. 493; (1929) 31 Bom.L.R. 1279: A.I.R. 1930 Bom. 39.

The discretion exercised by the trial Court under S. 90 ought not to be interfered with by the appellate Court especially when no objection under S. 90 was raised in the trial Court. Even assuming that the appellate Court was entitled to take a different view, an opportunity to adduce further evidence to support the presumption ought to be given to the party producing the document: 1958 An.L.T. 561. Admissibility and presumption as to document 30 years old—Interference with discretion of trial Court. *See* A.I.R. 1958 Ori. 26. Presumption not drawn by trial Court—Appellate Court refusing to draw inference—Genuineness of documents decided on evidence—Proper: 108 I.C. 412 (M.).

Expression 'may presume' in S. 90—Meaning of—It means that Court may either regard the fact as proved, unless and until it is disproved, or may call for proof of it—It is in the discretion of the Court and when the trial Court has exercised its discretion, the appellate Court ought not to interfere with the discretion unless it was exercised arbitrarily, injudiciously or capriciously—(Words and Phrases—'May presume'): 1967 Mah.L.J. 341: (1967) 69 Bom.L.R. 559: A.I.R. 1967 Bom. 382.

5. Nature and extent of presumption.—As to the extent of presumption regarding old documents. *See* 6 L.L.J. 97: I.L.R. 4 Lah. 233: A.I.R. 1924 Lah. 145; 82 I.C. 487: A.I.R. 1925 Mad. 184; 77 I.C. 472; A.I.R. 1924 All. 869: 22 All.L.J. 857; (1939) 41 Punj.L.R. 108: A.I.R. 1939 Lah. 285.

The principle underlying S. 90 is that if a private document thirty years old or more, is produced from proper custody and is, on its face free from suspicion, the Court may presume that it has been signed or written by the person whose signature it bears or in whose handwriting it purports to be and that it has been fully attested and executed, if it purports so to be. In other words, documents thirty years old prove themselves. The age of a document, its unsuspicious character, the production from proper custody and other circumstances are the foundation for the presumption as enunciated in the above section. This rule, it is now well settled, was founded on necessity and convenience. It is extremely difficult and sometimes impossible to prove the handwriting or signature or execution of ancient documents after the lapse of many years. It is, therefore, presumed that all persons acquainted with execution of documents,

if any, are dead and proof of those facts are dispensed with. Thus, the presumption relates to the execution of the documents, that is, signature, attestation, etc., in other words its genuineness, but not to the truth of its contents: A.I.R. 1958 Ori. 26.

A presumption under S. 90 covers the question of due execution: 1991 Punj.L.J. 587.

Such a document need not be proved by examing the scribe or the attestors or any person who knew the signature of the scribe and attestors: 1958 An.L.T. 561.

Ordinarily the presumption under S. 90 would include, due attestation by the persons by whom the document purports to be attested. If a document 30 years old shows that certain persons witnessed it in token of its execution by its maker, and it is produced from proper custody, the Court can presume 'due' attestation. It is not, however, necessary that the endorsement of attestation should also state that the attestator saw the executant sign and that he attested in the presence of the executant, so as to raise the presumption of due attestation: A.I.R. 1949 All. 733.

Under S. 90, documents more than thirty years old coming from proper custody prove themeslves, but there is no presumption that the contents of the document are true: (1938) 40 Bom.L.R. 1262: I.L.R. (1939) Bom. 97: A.I.R. 1939 Bom. 59; A.I.R. 1993 Madh. Pra. 5: 1993 M.P.L.J. 333.

The presumption relates to the signature, execution or attestation of a document, that is, to its genuineness. But it does not involve any presumption of correctness of every statement in it which may contain narrative of past events or that the contents of the documents are true or it has been acted upon. That must be proved like any other fact: A.I.R. 1984 Ori. 88: (1984) 57 Cut.L.T. 249 (D.B.).

There can be no presumption regarding the correctness of the contents of the copy. The presumption could only be about the genuineness of the endorsement that the copy was certified by an officer: A.I.R. 1973 Raj. 263: 1973 W.L.N. 240: 1973 Raj.L.W. 473.

S. 90 only gives the discretion to Courts to dispense with proof as to the execution of a document. It raises no presumption whatever as regards the accuracy of the plan and cannot be used so as to dispense with formal proof of the contents of the documents as required by law: 111 I.C. 361: A.I.R. 1929 Lah. 78. *See* also A.I.R. 1937 Nag. 43: I.L.R. (1937) Nag. 68.

S. 90 does not involve any presumption that the contents of a document more than 30 years old coming from proper custody are true. The presumption is only as regards due execution: 17 Mys.L.J. 510: 45 Mys.H.C.R. 57.

All that S. 90 of the Evidence Act lays down is that a Court may presume that documents purporting to be 30 years old have been written or attested by the persons who purport to have written or attested them. But there is no presumption necessarily attaching to them as to the correctness of the entries or recitals therein. Where the writer of such documents is alive but is not called in evidence to prove them, their mere production in Court without more cannot be of much use as evidence: 18 Cut.L.T. 117: A.I.R. 1951 Ori. 262.

In fact S. 90 dispenses with proof of document as required in Ss. 67 and 68 and what is required to be done is deemed to have been done by operation of law. But the proof of signature or handwriting does not establish that whatever is stated in document is also correct. That has to be proved not only by production of document but by proving its contents as well: A.I.R. 1981 All. 3.

S. 90 makes it clear that the presumption which is to be raised relates only to the signature, execution or attestation of a document. It does not involve any presumption that the contents of the document are true or that it had been acted upon. Such allegation has to be proved on adducing proper and relevant evidence: (1955-56) 60 Cal.W.N. 821: A.I.R. 1956 Cal. 205; I.L.R. (1966) 1 Cal. 395.

Merely because documents more than 30 years old are presumed under S. 90 to be duly executed, there is no presumption about their contents being true. But once its execution is presumed by the party's predecessor-in-title, the signatory to the document, it would amount to an admission of the executant about the truth of its contents. Such document is also admissible under S. 32(3) as it is a statement made against the proprietary interest of a person now dead: A.I.R. 1981 Guj. 142: (1981) 22 Guj.L.R. 389.

Presumption under, is rebuttable—*Held*, on the facts and in the circumstances of the case, presumption of the execution was not rebutted: A.I.R. 1953 Cal. 471: (1953-54) 58 Cal.W.N. 271.

Entry in settlement record—Acknowledgment made in deposition in settlement enquiry—Record of settlement enquiry produced from proper custody 30 years old—Presumption. *See* A.I.R. 1957 Trav.-Co. 246.

The mere proof of the fact that a map is more than 30 years old, by itself is only proof of the fact that the map was prepared by the maker thereof. The fact that a particular person prepared a map or in other words made certain statements by lines, cannot, without or apart from and independent of the proof of the correctness of its contents, have any bearing on the matters in issue in this suit. The fact that the map is a part of the decree does not make any difference, when the decree does not fall within any of the Ss. 40, 41 or 42 of the Act: (1944-45) 49 Cal.W.N. 791: A.I.R. 1945 Cal. 492. Jama Wasil Baki papers seventy years old—Presumption as to, *see* 45 C.L.J. 129. As to presumption of genuineness of pedigree tables, *see* 105 I.C. 81: A.I.R. 1928 Nag. 20.

Settlement pedigree-tables—Presumption of truth of relationship—Burden to prove that entry in such tables is wrong: (1961) 63 Punj.L.R. 177: A.I.R. 1961 Punj. 251.

Documents (pattas) thirty years old produced from proper custody and bearing proper endorsements under O. 13, R. 4, C.P.Code—Document altogether free from any kind of suspicion—Presumption—Documents stand properly proved without the necessity of any direct proof of execution and are admissible in evidence: I.L.R. (1960) 10 Raj. 94.

Registered gift deed executed 30 years before suit—Executant dead—Whether attesting witnesses were alive not known—Registration *held* sufficient proof of execution of document. [(1943) 2 M.L.J. 51: A.I.R. 1943 P.C. 83 and I.L.R. (1955) 5 Raj. 955, Rel. on; Registration Act, 1908, S. 60]: I.L.R. (1960) 10 Raj. 94.

Sale of immovable property—Consideration not paid—Title, if passes—Evidence of intention of parties when sale-deed is ambiguous: A.I.R. 1957 Ori. 243.

Old document: A.I.R. 1958 Madh. Pra. 246.

The discretion exercised by the trial Court under S. 90 ought not to be interfered with by the appellate Court especially when no objection under S. 90 was raised in the trial Court. Even assuming that the appellate Court was entitled to take a different view, an opportunity to adduce further evidence to support the presumption ought to be given to the party producing the document. [A.I.R. 1929 Pat. 51 and A.I.R. 1935 Oudh 482, Rel. on]: 1958 An.L.T. 561.

The first appellate Court has a right to interfere with the discretion of the trial Court in the matter of drawing any presumption under S. 90 if it is satisfied that the discretion was improperly exercised. In so doing it must come to its own conclusions on all questions of fact. S. 90 is worded in general terms as it was designed to meet situations varying in character, where passage of time might have obliterated the proof of the genuineness of any disputed document. Under this section wide powers were conferred on the Court. Before any presumption under S. 90 can be drawn, one fact must be satisfactorily proved and that is, the document in question has been produced from proper custody. The satisfaction of the Court on this point is a judicial satisfaction and ought to be found on the evidence on record. It is for the party who asks the Court to draw the necessary presumptions under S. 90 to prove by satisfactory evidence that the document was produced from proper custody. The finding of the trial Court on this point is a finding of fact and, as in the case of any other finding of fact, is subject to the scrutiny of the appellate Court. The factum of proper custody is not a matter for presumption but ought to be satisfactorily proved. It may be proved by one of the two ways, *i.e.*, either by adducing evidence *aliunde* to show that the document was produced from proper custody or by showing that the person who produced it was the depository of the document in question: I.L.R. (1960) Mys. 1206: (1962) 1 Cr.L.J. 441: A.I.R. 1962 Mys. 53.

Interpretation of S. 90—Question of proper custody—S. 139 not helpful: I.L.R. (1960) Mys. 1206: (1962) 1 Cr.L.J. 441: A.I.R. 1962 Mys. 53.

Document signed by *H* for *D*—Presumption will be only in respect of signature of *H* and not in respect of execution of document by *D*: 1963 B.L.J.R. 472: A.I.R. 1964 Pat. 241.

Documentary proof of relationship—Document must be relevant under S. 32(5), before raising presumption under S. 90: 1964 B.L.J.R. 152: A.I.R. 1964 Pat. 187.

Seventy years old deed presented by heirs of grantees—Presumption would be that the deed bore signature of executor and it was duly executed: A.I.R. 1966 Him. Pra. 54.

Where more than 30 years old mortgage deed, though unregistered, was produced from proper custody and its genuineness was not disputed, *held*, though the deed was inadmissible to enforce its contents, yet it was admissible as admission of joint possession of the property; presumption under S. 90 is attracted to the deed. [1961 M.P.L.J. 762, Rel. on]: A.I.R. 1983 Raj. 57.

6. Presumption in case of copies.—[*See* also Note 13, *infra*].—Court may presume genuineness of signature authenticating a copy: 56 I.A. 146: I.L.R. 52 Mad. 453; A.I.R. 1929 P.C. 115. The presumption contained in S. 90 cannot apply to a copy that is not itself 30 years old: 1940 Nag.L.J. 437: A.I.R. 1940 Nag. 382. *See* also A.I.R. 1936 Lah. 788; A.I.R. 1937 Lah. 930; A.I.R. 1939 Lah. 458; A.I.R. 1939 Lah. 273.

The view expressed by the Full Bench in I.L.R. 46 Mad. 92 that the presumption under S. 90 with regard to documents 30 years old arises in the case of copies as well as originals, and that if a copy is found to be a true copy a presumption may be made of the genuineness of the original itself is no longer good law. The party relying on such a copy must prove the execution of the original in some way known to law, at least by approved circumstantial evidence: (1950) 1 M.L.J. 720: A.I.R. 1950 Mad. 634, following I.L.R. 52 Mad. 453 (P.C.) and I.L.R. 57 All. 494 (P.C.).

The production of a copy is not sufficient to justify the presumption of due execution of the original under S. 90 and mere production of a certified copy would not ordinarily relieve the person producing it from the necessity of producing evidence as regards the execution of the original. In suitable cases, however, the presumptions arising under S. 90 also apply to copies; if the copy produced under S. 65 and admitted as secondary evidence is produced from proper custody and is over 30 years old, then the signature authenticating the copy may be presumed to be genuine. The copy would, therefore, be admissible as evidence of the terms of the lost original, being secondary evidence of the terms of the original grant. If the copy is not itself over 30 years old, S. 90 cannot be invoked in proof of the original of that document: 50 Mys.H.C.R. 118. No presumption under S. 90 can be raised on the basis of the certified copies when the originals are not forthcoming: (1939) 41 Punj.L.R. 377(2): A.I.R. 1939 Lah. 273. *See* also A.I.R. 1941 Oudh 433: I.L.R. 16 Luck. 778; A.I.R. 1941 Pesh. 89; A.I.R. 1941 Lah. 400.

A copy purporting to be more than 30 years old and produced from proper custody may be presumed to be a copy satisfying the requirements of the Evidence Act as to secondary evidence, when that copy contains a statement that it is a true copy and contains the signature of the author of the original. In such a case the Court is entitled to presume the genuineness of the signature on the copy under S. 90: 1939 Mad.W.N. 841: A.I.R. 1940 Mad. 273.

The language of S. 90 of the Indian Evidence Act requires the production of the particular document in regard to which the Court is invited to make the statutory presumption. If the document produced is a copy admissible as secondary evidence under S. 65 of the Evidence Act and is produced from proper custody and is over 30 years old, then only the signatures authenticating the copy may be presumed to be genuine; but production of a copy which is not a secondary evidence is not sufficient to raise the presumption of the due execution of the original: A.I.R. 1954 S.C. 606; A.I.R. 1961 Andh. Pra. 361. The presumption that attaches under S. 90 to the certified copy of the road cess return, therefore, is that the signature authenticating it is genuine. But there is no presumption that the original of that document was signed by the person who is said to have signed it: 1957 B.L.J.R. 542: A.I.R. 1958 Pat. 294.

The mere production of a copy of a document would not be sufficient to justify the presumption of due execution of the original. But if the copy is produced from proper custody and is over thirty years old, then the signatures authenticating the copy may be presumed to be genuine; and it will be admissible as evidence of the terms of the original: 26 Mys.L.J. 121.

The presumption enacted in S. 90 can be raised only with reference to original documents and not to copies thereof. Further if, the document happens to be signed by the agent of the person against whom the presumption is sought to be raised and there is no proof that he was an agent, S. 90 does not authorise the raising of a presumption as to the existence of authority on the part of the agent to represent that person: 1956 S.C.J. 279: I.L.R. 35 Pat. 221: 1956 S.C.R. 1: A.I.R. 1956 S.C. 305.

Where a document of mortgage which is produced is a copy admitted under S. 65, Evidence Act, as secondary evidence and it is produced from proper custody and is over 30 years old, the signatures authenticating the copy may be presumed to be genuine under S. 90. Even so, under S. 90, when a copy is produced, the presumption cannot be made that the signature, handwriting, execution or attestation of the original document were in order. The presumption under S. 90 cannot apply to a copy though it may have been admitted under the provisions of S. 65. It would make no difference to the said position that the copy in question is a certified copy of a registered document. In the case of a certified copy of a registered document, however, the party would be justified in contending that under the provisions of S. 60, sub-S. (2), Registration Act, it would be competent to the Court to hold that the execution of the document had been admitted by the executant before the Sub-Registrar. That is the endorsement which the certified copy produced, bears and the said endorsement must be given its due legal effect having regard to the provisions of S. 60, sub-S. (2). But the inference or presumption authorised by the provisions of S. 60(2), Registration Act, that the facts mentioned in the endorsements made under S. 58 have occurred as therein mentioned need not be connected or confused with the presumption or inference that may arise under S. 90, Evidence Act. This position would not materially assist the party wishing to prove execution of a registered mortgage because the valid execution of the document implies the proof of some other facts. It would not be enough to prove that the mortgagor put his signature to the document of mortgage and admitted that the document had been executed by him before the registering authority. Having regard to the provisions of S. 59, Transfer of Property Act, the plaintiff would further have to prove that the deed of mortgage executed by the mortgagor was attested by at least two witnesses. In other words, before a deed of mortgage can be said to be validly executed, it must be proved that it was executed by the mortgagor and that the execution by the mortgagor was attested by at least two witnesses. And it would be clear that, so far as the proof of this additional fact is concerned, S. 60(2), Registration Act, would be powerless to give any help to the party. S. 60(2) is confined to the endorsements made under S. 58 of the Act and it provides for the raising of a statutory presumption or inference in respect of the said endorsements alone: A.I.R. 1956 Bom. 65: I.L.R. (1955) Bom. 999.

In spite of the strict provisions of S. 90, Evidence Act, there may be circumstances under which a copy produced would be available not only to prove the existence of the original document, but of the terms thereof as well. The circumstances, therefore, have to be considered, where on the facts in a particular case, if a copy of a document is found to be admissible as secondary evidence under S. 65, Evidence Act, whether the terms thereof can be taken to have been proved, although they do not under S. 90 itself prove themselves on a presumption raised under that section: (1955-56) 60 Cal.W.N. 821: A.I.R. 1956 Cal. 205.

The Court can presume the genuineness even of an unregistered document thirty years old from a copy of such document, if the original is proved to have been duly executed, and further it is also proved that the original is lost: A.I.R. 1929 All. 561.

The words 'any document' and 'is produced' used in S. 90 indicate that reference is to the original document and not to the certified copy of that document. Thus, S. 90 cannot be pressed in service for introducing certified copies in evidence as the statutory presumption arising under S. 90 can be availed of only if the original documents are produced on record: A.I.R. 1978 Guj. 193: (1978) 19 Guj.L.R. 412; 1986 W.L.N. (U.C.) 432 (Raj.).

Presumption of due execution and attestation does not apply to certified copy—It applies to original documents: I.L.R. (1953) Bom. 734: A.I.R. 1953 Bom. 338.

The presumption regarding old documents over thirty years old under S. 90 can not be extended to the certified copy produced to prove the execution of the original sale deed: A.I.R. 1984 Bom. 19.

Presumption under S. 90 applies with regard to the original documents and not their copies; no presumption of genuineness of the original can be drawn on the basis of certified copy of the document: A.I.R. 1983 All. 216.

Under S. 90 of the production of a certified copy of a document which is more than 30 years old can prove the contents of the document but not its execution. The section requires production in Court of the particular

document in regard to which it is asked to draw the statutory presumption of execution. [I.L.R. 57 All. 494 (P.C.), Rel. on]: 1949 Nag.L.J. 226: I.L.R. (1949) Nag. 521; I.L.R. (1955) Nag. 1000: A.I.R. 1956 Nag. 38.

The statutory presumption under S. 90 is not applicable to the certified copies of the documents being 30 years old. The certified copy of the registered Kabuliyat may, however, be received as secondary evidence of the original documents under S. 65(*c*) when it was transpired from evidence that the original was lost and not traceable and that non-production of the original was not due to any default or neglect on the part of the party producing the certified copy: A.I.R. 1988 Cal. 68: (1986-87) 91 Cal.W.N. 958 (D.B.).

Mere production of a certified copy of a document more than thirty years old is not sufficient to raise a presumption under S. 90 of the Evidence Act regarding its genuineness or execution although the certified copy may be used to prove the contents of the document. Where the document is registered then although its mere registration may not by itself constitute sufficient proof of the execution of the document, in view of Ss. 57 and 60 of the Registration Act, the certified copy and the certificate issued by the Registrar, would constitute sufficient evidence to prove the contents of the document and be also to some extent an evidence of the execution of the document. It may be that proof of admission of execution before the Registrar may not satisfy completely the requirements of S. 67 of the Evidence Act which requires that the signature of the executant must be proved to be in his handwriting. But it cannot be argued that admission of signature before the Registrar cannot in any case form an evidence of the execution of the document. If apart from the admission incorporated in the certificate of the Registrar under S. 60(2) of the Registration Act, there is other evidence to corroborate the admission, the execution of the document can be considered as proved: A.I.R. 1964 Andh. Pra. 284.

The statutory presumption under S. 90 can be raised only with regard to the actual document produced in Court; it cannot be raised with regard to the original document when that is not produced and when what is produced is only a certified copy: (1945) 47 Bom.L.R. 116: A.I.R. 1945 Bom. 319.

The presumption under S. 90 relates to the execution of the documents, *i.e.*, signatures, attestation, etc., in other words its genuineness, but not to the truth of its contents. The presumption can be raised only with reference to original documents and cannot be availed of in case of certified copies: I.L.R. (1961) Cut. 249: A.I.R. 1962 Ori. 40.

If a certified copy is admissible as secondary evidence under S. 65, Evidence Act and is produced from proper custody and is over 30 years old, the signatures authenticating the copy may be presumed to be genuine but the production of a copy is not sufficient to raise the presumption under S. 90 of due execution of the original and the party relying upon the copy should prove the due execution of the original in some way known to law, at least by approved circumstantial evidence: I.L.R. (1963) Andh. Pra. 1085; A.I.R. 1941 Lah. 400.

If a plaintiff in a suit for possession does nothing more than produce a certified copy of the original sale deed in his favour which was more than 30 years old, he would not succeed in establishing his title to the property. But if he produces evidence of identifying witness of the executants it can be held that the evidence is sufficient to prove the due execution of the sale deed in question: 1939 All.L.J. 1023: A.I.R. 1940 All. 74.

Where in a suit brought in 1961, for redemption of mortgage of 1895, by the purchaser of the rights of mortgagor, the plaintiff relied on certified copy of a statement made in mutation proceedings for the purpose of acknowledgment under S. 18 of the Limitation Act, but did not produce its original nor he examined any witness to prove the fact that the persons shown to have signed the original had in fact signed the same or those persons were the mortgagors/their representatives, *held*, in such circumstances, certified copy was no proof of the original nor the presumption under S. 90 or S. 114(*e*) could be raised: A.I.R. 1971 S.C. 2342: (1971) 2 S.C.R. 104.

Ancient registered document—Admissibility of certified copy for proof of contents—Proof of its execution by registrar's endorsement on the copy: (1966-67) 71 Cal.W.N. 362. But *see infra*.

The statutory presumption under S. 90 cannot be made in respect of a document merely on production of its copy under S. 65

of the Act. Where the original is a registered document, and the copy produced is a certified copy, bearing the necessary endorsement of the Registering Officer before whom the executant acknowledged the execution and was duly identified, the facts mentioned in the endorsement may be proved by the endorsement, and the copy can be admitted in evidence as proof of the execution of the original: (1945) 47 Bom.L.R. 962: A.I.R. 1946 Bom. 193.

The section, worded in general terms, is meant to meet varying situations when passage of time might have obliterated the original document; it confers wide powers on the Court. However, before the presumption can be raised, it must be established that: (*1*) the document (certified copy) has come from proper custody, and (2) the original document has been destroyed or lost. Thus, where it was proved from the reply of the District Court that the original special *wakalat*, more than 30 years' old, had been destroyed as per rules, *held*, its certified copy coming from proper custody was entitled to the presumption under S. 90: A.I.R. 1982 Andh. Pra. 24: (1981) 2 An.W.R. 290 (D.B.).

The certified copy of a document is not admissible under S. 90. But the same may be received in evidence under S. 65 when the person in custody of the original document has refused to produce the original: 1973 B.L.J.R. 406.

Loss of a document can be proved by several modes including its having become untraceable; thus, where the plaintiff never had custody of documents more than thirty years old and stated on oath that they were not at all traceable, *held*, the loss of documents was established; proving them by certified copies granted by the Sub-Registrar could be allowed as well by raising the presumption under S. 90: (1991-2) 100 Punj.L.R. 611: 1991 Punj.L.J. 473.

7. Presumption in case of will.—The presumption which arises under S. 90, Evidence Act, can also be drawn in case of a will, the genuineness of which is in controversy in the Probate Court, though there is a possibility that the propounder may antedate the will and thereby call in his aid the presumption under the section: A.I.R. 1953 Cal. 471: (1953-54) 58 Cal.W.N. 271; A.I.R. 1956 Mad. 566.

S. 90 applies to wills also and when the will was duly registered, a presumption of its validity would arise: 1991 Punj.L.J. 587.

A will being more than 30 years old and produced from proper custody may be presumed to have been duly executed by the testator when he was in a sound disposing state of mind. [A.I.R. 1961 Mad. 262; A.I.R. 1947 P.C. 15 and A.I.R. 1962 Andh. Pra. 29, Rel. on]: A.I.R. 1976 Raj. 40: 1976 Raj.L.W. 14: 1975 W.L.N. 931. But *see* 1977 All.W.C. 18.

S. 90 according to its plain terms applies to wills as to other documents. If, therefore, a will made more than 30 years ago is produced from the proper custody, the Court may presume that it was duly executed and attested. Where the Court chooses to make the presumption authorised by S. 90, no further proof of the facts is necessary under S. 69: I.L.R. (1943) Cal. 392: (1942-43) 47 Cal.W.N. 359: A.I.R. 1944 Cal. 241.

If a document evidencing a will comes from proper custody and is more than 30 years old, a presumption arises under S. 90 that it is a genuine document and is validly executed. The presumption also extends to the due execution of the will: A.I.R. 1948 Sind 127.

The presumption under S. 90 is one of due execution and attestation. This involves the idea that the document was executed duly and attested duly; in other words, that the document was validly executed. This involves a further conception that the testator had testamentary capacity to execute the will. Thus, the Court may presume that the will in question was duly executed and attested in accordance with the formalities required by the Indian Succession Act: A.I.R. 1953 Cal. 471: (1953-54) 58 Cal.W.N. 271.

The presumption under S. 90 is one of due execution and attestation as well as of testamentary capacity of the testator executing a will. This presumption does not extend to the truth of the contents of the will: A.I.R. 1988 Cal. 196 (D.B.).

The presumption about wills not only applies to signatures but also to their due execution and attestation; the presumption also extends to the fact that on the date when the will was executed the testator was in a sound and disposing state of mind and that the will

was genuine; the presumption will obviously apply only to a document which bears the signature of the writer or of witnesses and not to an unsigned or anonymous document though the presumption of execution shall extend to a mark put on the document to indicate its execution by a symbolic writing in the absence of proof to the contrary. Any recognised form in which a person affixes or impresses his name or mark either by himself or by another person with the intention to treat it as his signature is sufficient in law to draw the presumption under S. 90. [I.L.R. 47 All. 31 (F.B.); I.L.R. 24 All. 319; A.I.R. 1961 Ori. 180, Foll.]: (1971) 1 A.P.L.J. 350 (D.B.); (1985) 1 Karn.L.J. 331; (1991) 1 Ker.L.T. 559: (1990) 1 Ker.L.J. 354; I.L.R. (1992) 3 Ker. 543.

As the affixing of the signature of the attesting witnesses in the presence of the testator is the ordinary mode of attesting a document and is the mode by which attestation is defined in S. 3 of the T.P. Act, where under S. 90 of the Evidence Act the presumption of due execution of a will is drawn, it necessarily amounts to a finding that the attesting witnesses signed in the presence of testator: A.I.R. 1947 Pat. 449.

Where a will was more than thirty years old and was produced from proper custody, on a question whether the presumption under S. 90 of the Evidence Act extended to the testamentary capacity of the testator in addition to its actual execution and attestation, *held*, that a party setting up a will is required to prove that the testator was of sound disposing state of mind when he made his will but in the absence of any evidence as to the state of the testator's mind, proof that he had executed a will rational in character in the presence of witnesses must lead to a presumption that he was of sound mind, and understood what he was about. This presumption can be justified under the express provisions of S. 90 since a will cannot be said to be 'duly' executed by a person who was not competent to execute it; and the presumption can be fortified under the more general provisions of S. 114 of the Act, since it is likely that a man who performs a solemn and rational act in the presence of witnesses in sane and understands what he is about: (1946) 2 M.L.J. 453 (P.C.): I.L.R. (1946) Nag. 917: A.I.R. 1947 P.C. 15 (P.C.); 1959 B.L.J.R. 525.

Although the document produced is a certified copy of a will more than thirty years old, the presumption under S. 90 cannot be raised with respect to the original. Its due execution should be proved at least by approved circumstantial evidence.

Where the certified copy shows that the original contained an endorsement by the Sub-Registrar under S. 60 of the Registration Act, it can be taken as evidence of the fact that the original contained the testator's signature.

The fact that the will which came into effect in the year 1921 had not been disputed at all by any one of the several persons who could have disputed it, is the strongest piece of evidence that everybody interested and likely to have been in a position easily to ascertain the facts, took it for a valid will.

The same circumstances that raise a presumption that the will was duly attested and executed also afford evidence that the testator was in a sound disposing state of mind when he executed it: A.I.R. 1958 Andh. Pra. 720.

Where a certified copy of a registered will is produced from Registration Department, the fact that it is more than thirty years old cannot lead to a presumption about the genuineness of the original: All that can be presumed is that the officer granting the copy endorsed it as an authentic copy: 1958 M.P.C. 351: 1958 Jab.L.J. 512: 1958 M.P.L.J. 513: A.I.R. 1958 Madh. Pra. 261.

The production of a certified copy of a will more than thirty years old from the Registration Office cannot be considered to be sufficient to justify the presumption of due execution of the original will under the provisions of S. 90, Evidence Act: A.I.R. 1957 Punj. 146: I.L.R. (1957) Punj. 418.

Apart from S. 90, the Court can make a presumption of fact about the valid execution of a will from a certified copy of the will obtained from the Registration office, if such presumption is justified by the proved facts and circumstances of the case: A.I.R. 1938 Oudh 69: I.L.R. 13 Luck. 723.

A will which was a registered document of 30 years old, when tendered in evidence and was produced from a proper custody should be presumed as a valid and genuine document. Where all the parties to a will, excepting the beneficiary are dead and the signature of the scribe had been identified by his fellow deed writer who was acquainted with his signature, the will could not be said to have

been not proved. In such circumstances, the onus shifts to the defendants and where none of them examine themselves, the presumption does not stand rebutted: I.L.R. (1979) 2 Cut. 130: (1979) 48 Cut.L.T. 211.

Where ownership was sought to be established by a registered will, more than 30 years old but without the plea that it had been acted upon after the testator's death, that he was in a sound state of mind at the time of its execution, that it was duly attested and that it was his last will and testament nor was it made clear as to how the propounder had gained knowledge of the will, *held*, no presumption under S. 90 could be raised; it being a registered will was of no importance: A.I.R. 1992 Karn. 282.

Under S. 90, the Court has got a judicial discretion to be exercised in drawing the presumption. But the Court cannot arbitrarily say that it will not draw the presumption merely because the matter is one for the exercise of its discretion. Where it is found that the document in question emanates from an apparently lawful custody and where the document is such that it is likely to have been executed, the Court will draw the presumption. However, in as much as the presumption dispenses with proof of due execution in cases of testament where the onus of proof is heavy on the propounders of the will, the Court must act with extreme caution and the utmost circumspection: (1961) 74 Mad.L.W. 261: A.I.R. 1961 Mad. 262.

A party setting up a will is required to prove that the testator was of sound disposing mind when he made his will but, in the absence of any evidence as to the state of the testator's mind, proof that he had executed a will rational in character in the presence of witnesses must lead to a presumption that he was of sound mind and understood what he was about. The circumstance that the purported signature of the testator in the will does not contain the surname, far from being a suspicious one, invests the document with an impress of truth. Where the will was *ex facie* duly executed and properly attested and the agnatic relations of the testator agreed to the will and some of the blood relations actually attested it, the execution of the will is not only not improbable but also probable: A.I.R. 1962 Andh. Pra. 29.

In a case based upon a will, the propounder or the plaintiff must plead that the document was properly executed and duly attested and was the last will of the testator. He cannot say that the defendants had not denied those facts. The question of presumption under S. 90 would arise only with respect to a case set up by the plaintiff and not with respect to a case which was never pleaded by the plaintiff. Where the plaintiff has not pleaded that the will was duly attested, there will be no question of presuming attestation under S. 90, Evidence Act. Assuming that the presumption under S. 90 could be made and the valid attestation of the will could be upheld though not pleaded by the plaintiff, the presumption will not extend to the will being the last will of the testator. The mere fact that it was a registered document would not contra-indicate its cancellation at a subsequent date of the making of another will at a later date, particularly when the testator lived for more than thirty years after the will: 1967 Mah.L.J. 41: (1967) 69 Bom.L.R. 559: A.I.R. 1967 Bom. 382.

Where a person executes a will and deposits it with the Registrar and the endorsement by the Registrar shows that the will was so deposited by the executant on being identified by two persons, a presumption under S. 90 as to execution arises. The presumption, however, does not cover the question of a disposing mind: A.I.R. 1933 Lah. 53: 145 I.C. 241.

Production of copy of will purporting to be 30 years old does not warrant presumption of its execution or attestation—Presumption under S. 90 arises in respect of original document: (1968) 2 M.L.J. (S.C.) 75: (1968) 2 S.C.R. 292: A.I.R. 1968 S.C. 947.

The burden of proving the fact that the testator at the time of execution of the will was of sound mind lies upon the party setting up the will. However, when the will was executed about 45 years back by which time almost all the attesting witnesses would have been dead, it is necessary to prove that the executor was of sound mind at the time of execution of the will. The fact that the will was rational in character as having been made in favour of a public trust and that by the will the widows of the testator had been nicely provided for upto their life-time and that no near relative had been deprived of the property, will itself raise a presumption that the executor was of sound mind at the time of making the will. Hence, the proof of the handwriting of the attesting witnesses will be sufficient to

prove the fact that the executor was of sound mind when he executed the will: 1968 M.P.L.J. 545: A.I.R. 1969 Madh. Pra. 4.

8. "Duly executed and attested".—The words 'duly executed and attested' merely mean execution and attestation according to law. The question whether the document has been explained to the executant and whether she has fully understood the import and effect of it, is hardly a question of execution: I.L.R. 5 Luck. 526: A.I.R. 1931 Oudh 103.

The words 'duly executed' in S. 90 mean execution by a person legally competent to execute the document. [A.I.R. 1930 Mad. 744; A.I.R. 1947 P.C. 15; A.I.R. 1962 Andh. Pra. 29, Rel. on]: A.I.R. 1977 Ker. 41: I.L.R. (1976) 2 Ker. 678 (D.B.).

Presumption can be raised in the case of School register 30 years old: 163 I.C. 811: A.I.R. 1936 Lah. 104.

When a Registrar makes his endorsement on the back of a document, he is simply carrying out the statutory duties under the Registration Act and makes the signature *alia intutio* and is not purporting to attest the document. And though the endorsement shows that the Registrar received from the executant a personal acknowledgment of his signature, in the absence of evidence that the Registrar signed in the presence of the executant, no presumption can possibly be made under S. 90, that the signature of the Registrar was affixed in the presence of the executant or that the document was duly attested, even if the document is over 30 years old: I.L.R. 61 Cal. 525: A.I.R. 1934 Cal. 772.

9. Proper custody.—Before a custody can be said to be proper, it should afford reasonable assurance of authenticity of the document: A.I.R 1952 Trav.-Co. 438. Whether custody is proper is a question of fact: 126 I.C. 19. As to proper custody, *see* 94 I.C. 814: A.I.R. 1926 Cal. 370; I.L.R. 12 Luck. 400: A.I.R. 1937 Oudh 194.

It is for the Court to decide in each case whether the custody from which the document is produced is or is not proper and if it considers the custody to be proper it can raise the presumption. Where the lower Court draws the presumption after considering the circumstances of the case, the High Court will not interfere in second appeal: (1930) 32 Punj.L.R. 626: A.I.R. 1932 Lah. 43. *See* also (1936) 38 Punj.L.R. 322: A.I.R. 1937 Lah. 17; 11 O.W.N. 1435: A.I.R. 1935 Oudh 96; A.I.R. 1933 Lah. 347: (1932) 34 Punj.L.R. 356; 1938 A.M.L.J. 563; I.L.R. 14 Luck. 393: A.I.R. 1939 Oudh 96.

And where the appellate Court is constrained to do so, the party producing the document should be given an opportunity of supporting the presumption: 1933 All.L.J. 907: A.I.R. 1933 All. 443.

Proof of custody—Satisfactory account of the origin of custody and not of the history of its circumstances essential: (1971) 1 A.P.L.J. 350 (D.B.).

Where certain partition deeds which were more than thirty years old had been produced by the defendant who stated on oath that they had been entrusted to him by the vendee of property covered by those deeds for the purpose of certain cases in Court; the custody of such documents cannot be said to be improper and the Court would be entitled to raise a presumption as to their genuineness under S. 90: 1955 Raj.L.W. 434: A.I.R. 1955 Raj. 179.

Where a sale has been made nearly 30 years before the suit is brought and all the parties to the transaction have died, it is impossible to expect full and detailed evidence of all circumstances that gave rise to the transaction and presumptions are permissible to fill in the details which have been obliterated by time: 30 Nag.L.R. 192: A.I.R. 1934 Nag. 106.

Where the genuineness of an ancient register maintained at, and by, the Church, coming from proper custody, evidenced payment of *streedhanam* decades ago at the time of the two sisters' marriage where there could be no motive for making any false or imaginary entries and its genuineness was also not disputed, *held*, the genuineness of the entries stood proved: A.I.R. 1979 Ker. 34: I.L.R. (1979) 1 Ker. 83: 1979 Ker.L.T. 130 (F.B.).

In case where documents more than 30 years old are being produced only as instances of a particular custom and not as foundation of title, such documents may be admitted in evidence irrespective of the fact whether they come from proper custody or not: (1939) 41 Punj.L.R. 670: A.I.R. 1939 Lah. 152.

Where a letter written by the lessee to the lessor was more than thirty years old and came from proper custody, *held*, presumption under S. 90 may be raised: A.I.R. 1978 Cal. 312 (D.B.).

10. Computation of thirty years.—The period of 30 years, under S. 90, is to be reckoned not from the date upon which the deed is filed in the Court but from the date on which, it having been tendered in evidence, its genuineness or otherwise becomes subject of proof: 63 I.A. 85: A.I.R. 1936 P.C. 15: 70 M.L.J. 206 (P.C.); 169 I.C. 402.

As the rule embodied in S. 90 is based on the impossibility of obtaining living testimony to the signing or the handwriting of a document, it logically follows that time should run from the date which the document bears whether it is a will or any other document. Hence, the period of presumption in case of will also begins from the date of execution and not from the date of the death of the testator which is the date from which the will becomes operative. Similarly, the outer limits of the period of thirty years is the date when the will is sought to be proved and not the date of its filing in Court: A.I.R. 1953 Cal. 471: (1953-54) 58 Cal.W.N. 271. *See* also (1980) 2 Karn.L.J. 380.

The material date for the admissibility of a document is the date on which it is tendered in evidence and not on the date when it is filed in the Court. (*See* A.I.R. 1936 P.C. 15): A.I.R. 1972 All. 406; 1979 R.D. 233.

But *see* (1993) 1 Hindu L.R. 433 (Del.) [Where at the time the suit was filed, the document was not 30 years old, *held*, no presumption can be drawn regarding its due execution by reference to the provisions of S. 90].

11. Objection to admissibility of document.—Objection to admissibility of document—Time for—Document marked as exhibit under S. 90, Evidence Act—Failure to raise objection as to its admissibility—Effect. *See* A.I.R. 1958 Ori. 26.

It is well settled that if the mode of proof is not challenged at the time of exhibition of the document, it cannot be allowed to be challenged at a later stage: (1984) 86 Punj.L.R. 272: 1984 Rev.L.R. 179; (1987) 2 W.L.N. 791: 1987 Raj.L.W. 584.

A document once exhibited without objection cannot be objected to later on. Thus, where the lower appellate Court rejected registered documents, 80 and 73 years old, respectively which were exhibited during trial without objection, *held*, the lower appellate Court erred in holding that presumption of their due execution or genuineness could not be raised under S. 90; S. 90 is a solution to the difficulty in proving documents more than 20 years old [under the provisions as applicable in U.P.] by witnesses which may well be impossible; though presumption under S. 90 is discretionary, the Court could raise the presumption under Ss. 4 and 114; S. 60 of the Registration Act also provides for raising such presumption of execution and correctness of the contents of a duly registered document: A.I.R. 1988 All. 57: (1988) 14 All.L.R. 174.

Where the defendants produced a certified copy of a registered will which was 80 years old and the plaintiffs neither asked the defendants to produce the original will nor they objected to its admissibility, *held*, in second appeal, no objection regarding admissibility or due execution and attestation of the will could be taken. [A.I.R. 1968 All. 363, Disting.]: A.I.R. 1980 N.O.C. 7 (All.).

12. Evidentiary value of recitals in document.—Repeated assertions of title in ancient documents being recitals are no evidence of what is there recited, though actual possession in conformity therewith would constitute *prima facie* title: 56 Cal.L.J. 369: A.I.R. 1933 Cal. 222.

Under S. 90, apart from the presumption of due execution, there is no presumption that the document has the legal effect that it purports to have. In the case of an alienation by a Hindu widow, even if the execution of the document by her is admitted or proved, on the question whether she alienated only her life estate in the property or whether she made an absolute alienation; no assistance can be derived from S. 90. Such matters are extraneous to the execution of the documents. However, a presumption can be drawn in certain circumstances in the case of ancient alienations by Hindu widows. No presumption can be drawn as to the existence of legal necessity from the single circumstance that the alienation by the Hindu widow was of the year 1921, in a suit for declaration of title by the next reversioner in the year 1951 when other evidence as to the circumstances of legal necessity has not disappeared: 1960 Nag.L.J. 113: (1960) 62 Bom.L.R. 322: A.I.R. 1961 Bom. 169.

13. U.P. Amendment.—The presumption which was by virtue of S. 90(1) available in respect of the original documents has now been, by virtue of S. 90(2), extended even to certified copies of registered documents. The

provision in S. 90 can have no effect on Ss. 61, 62, 63 and 65 of the Evidence Act which occur in Chapter V of the Act and which chapter deals with documentary evidence. Contents of a document can be proved by tendering the document itself, *i.e.*, by tendering primary evidence, and secondary evidence can be given to achieve the same object only in circumstances enumerated in S. 65.

There arises no occasions to raise a presumption under S. 90 till a case for the reception of secondary evidence has been made out. After the amendment, the presumption under S. 90 is to be made in respect of 20 years' old document and the same can also be extended to copies. There is no other effect of the amendment. So far as the right to offer secondary evidence is concerned, it continues to be governed by the same provisions even after the amendment introduced in S. 90 by which it used to be governed prior to this amendment. The only effect of the amendment is that if a party is found entitled to offer secondary evidence in accordance with the provisions contained in Chapter V of the Act, then he shall have no more to lead evidence to prove its execution provided the document is 20 years old.

Where in a suit filed in 1956, for possession of suit property and for damages, the plaintiffs relied on sale deed of 1896 and they failed in proving the loss of original deed, they could not be allowed to lead secondary evidence of the same by tendering in evidence their certified copies to prove the contents of sale deed.

Mere failure to file the original sale deed does not mean that the original sale deed has been lost. Absence of possession of the original can be due to various reasons other than loss of the original. If the transaction evidenced by the sale deed in question was never intended to be a genuine transfer, there would be no occasion for the original sale deed coming into possession of the purchaser in whose name it is executed and in that case absence of possession of the original deed by the purchaser or the purchaser's successor-in-interest may mean that the original has been lost: A.I.R. 1968 All. 363.

On a plain reading of S. 90(2), as amended by U.P. Legislature, it is clear that the presumption which can be raised in respect of the original can also be raised in respect of a certified copy, the only condition being the certified copy should be that of a document more than 20 years old. This sub-section is not controlled by S. 90-A(2): 1971 R.D. 546.

In view of the amended provisions of S. 90 of the Indian Evidence Act by the State of U.P., a certified copy of a registered document is a good piece of evidence. [A.I.R. 1980 All. 385, Foll.]: 1983 R.D. 218.

The original S. 90, renumbered as sub-S. (1) of S. 90, allows a presumption to be raised only to such documents which are produced by a party from proper custody; no such condition is super imposed by the Legislature on documents falling in the category enumerated in S. 90(2), which is for the sake of general convenience meant to avoid the difficulty which is generally felt in getting the original of registered documents filed as evidence. S. 90 is neither controlled by S. 65 or by S. 90(1): (1981) 7 All.L.R. 284.

The presumption under S. 90 is not subject to the exception given in S. 90-A(2) of the Act. The correct interpretation of the two sections, *i.e.*, S. 90 as amended and S. 90-A read together will be that in cases where a registered document or certified copy thereof is more than twenty years old, the same may be presumed without formal proof of execution and attestation even though the said document or certified copy is the basis of suit or of defence, whereas under S. 90-A, if a document is not more than twenty years old but a registered document or a duly certified copy thereof, a presumption about its due execution can also be made provided the document does not form the basis of the suit or defence. S. 90-A also refers to presumption in respect of documents which are parts of the record: 1969 All.W.R. (H.C.) 188.

There is no conflict between the provisions of S. 90 as amended in U.P. and S. 90-A as added in U.P. though they are designed to operate in different fields, yet they can operate simultaneously over a limited common area also. They do not mutally exclude the applicability of one by the other. A document which is registered and is also more than 20 years old cannot be admitted in evidence under S. 90-A, if it is the basis of the suit or of defence, yet it can still be held proved in view of the provisions of S. 90 and a presumption referred to therein can be raised in respect of such a document: A.I.R. 1981 All. 274.

The presumption under S. 90-A, Evidence Act, may be made only if the original shows on the face of it the name of the person by whom it purports to have been executed. The mere fact that it is 20 or 30 years old does not make it admissible without proof. The presumption under—S. 90-A is with regard to the execution of a document and in that respect S. 90-A is narrower in scope than S. 90, under which a presumption may be made that a document is in the handwriting of a person by whom it purports to have been written. It is not without reason that the legislature while amending S. 90, Evidence Act, confined the scope of S. 90-A to raising a presumption regarding the execution only as it has within its purview not only a registered document but also a certified copy of a document forming part of the record of a Court of justice: A.I.R. 1962 All. 111.

A presumption may be raised, if permissible, under one provision and not under another; thus, if a presumption is not available under S. 90-A(1) but available under S. 90-A(2) or any other provision, the Court may draw it. Similarly, a presumption available under S. 90 may be raised by the Court even after coming to the conclusion that it is not available under S. 90-A: A.I.R. 1980 All. 385 (F.B.).

The presumption under S. 90, so far as it relates to registered documents, applies only to documents which are more than 20 years old and the presumption is not subject to a condition similar to the one contained in sub-S. (2) of S. 90-A. On the other hand, the presumption available under sub-S. (1) of S. 90-A applies to registered documents or copies which are not more than 20 years old and that is subject to the condition laid in sub-S. (2) of this section, that it will not apply to those documents which are the basis of the suit of defence or are relied upon in this plaint or written statement: 1971 All.L.J. 992.

S. 90-A(2), no doubt, provides that the presumption under S. 90-A(1) shall not be made in respect of any document forming the basis of a decree in a suit or of a defence or is relied upon in a plaint or written statement, where, however, a judgment in a suit, is only one of several pieces of evidence, and not the sole basis of the defence set up, the bar under S. 90-A(2) loses force. If the party relying on the presumption alleges fraud in respect of the judgment or decree in question, it is for that party to summon the original and adduce evidence in support of the plea of fraud set up by that party: 1971 R.D. 298 (All.).

Presumptions under Ss. 90 and 90-A are not similar; S. 90(2) permits raising of presumption about signature, handwriting, execution and attestation; while S. 90 permits to raise it only in respect of execution of documents more than 20 years old, S. 90-A places no such restriction and includes even documents from judicial record; neither of the two sections, therefore, encroaches upon a field exclusively occupied by the other; they deal with different fields and different circumstances and permit different types of presumptions to be raised. It is, thus, not possible to hold that S. 90-A(2) will override and nullify S. 90, if the document, though more than 20 years old, is the basis of the suit or defence or is relied upon in the plaint or the written statement. [A.I.R. 1974 All. 389, Overruled; 1969 All.W.R. (H.C.) 188; 1970 All.W.R. (H.C.) 634 and 1971 All.L.J. 992, Approved]: A.I.R. 1980 All. 385 (F.B.).

Release application by landlord contending that family partition took place and that disputed shop came to his share—Certified copy of memorandum of partition obtained from record of earlier suit filed—Memorandum of partition, *held*, was admissible: 1979 (U.P.) R.C.C. 608.

Presumption under—Gift deed ignored on ground of production of only a copy and not having been proved in accordance with law—Such discarding is patent error: 1979 R.D. 233 (All.).

A deed of adoption does not require attestation and if the document is registered and is produced from proper custody, the provisions of S. 90-A could have applied thereto. However, where the deed of adoption was a document which was referred to and relied upon in the written statement, *held*, even though the original document had been filed, yet on account of the proviso to S. 90-A(1), the presumption which could have been raised under S. 90-A(1) will not apply in such a case: A.I.R. 1981 All. 274.

Where in a registered lease deed, twenty years or more old, the plaintiff and the defendants were conferred by the ex-zamindars additional rights as sons of their father, *held*, the plaintiff's suit for partition and separation of his one-fifth share in the suit property could

CHAPTER VI

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE

91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.—When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.—Wills [1][admitted to probate in [2][India]] may be proved by the probate.

Explanation 1.—This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

Explanation 2.—Where there are more originals than one, one original only need be proved.

Explanation 3.—The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

---

1. Substituted by Act 18 of 1872, S. 7, for "under the Indian Succession Act".
2. Substituted by Act 3 of 1951, S. 3 and Sch., for "the States".

---

not be said to be the basis of his suit; S. 90-A(2) was not attracted: A.I.R. 1972 All. 406.

When presumption under S. 90-A has been raised by the trial Court and the lower appellate Court in exercise of their discretion, the High Court in second appeal should not interfere unless it is established that the discretion has been exercised arbitrarily without the consideration of material evidence on record: A.I.R. 1986 All. 163.

Chapter VI—Note.

The law does not permit Courts to brush aside completely the testimony of witnesses on the general assumption that witnesses are always easy for the party to procure; it would be unnecessarily uncomplementary to the witness; the Courts have therefore, to be very cautious in making observations about the credit worthiness of witnesses. Examination of witnesses is not a mere formality to fulfil the requirement of the law of procedure; Courts are free to draw their inference from the deposition but not to ignore it; the practice of ignoring relevant oral evidence in the face of documentary evidence is not warranted in law. There are only certain conditions as laid down in Chap. 6 whereby documentary evidence excludes oral evidence; in all other cases relevant oral evidence must be considered alongwith documentary evidence; there may be certain facts which are not reflected by documents. [A.I.R. 1961 S.C. 1720 and A.I.R. 1959 S.C. 57, Disting.]: 1973 All.L.J. 4: 1973 R.D. (Rev.) 29.

Section 91—Synopsis.

1. Scope and applicability.
2. Scope and effect of this section and section 92.
3. Unregistered or unstamped/understamped document.
4. Suit on promissory note.
5. *Benami* transactions.
6. Sale transactions.
7. Reconveyance deed.
8. Wakf.

Illustrations

(*a*) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(*b*) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(*c*) If a bill of exchange is drawn in a set of three, one only need be proved.

(*d*) *A* contracts, in writing, with *B*, for the delivery of indigo upon certain terms. The contract mentions the fact that *B* had paid *A* the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(*e*) *A* gives *B* a receipt for money paid by *B*.

Oral evidence is offered of the payment.

The evidence is admissible.

---

9. Terms of grant.
10. Lease/Rent deed.
11. Mortgage deed.
12. Partition deed.
13. Gift deed.
14. Deposition of a witness.
15. Confessional statement.
16. Dying declaration.
17. Recovery memo.
18. Exception 1.
19. Miscellaneous.

---

1. Scope and applicability.—It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court. Ss. 60, 64 and 91 of the Indian Evidence Act, 1872 are based on this rule: 1995 Cr.L.J. 76 (Ori.).

The moment an oral contract is reduced to writing, it is not open to any of the parties thereto to prove the terms of the contract by referring to any original oral agreement. S. 91 would stand in his way and he would be precluded from proving the terms of the transaction otherwise than by the deed itself: A.I.R. 1950 Pepsu 34; A.I.R. 1928 Mad. 546: 28 Mad.L.W. 234; A.I.R. 1957 Manipur 9.

The moment an oral contract is reduced to writing it is not open to any of the parties thereafter to seek to prove the terms except by producing the document itself or secondary evidence of it. It does not make any difference to the operation of S. 91, Evidence Act, whether the parties subsequently changed their minds with regard to getting the document registered. The terms of the contract remain the same. A distinction cannot be drawn between a deed evidencing a contract and an instrument which of itself operates to transfer title so far as the application of S.91 is concerned. Both are equally hit by the section: A.I.R. 1955 Vindh. Pra. 41.

Where the terms of a contract have been reduced to writing at the same time as it is made, the document only, or if permissible, secondary evidence of its contents can be the only evidence available to prove the document under S. 91; the parties are debarred from adducing oral evidence to prove such contract: 22 Pat.L.T. 666: A.I.R. 1940 Pat. 245; I.L.R. 33 Mad. 413: 11 Cr.L.J. 716; 13 R.D. 685; 3 Pat.L.T. 485: A.I.R. 1923 Pat. 111; A.I.R. 1956 Him. Pra. 22; A.I.R. 1958 Pat. 51; (1988) 2 An.L.T. (N.R.C.) 7.

Where a contract is entered into between parties, the contract deals with the subject-matter as well as the persons between whom it is entered into, and the names of the parties in so far as they relate to terms which create obligations cannot be regarded as so divorced from the terms of the contracts, that evidence may be led to show that some other persons intended to incur obligations under the contract instead of the parties designated therein: A.I.R. 1956 Bom. 165.

What is the precise legal connotation of the expression 'terms' used in Ss. 91 and 92? Terms of a contract necessarily postulate a contract in existence containing statements in the nature of terms; the expression 'terms of a contract' would not apply to a statement contained in a written document which is in the nature of a condition precedent to the very formation of that contract; 'terms' must relate to statements, assertions or representations contained in a written contract relating to its subject-matter and to something to be done or not to be done under the contract. [(1908) I.L.R. 31 Mad. 45, Rel. on]: A.I.R. 1972 Bom. 365: (1972) 74 Bom.L.R. 509: 1972 Mah.L.J. 756.

Ss. 91 and 92 are clearly attracted when a transaction has been reduced to writing, whether by the parties' consent or by requirement of law; the written instrument then becomes the only permissible evidence of the terms of the contract; so long as the writing exists and is within the party's power, no other evidence is admissible: A.I.R. 1975 Gau. 43 (D.B.).

A perusal of Ss. 91 and 92 makes it clear that it restricts oral evidence against the terms of the sale-deed between the 'parties'. The word 'parties' used in these sections contemplates vendor on one side and the vendee on the other and their representatives. Thus, the provisions of Ss. 91 and 92 are not applicable to a case where there is a dispute between vendees *inter se* and the Court will be justified in considering the oral evidence regarding the shares of the parties against the terms of the sale deed: 1982 All.L.J. 264.

Both documentary and oral evidence are evidence; there is no provision empowering the Courts to prefer documentary to oral evidence, though on facts of each case and the nature of the documents proved and character of the witnesses, the Courts may exclude specific evidence against documentary evidence; otherwise, the Courts are not prohibited to prefer or act upon oral testimony to documentary evidence for good and sufficient reasons: A.I.R. 1992 Karn. 160: (1992) 1 Karn.L.J. 160.

There is no conflict between Ss. 91 and 145 and S. 49 of the Registration Act; S. 145 is meant for a totally different purpose; its first part permits putting of relevant oral questions in cross-examination without showing the writing to the witness or proving it; but if it is intended to contradict him with any of its part, it may be done so provided it is not inadmissible for want of registration; if it is so admissible, it may be proved; the bar of S. 92 would not be attracted in such a case: A.I.R. 1974 P.&H. 350 (D.B.).

If there was *ab initio* a stipulation between the parties that the contract would not be enforced or acted upon, oral evidence in support of such a plea may be given; true, under Ss. 91 and 92 when the terms of a contract have been reduced to writing, extrinsic evidence as to what transpired subsequent to the contract is not admissible for ascertaining the terms and no oral agreement or statement is admissible contradicting, varying, adding and substracting from its terms. S. 92 does not preclude a party from showing that the writing is not really a contract but only a fictitious or colourable device which cloaked something else: 1972 Jab.L.J. 632: 1972 M.P.L.J. 852 (D.B.).

When the recitals in documents are absolutely clear and are expressed in unmistakable terms, there is no room for adducing evidence *aliunde* to contradict the recitals of these documents, and any evidence so adduced is clearly hit by Ss. 91 and 92: 1974 Kash.L.J. 331.

S. 91 does not stand in the way of a party to show that the original agreement continues to govern them notwithstanding any change or variation of any particular term thereof; however, if oral evidence to that effect is excluded, it will have no effect on the Court's ultimate decision: A.I.R. 1975 All. 73: 1974 All.L.J. 845.

S. 91 read with its Explanation 3 clearly lays down that if oral evidence sought to be adduced does not relate to (*a*) terms of the contract, grant or other disposition of property or (*b*) matters required by law to be reduced to writing, *held*, S. 91 constitutes no bar: A.I.R. 1993 Andh. Pra. 130: (1992) 3 An.L.T. 373.

S. 91 precludes any other evidence, apart from terms of the document itself, from being taken in to prove such terms; however, it does not preclude even in case of an unregistered deed of sale, not brought on the record, evidence of oral sale having been effected: A.I.R. 1976 Pat. 18: 1976 B.L.J.R. 378 (D.B.).

Whether a transaction embodied in a document is sham or fictitious and not real may be proved by inferences which may reasonably be drawn from the intrinsic evidence respecting the transaction itself or from extrinsic circumstances surrounding the transaction; such evidence is not barred under Ss. 91 and 92: A.I.R. 1978 All. 123 (D.B.).

The provisions of S. 91 are not applicable to a permission granted by a Municipal Committee: 120 I.C. 221: A.I.R. 1930 Nag. 130.

Where officials from the Municipal Corporation, Excise and Sales Tax Departments deposed on the basis of official records the name of a party's father, *held*, S. 91 was not attracted as the oral evidence was not with reference to the terms of a contract or grant or disposition

of property; the evidence was, thus, admissible though in the absence of the extracts of official records, it may be worth nothing: (1990) 40 Del.L.T. 1 (S.C.).

Having regard to the terms of S. 91, what the Court has got to do is to find out the real contract between the parties: A.I.R. 1928 Mad. 459. The term 'in proof of such matter' must carry with it the term 'in disproof of it', because if evidence were to be admitted on one side, it would have to be admitted on the other. Therefore, a Court which allows evidence to prove that a payment endorsed on a promissory note had not been made, violates the provisions of S. 91: 1935 All.L.J. 304: A.I.R. 1935 All. 58. *See* also I.L.R. (1950) All. 1033: A.I.R. 1951 All. 93 (F.B.).

A document which is signed only by one of the parties is not a written agreement, and oral evidence is admissible to show the real intention of the parties. But *see* A.I.R. 1949 Nag. 389; A.I.R. 1947 P.C. 32 (P.C.).

Even though a contract in writing was signed only by a certain party, oral evidence could be adduced to show that another person was also a party to the arrangement or was bound by it: 43 Mad.L.W. 218: A.I.R. 1936 Mad. 5.

S. 91, even if it covers a deposition, merely excludes oral evidence of its contents but does not make the document itself inadmissible or prevent its being otherwise proved: 74 I.C. 445: A.I.R. 1923 Oudh 119.

Where there is any dispute that the actual contract between the parties was the one recorded in the deed, it will not be thereafter open to the parties to let in oral evidence to prove that its terms were different from what is contained in the deed. S. 92 precludes such a course. When it is admitted that the actual contract between the parties has been reduced to writing, oral evidence cannot be given to show that its terms were different from those found in the deed. S. 91 of the Evidence Act forbids such a course. There is material difference between an attempt to show that the terms of a contract were different from those recorded in a deed and an attempt to show that the contract as mentioned in the deed was not the real contract. It is the former that is hit by S. 91 of the Evidence Act but the latter is not to hit. The contention of the plaintiff is that the actual contract itself was different, and that for certain reasons it was made to appear in the document that it was a rectification deed. S. 91 does not preclude the plaintiff from proving that the real contract was different from what is found in the deed: A.I.R. 1962 Mad. 360.

Where the consideration set out in the document was the Bank's (future) readiness to advance some loans when the loans had already been advanced and were not to be advanced afresh, *held*, it is settled law that if a document mentions a wrong consideration, oral evidence is admissible to show what the real consideration was; Ss. 91 and 92 restrict oral evidence regarding the contract's terms; its consideration is certainly not a term of the contract. A contract is nothing but a promise to do or forbear to do something; anything which enlarges or limits or conditions the promise is alone hit by the bar. [A.I.R. 1938 Mad. 320 and A.I.R. 1939 Nag. 91, Rel. on]: A.I.R. 1984 Guj. 93 (D.B.).

S. 34 of the Punjab Land Revenue Act lays down the procedure for making entries in the mutation register and the orders to be passed by the Revenue Officer; it does not—and no other provision in the Act does—even remotely deals with the relevance or admissibility of any evidence; by no stretch of imagination can it be said that S. 34 of the said Act constitutes a special provision to override Ss. 65 and 91. [1979 Punj.L.J. 82, Overruled]: A.I.R. 1986 P.&H. 143: 1986 Rev.L.R. 42: (1986-1) 89 Punj.L.R. 109 (F.B.).

A new term sought to be introduced in written compromise, inconsistent with tenor of the draft of the compromise—Evidence of the new term is not admissible under S. 91, when compromise is sought to be enforced as a contract: A.I.R. 1961 Pat. 310.

Intention of parties to a document must be gathered from terms of document and surrounding circumstances—Subsequent conduct cannot be proved to show that intention was different: I.L.R. (1963) 15 Assam 496: A.I.R. 1965 Assam 90; 1976 Punj.L.J. 20.

Document embodying only some terms of contract—Oral evidence of other terms not inconsistent with written terms is admissible: A.I.R. 1930 All. 615. Verbal negotiations leading up to an express contract in writing cannot be set up as an independent contract and are not admissible in evidence: I.L.R. 53 All. 114: A.I.R. 1931 All. 183 (F.B.).

To the extent, the terms of contract are clear and unambiguous, *aliunde* evidence bearing on the construction of any of the terms of the contract is inadmissible and should not be looked into: I.L.R. (1960) Mys. 151: A.I.R. 1961 Mys. 29.

In order to ascertain as to what really was intended by the transaction was set down in the document or the document was merely meant to be something different which the parties sough to hide by their collateral agreement, *held*, it is permissible to adduce evidence of the parties' subsequent conduct and other surrounding circumstances; Ss. 91 and 92 are not attracted: A.I.R. 1981 N.O.C. 94: 1981 M.P.L.J. 391; 1972 Mah.L.J. 509: (1972) 74 Bom.L.R. 246.

In the case of conveyance deeds executed, *held*, no oral evidence for the purpose of adding to their terms can be admitted under Ss. 91 and 92: 1973 Rev.L.R. 484: 1973 Cur.L.J. 599 (Punj.).

Where the language of a document is plain and unambiguous, *held*, no party is entitled to lead oral evidence in order to vary its plain meaning for deciding whether it is a will or not: (1993) 2 Hindu L.R. 637 (Bom.).

S. 91 has no application to matters entered in a special diary under S. 172 of the Cr.P. Code. Oral evidence is admissible to prove statements made to the Police by witnesses who heard them made: 18 Cr.L.J. 1022: 42 I.C. 766.

An arbitration agreement is a contract within the meaning of S. 91 of the Indian Evidence Act, and when the parties to an agreement of reference refer a dispute which arises between them, they cannot lead evidence to vary or add to the terms of the agreement by saying that they made the reference in any other capacity save that appearing from the agreement itself: A.I.R. 1957 All. 406.

Statements in power-of-attorney have to be proved like any other statements: A.I.R. 1970 Manipur 57.

2. Scope and effect of this section and section 92.—In view of the provisions of Ss. 91 and 92, a mortgage-deed cannot be of any declaration that the rights transferred may not merely be of those of the mortgagee but of a full owner: A.I.R. 1955 Ajmer 28.

Ss. 91 and 92 are very clear; under S. 91 when a transaction is reduced to the form of a document, whether by the parties' consent or agreement or by requirement of law, that document alone must be regarded as the sole appropriate evidence of the terms of the contract; so long as the document exists, and is within the party's power, no other evidence of the transaction is admissible; under S. 92, when the parties voluntarily and deliberately set down in writing the terms of a transaction, it is presumed between themselves and their privies that they intended the document to be a full and final statement of their intentions and they are, therefore, precluded under S. 92 from giving any extrinsic evidence to contradict or vary its terms; nothing in S. 92 warrant that its bar extends only to agreements required by law to be registered; however, it does not preclude the parties that the document was not really the contract between them but only a fictitious or colourable device to cloak something else; all contracts must be made *animo contrabandi*; parole evidence, it is settled law, is admissible to prove absence of such animus. [A.I.R. 1936 P.C. 70; A.I.R. 1938 Nag. 335 (F.B.); A.I.R. 1962 Mad. 360, Foll.]: A.I.R. 1975 Gau. 43 (D.B.).

In order to establish what the terms of the disposition of property were, it would not be open to a party to whom the property is transferred, or the party transferring the property to prove the terms of the disposition by any other evidence excepting the document itself. But under S. 92, it is open to a party to a document to contend that either there was a failure or a want of consideration and therefore the document is not binding upon him or the document is invalidated. It is always open to parties to an agreement or a document containing disposition of property to prove that certain recitals which are statements of facts are not correct. If the parties were to do that, then they are not in any way contradicting or varying or adding to or subtracting from the terms of the contract or disposition. But consideration is undoubtedly a term—and very important term—of a contract or a deed of conveyance or of gift. A conveyance may mention the consideration for the transfer of property. A deed of gift may mention that the term of the transfer of property is that there is no consideration. When the party tried to establish that the deed of gift was not a deed of gift but a conveyance of property for consideration, it was contradicting an important term of the deed of gift: I.L.R. (1955) Bom. 309: A.I.R. 1955 Bom. 122. (This decision was reversed in A.I.R. 1958 S.C. 448).

S. 92 only excludes oral evidence to vary the terms of the written contract, and has no reference to the question whether the parties had agreed to contract on the terms set forth in the document. So also S. 91 only excludes oral evidence as to the terms of a written contract. Oral evidence is admissible, therefore, to show that a document executed by a person was never intended to operate as an agreement, but brought into existence solely for the purpose of creating evidence about some other matter. Even if there were no provisos to Ss. 91 and 92, there is nothing in either section to exclude oral evidence in such a case to show that there was no agreement between the parties and therefore, no contract: 63 I.A. 126: I.L.R. 59 Mad. 446: A.I.R. 1936 Pat. 70: 70 M.L.J. 232 (P.C.); A.I.R. 1938 All. 132: 1937 All.L.J. 1352. *See* also A.I.R. 1938 Mad. 320: (1938) 1 M.L.J. 236; I.L.R. (1939) Nag. 1; A.I.R. 1938 Nag. 335 (F.B.); 7 Mys.H.C.R. 189; A.I.R. 1933 Lah. 222; A.I.R. 1938 Oudh 26: I.L.R. 13 Luck. 697. *See* also 1977 B.L.J.R. 308: 1977 B.B.C.J. 520.

Evidence intended to show that there was no grant, contract or disposition of property does not offend against the provisions of either S. 91 or S. 92. There is no difficulty in spite of Ss. 91 and 92 in leading evidence to show, notwithstanding the recital of payment of consideration in a document, that it was actually not paid: (1955) 57 Bom.L.R. 250: A.I.R. 1955 Bom. 320.

It is open to party to prove that a particular transaction was not consented to by him. S. 92 excludes oral evidence to vary the terms of the written contract, but has no reference to the question whether the parties agreed to contract on the terms set forth in the document: 1954 Nag.L.J. 64: A.I.R. 1954 Nag. 193.

S. 91 is based on what is sometimes described as the 'best evidence rule'. The best evidence about the contents of a document is the document itself and it is production of the document that is required by S. 91 in proof of its contents. In a sense, the rule enunciated by S. 91 can be said to be an exclusive rule inasmuch as it excludes the admission of oral evidence for proving the contents of the document except in cases where secondary evidence is allowed to be led under the relevant provisions of the Evidence Act. It is after the document has been produced to prove its terms under S. 91 that the provisions of S. 92 come into operation for the purpose of excluding evidence of any oral agreement or statement, for the purpose of contradicting, varying, adding to or subtracting from its terms. Ss. 91 and 92 in effect supplement each other. S. 91 would be frustrated without the aid of S. 92, and S. 92 would be inoperative without the aid of S. 91. The two sections, however, differ in some material particulars. S. 91 applies to all documents, whether they purport to dispose of rights or not, whereas S. 92 applies to documents which can be described as depositive. S. 91 applies to documents, which are both bilateral and unilateral, unlike S. 92 the application of which is confined only to bilateral documents. S. 91 lays down the rule of universal application and is not confined to the executant or executants of the documents. S. 92, on the other hand, applies only between the parties to the instrument or their representatives in interest. What S. 91 prohibits is the admission of oral evidence to prove the contents of the document. Whether or not the terms of a document could be varied by proof of an oral agreement is a matter which is not covered by S. 91 at all. That is the subject-matter of S. 92, and so, if S. 92 does not apply, there is no reason to exclude evidence about an oral agreement solely on the ground that if believed the said evidence may vary the terms of the transaction. From the terms of S. 92 itself, it is clear that strangers to the document are outside the scope of S. 92; but S. 99 has presumably been enacted to clarify the same position. It would be unreasonable to hold that S. 99 was intended not only to clarify the position with regard to the strangers to the document, but also to lay down a rule of exclusion of oral evidence by implication in respect of the parties to document or their representatives-in-interest. The true position is that if the terms of any transfer reduced to writing are in dispute between a stranger to a document and a party to it or his representatives-in-interest, the restriction imposed by S. 92 in regard to the exclusion of evidence of oral agreement is inapplicable; and both the stranger to the document and the party to the document or his representative-in-interest are at liberty to lead evidence of oral agreement notwithstanding the fact that such evidence, if believed may contradict, vary, add to or subtract from its terms: A.I.R. 1958 S.C. 448.

It is well established that when the terms of a contract have been reduced to writing, extrinsic evidence as to what transpired

subsequent to the contract is not admissible for ascertaining the terms. In view of provisions of S. 91 of Evidence Act, no extrinsic evidence, oral or documentary can be admitted to prove the terms of a contract, grant or other disposition of property, except the document itself or secondary evidence of its contents when admissible under the relevant provisions of that Act, and the Court must find out the express intention of the parties. The fundamental rule of construction is to ascertain the intention from the words used in the document which is considered to be the written declaration of the mind of the author. If the words are clear in expressing that intention and the language applies to existing facts, extrinsic evidence is not admissible for construing the deed or for ascertaining the real intention of the parties, *e.g.*, surrounding circumstances cannot be considered with a view to holding that a document which is, on the face of it, a sale deed was intended to operate as a mortgage. If, however, the words are such that one may suspect that they do not convey the intention correctly, or in other words there is some doubt as to what the words mean or how they are to be applied to the circumstances of the writer or to the facts existing at the time when the document was executed, extrinsic evidence is admissible, both under proviso (6) to S. 92 of the Evidence Act as well as in English law. In such cases extrinsic evidence is admissible for the purpose of finding out the meaning of the words which have actually been employed, or, what is the same thing, in translating the language of the document by giving definite meaning to the terms or by connecting them with the proper subject-matter; in other words, for the purpose of throwing light on the meaning of the words used with a view to arrive at the true effect of the transaction to which the document relates. The whole object in such cases is to place the Court, as near as may be, in the position of the parties to the document. The subsequent conduct of the parties is, however, not relevant or admissible for the purpose of construing a written document. If the language employed in the document is ambiguous, the question of the admissibility or otherwise of extraneous evidence would be regulated by the provisions of Ss. 93 to 98 of the Evidence Act. In view of S. 92 of the Evidence Act, oral evidence can, in no event, be admitted to contradict, vary, add to or subtract from the terms of the document, as far as the parties to that document are concerned: A.I.R. 1969 Bom. 231.

Ss. 91 and 92—Scope and effect of—Suit for declaration of title based on partition deed and for possession on strength of title—Excess area than actually allotted claimed—Exact place of demarcating line not mentioned in document—Neither side measurements given nor boundary mark of any kind referred to—No allegation that property allotted was wrong or for rectification of deed—Acquisition of title to any portion of suit property by prescription not claimed—*Held*, that partition having been effected by means of a document, and there being no other title pleaded by the plaintiffs, no other evidence for the purpose of ascertaining or varying the terms of the partition, can be admitted under Ss. 91 and 92—Oral evidence as to real demarcating line and possession of plaintiff of that excess land is inadmissible: 1969 Ker.L.R. 462.

Where an endorsement of payment has been made on the back of a bond and it does not specify whether it was towards principal or interest, Ss. 91 and 92 would stand in the way of the admission of any oral evidence to show that the payment was in fact made towards interest: I.L.R. 14 Luck. 456: A.I.R. 1939 Oudh 142.

The mere fact that both the parties to a contract have not signed it would not make it an oral one so as to take it out of the provisions of Ss. 91 and 92. These sections do not require the whole contract to be embodied in the writing, but only the 'terms'. Hence, even when the signatures are absent or the proposal and acceptance are not entered in it, it would still be hit by Ss. 91 and 92, provided the terms are reduced to writing. Of course all the terms must be there. Where all the terms of the contract are there, Ss. 91 and 92 would be attracted even if there are no signatures and no proposal and acceptance or date embodied in the document: A.I.R. 1949 Nag. 389. *See* also 230 I.C. 80: A.I.R. 1947 P.C. 32.

But where a contract of marriage is not signed by either of the contracting parties but it is in the nature of the memorandum prepared by a nikahkhwan belonging to the Shariah Department of Musal, it is open to one of the parties to prove by other oral or documentary evidence that he or she had been married and also the terms: A.I.R. 1934 Lah. 705. Where a number of letters and the forma

deed of agreement together really constitute the contract between the parties, such letters are admissible in evidence to explain the clauses in the agreement and Ss. 91 and 92 do not stand in the way of such admission: I.L.R. (1946) All. 231: A.I.R. 1946 All. 406.

Ss. 91 and 92 do not apply to a will as it is neither a contract nor a grant nor a disposition of property until the death of the testator makes it operative. S. 92(4) does not prevent the revocation of a registered will by an unregistered document: A.I.R. 1938 Mad. 616: (1938) 1 M.L.J. 444.

Where a will is self-contained in all respects, it is not permissible to import into it any condition precedent alleged to be contained in some other collateral agreement in view of the provisions of Ss. 91 and 92. A condition precedent to a legacy, cannot be imported from outside into the will which bequeaths the legacy: I.L.R. 21 Luck. 314: A.I.R. 1946 Oudh 193.

An unprobated will though may be admitted in a proceeding other than a probate proceeding for collateral purposes, but it cannot be admitted into evidence for proving title under the will as an executor or legatee: (1988) 1 Cal.H.N. 234: (1987-88) 92 Cal.W.N. 332.

It is open to *A* to prove that he executed a sale deed benami in favour of *B* in order to defeat the claims of a creditor. In such a case, if the contemplated fraud was not carried out and was not effected in whole or in part, there is nothing preventing the plaintiff *A* from repudiating the transaction as being benami and recovering possession of the property. In such a case, the question really is not one under S. 92 of the Evidence Act regarding proof of a collateral oral agreement under which *B* is to hold the property for the benefit of *A* but it is really a case where the transferor seeks to establish by attendant circumstances that he did not intend by his deed to dispose of the beneficial interest in the property to the transferee and that, therefore, he must hold the property for his benefit: (1953) 2 M.L.J. 450: (1953) 66 Mad.L.W. 760: A.I.R. 1954 Mad. 84: I.L.R. (1954) Mad. 271.

Deed—Construction—Bar of S. 92 when applicable: A.I.R. 1969 Guj. 169.

Execution of sale deed—Allegation of collateral agreement between the parties that the deed will be nominal and will not be acted upon—Agreement not hit by Ss. 91 and 92 and can be proved—Both direct and circumstantial evidence can be considered in support of the alleged agreement: 1969 M.P.W.R. 994: 1970 M.P.L.J. 50: 1970 Cr.L.J. 1176.

3. Unregistered or unstamped/under stamped document.—There is a difference between inadmissibility of a document for want of proper stamp and its inadmissibility because of non-registration. No doubt, a document which is required to be stamped is not admissible for any purpose. But if on payment of the proper stamp and penalty, the document can be admitted, then the question arises whether because of its non-registration it can be used for purposes other than for enforcing or maintaining any right, title or interest to or in immovable property or whether it can be relied upon to prove the nature of possessions and to defend the possession under the doctrine of part performance. A finding that a mortgage deed could not be admitted in evidence because it was unstamped and unregistered cannot be taken as a bar to the determination of the question whether the mortgage deed is admissible for collateral purposes or to support a plea of part performance: A.I.R. 1956 Madh. Bh. 117.

Unregistered deed compulsorily registrable—Delivery in pursuance thereof—Non-production of the deed—Secondary evidence of contents admissible to ascertain the nature of possession—Proviso to S. 49, Registration Act applies: 1961 M.P.L.J. (Notes) 297.

Secondary evidence by way of oral evidence with regard to a document either unstamped or insufficiently stamped is not admissible in view of the bar of S. 35 of Stamp Act, 1899 even though no objection could be taken under the Evidence Act with regard to the admissibility of such secondary evidence. [A.I.R. 1927 Rang. 109 and A.I.R. 1937 Mad. 431, Overruled]: A.I.R. 1971 S.C. 1070: (1972) 85 Mad.L.W. (S.N.) 26.

Admissibility of unstamped instrument—Determination of: A.I.R. 1957 Raj. 47.

S. 52(1)(*c*) of the Registration Act, after its amendment in 1961 provides that a copy of every document admitted to registration shall be pasted in the book appropriated therefor in the order of their admission; thus, where the sale deed given to the Patwari for attestation of mutation was not returned to the vendee and the trial Court refused to admit its certified copy prepared from its pasted copy kept

in the Sub-Registrar's register, *held*, in revision that the trial Court had acted with material irregularity and illegality: A.I.R. 1981 P.&H. 224: 1981 Rev.L.R. 303: (1981) 83 Punj.L.R. 437.

Sale deed and partition deed.—Unregistered sale deed and partition deed can be used as evidence to establish the nature of the possession of the person who claims under the deeds. The fact of possession and partition of property can also be proved by oral evidence: 98 I.C. 940: (1926) 28 Punj.L.R.18. *See* also 100 I.C. 153: A.I.R. 1927 Lah. 842; 92 I.C. 1028: A.I.R. 1926 Mad. 402 (partition deed); 95 I.C. 585: A.I.R. 1926 Mad. 812 (sale deed); 103 I.C. 281: A.I.R. 1927 Mad. 830; (1925-26) 30 Cal.W.N. 254: A.I.R. 1926 Cal. 705.

Where a deed of partition is not admissible in evidence owing to the absence of stamp and registration, oral evidence of partition is also excluded under S. 91: I.L.R. (1955) 1 Cal. 207.

Where an unregistered partition deed is relied upon by the defence in a partition action, though the deed may be inadmissible in evidence being unregistered that does not prevent any other evidence being admissible to prove merely the factum of separation in order to defeat the plaintiff's claim: 1938 Pat.W.N. 799: A.I.R. 1938 Pat. 603; (1932) 34 Punj.L.R. 1033: A.I.R. 1933 Lah. 194; 144 I.C. 312: A.I.R. 1933 Nag. 270; 145 I.C. 833: A.I.R. 1933 Rang. 249; 12 Mys.L.J. 236; I.L.R. 6 Rang. 537: A.I.R. 1928 Rang. 196.

Where a deed of partition is unregistered and, therefore, inadmissible in evidence under S. 49, Registration Act, other evidence can be led to prove the fact of partition as distinct from the terms of partition. S. 91, in such a case of disposition of property, bars evidence in proof of the terms of the disposition and no more. The fact of partition itself is not a term of the document. As a matter of fact, the partition precedes the actual distribution of what was formally joint property. It is only after the family has decided to separate and partition the property that they sit down to divide the property by metes and bounds. Whether in a particular case such evidence of the fact of partition would be of any use without the terms of the partition will depend upon the circumstances of each case: A.I.R. 1955 Raj. 157. *See* also I.L.R. 29 Pat. 980; 6 Sau.L.R. 103: A.I.R. 1954 Sau. 46; A.I.R. 1955 Madh. Bh. 129; I.L.R. (1971) 21 Raj. 823: 1971 Raj.L.W. 500.

Unregistered partition deed—Terms are inadmissible in evidence—Fact of partition can be proved by other evidence: (1964) 1 An.W.R. 384: A.I.R. 1965 Andh. Pra. 274 (F.B.).

No document is necessary to effect a partition amongst joint owners. It is permissible to effect a partition orally and subsequently a document may be made recording the fact of such partition. In such a case, even if the document of partition is hit for non-registration, independent oral evidence may be given of the actual division. Where, however, under an unregistered document itself, the severance in status is effected and that document records the shares allotted to each of the dividing members, the document is inadmissible under S. 49, of the Registration Act as evidence of any transaction affecting the properties for want of registration and no oral evidence can be given to prove the terms of partition in view of S. 91, of the Evidence Act. The change of status from joint members of a coparcenary to a separated member having a defined share in the ancestral property may be effected orally or it may be brought about by a document. If the document does not evidence any partition by metes and bounds, it does not come within the purview of S. 17(1)(*b*). Hence, in so far as documents are evidence of partition only in the sense that what was once a joint title has become a divided title, though there has been no division in properties in metes and bounds, they are compulsorily registrable under S. 17, and would, therefore, not come within the mischief S. 49: 1965 M.P.L.J. (Notes) 64.

The document purporting to prove separation was unregistered. The combined effect of S. 91 of the Evidence Act and S. 49 of the Registration Act was only to exclude all evidence to prove the terms of an unregistered deed. Those provisions did not bar the evidence to prove separate status. S. 49(*c*) of the Registration Act prohibited the use of an unregistered document in any legal proceeding in which such a document was sought to be relied upon in support of a claim to enforce or maintain any right, title or interest to or in any immovable property. So long as the document was not used as evidence of any right, title or interest to or in any immovable property, there was nothing to prevent the document from being received as evidence for other purposes. The proviso to S. 49 of the Registration Act itself said that a document

though unregistered was admissible to prove a collateral fact. The partition of immovable property belonging to the joint family could not be proved by an unregistered instrument. But the partition, that is, the severance of joint status which was not required to be effected by a registered instrument was a collateral transaction and the unregistered instrument would be admissible to prove the fact of such a severance in status. The document was admissible to prove an intention to become divided in status: 1962 M.P.L.J. (Notes) 63.

The provisions of S. 49 of the Registration Act, 1908 do not bar the reception of an unregistered instrument of partition for the purposes of ascertaining the nature of possession of any party to such an instrument. S. 91, Evidence Act does not bar the reception of the unregistered deed to prove the factum of partition: A.I.R. 1977 Punj. 94: (1976) 78 Punj.L.R. 909.

Documentary evidence—Exclusion of oral evidence—Deed of partition—Effect of non-registration—If a deed of partition is not registered, no title will pass under it—Unregistered document will not be admitted in evidence—Oral evidence will be inadmissible to prove partition—(Registration Act, 1908, Ss. 17 and 49): (1966-67) 71 Cal.W.N. 17: A.I.R. 1967 Cal. 369.

A partition deed, even if unregistered, can be used in evidence for a collateral purpose; but such purpose has only a limited scope and meaning; using it to show that it created or declared or assigned or limited or extinguished a right to immovable property is no collateral purpose. [A.I.R. 1976 S.C. 807, Foll.]: A.I.R. 1980 All. 180.

Where an unregistered and unstamped partition deed was sought to be proved to establish partition and the bar under S. 35 of the Stamp Act had been removed by payment of the stamp duty and penalty, *held*, neither the deed nor oral evidence of its contents was admissible to prove partition; the bar under S. 91, however, is not absolute; the deed could not be looked in so far as it declared, assigned, limited or extinguished a right to immovable property but it could be used to prove collateral transactions. Of the three stages of partition, namely (*i*) effecting a division in stages, (*ii*) dividing properties by metes and bounds and (*iii*) each party taking possession of properties allotted to it, the first and the third stages, even if reduced to writing, need no registration because neither the status nor taking of actual possession can be said to create, declare, assign, limit or extinguish any right, title or interest to or in immovable property. The deed is admissible to prove these collateral purposes. The oral evidence barred under S. 91 is of the terms and not for finding out the division in status and nature of possession. [(1974) 87 Mad.L.W. 215 (D.B.); (1947) 60 Mad.L.W. 135 (D.B.) and (1961) 74 Mad.L.W. 844 (D.B.), Rel. on; (1965) 1 An.W.R. 384 (F.B.); (1969) 1 An.W.R. 396 (F.B.), Foll.]: (1978) 91 Mad.L.W. 156: (1978) 1 M.L.J. 248 (D.B.).

S. 91 read with S. 49 of the Registration Act, *held*, shuts out all evidence to prove the terms of an unregistered partition deed; the unregistered deed is not admissible to prove as to which property fell to the share of any party thereto; the unregistered partition deed is not admissible to prove exclusive ownership of the disputed site vesting in the plaintiff: A.I.R. 1988 Del. 13 (D.B.).

Though an unregistered partition deed is inadmissible to prove the terms of partition, it can certainly be used for proving the division of status and the factum of partition and the character of possession of a family member: (1974) 87 Mad.L.W. 215 (D.B.).

Where the 'list of items of suit property divided between members of the family' is inadmissible for want of registration, *held*, it can nevertheless be used for collateral purposes of proving the co-parceners' intention to become divided in status and their ceasing to be joint from the date that list was prepared; even oral evidence to prove separation in the parties' status and an agreement between them to enjoy the joint family property in separation may also be given; it is not hit by the bar in S. 91: A.I.R. 1993 Madh. Pra. 65.

A document allotting specified properties to individual co-parceners being compulsorily registrable as value of property was over Rs. 100, *held*, in absence of registration is inadmissible to show when property was partitioned. However, it could be admitted to show the intention of parties to partition the property: (1982) 8 All.L.R. 748.

An unregistered partition deed, though not admissible as evidence of partition, *held*, is nevertheless admissible for the collateral purpose of proving date on which partition was effected: A.I.R. 1988 Karn. 225 (D.B.).

Where the main relief sought for was declaration of title and the consequential belief was injunction and partition was set up by way of evidence to the main relief, *held*, as in such a case question of possession became a collateral fact, admissions contained in an unregistered partition deed could be received in evidence to prove possession. [1969 S.C.D. 1158, Rel. on]: 1983 Hindu L.R. 11 (Karn.).

Where all the joint family members got themselves divided and partitioned properties prior to 1960 and were enjoying their respective shares separately; however, they had then decided to keep one property joint for future division which took place in 1960 as agreed upon by them earlier; the suit was filed by two brothers to take possession of their separate shares as settled at the general partition prior to 1960; *held*, even if the partition deed executed in 1960 is unregistered, yet oral evidence is permissible to prove the factum of the family members having taken over their respective shares in the property in 1960. [A.I.R. 1974 Mad. 239, Foll.; (1941) 54 Mad.L.W. 499; (1944) 57 Mad.L.W. 472 (F.B.), Disting.] A.I.R. 1979 Andh. Pra. 275.

Family arrangement reduced to form of document inadmissible for want of registration. Evidence relating to contents of document is admissible: 26 All.L.J. 952: A.I.R. 1928 All. 641 (F.B.).

Where after partition by metes and bounds, an unregistered document recording the arrangement arrived at as to division of the remaining property, was sought to be adduced in evidence, *held*, being only a memorandum of family arrangement, it did not require registration and was admissible: A.I.R. 1988 S.C. 881.

Unregistered document effecting severance in joint family status between two brothers—Each abandoning his claim to land in exclusive possession of the other—Admissibility—Document though admissible to prove severance in status not admissible to prove nature of possession subsequent to its execution—Oral evidence to prove actual division not admissible: (1962) 4 Ori.J.D. 226: A.I.R. 1962 Ori. 107.

Document regarding family arrangement—Registration—When necessary. *See* 1961 B.L.J.R. 881: A.I.R. 1962 Pat. 400.

Unregistered partition koorchit—Oral evidence to prove its terms—Admissibility. *See* (1947) 1 M.L.J. 90.

Note of co-sharer for owelty—Suit on—Oral evidence of terms of partition—Unregistered partition lists—Admissibility: (1937) 1 M.L.J. 676.

Where property is conveyed by an unregistered sale deed, though the document cannot be relied upon for the purpose of establishing title, it may be referred to for the purpose of understanding the nature of the contract between the parties and to prove delivery of possession. To such a case S. 91 does not apply: 10 Pat.L.T. 449: A.I.R. 1929 Pat. 620. *See* also A.I.R. 1937 Nag. 116.

Reading Ss. 91 and 66 together, it appears that the law imposes an absolute prohibition against tendering of secondary evidence of the contents of the document referred to in S. 65(*a*) and thereby also prohibits the proof of the terms of the unregistered sale deed by any other mode except by proof of the document itself, when the said document is admitted to be in existence. [A.I.R. 1923 P.C. 50; A.I.R. 1958 S.C. 448, Rel. on; A.I.R. 1964 Andh. Pra. 53, Disting.]: A.I.R. 1973 Ori. 65.

Sale of property less than hundred rupees in value—Proof of transaction effected by actual delivery—Existence of unregistered document is no bar. *See* A.I.R. 1954 Ori. 31: 20 Cut.L.T. 62.

When there has been an oral sale of property worth less than one hundred rupees by payment of the price and delivery of possession, the fact that some time later an unregistered sale deed is passed on to the vendee does not prevent evidence of the oral sale being adduced: 44 Mad.L.W. 949: A.I.R. 1937 Mad. 265. *See* also 19 Pat.L.T. 489.

Proviso to S. 58(*e*), Transfer of Property Act—Applicability to Punjab—Sale or mortgage—Distinction—Sale with a condition to reconvey—Determination of real nature—Admissibility of oral evidence—Tests indicating a mortgage—Transaction in suit held a mortgage and not a sale: (1960) 62 Punj.L.R. 1064: A.I.R. 1964 Punj. 81.

Lease deed/Rent note.—Though an unregistered deed of lease cannot be used to prove its terms like the period of its duration and the rate of rent, it can, it is well established, be admitted to prove collateral transaction; thus it can certainly be used to show the nature and character of the lessee's possession; from his possession and other circumstances, his status as a tenant in the premises may well be

established; and if the tenancy is not for agricultural or manufacturing purpose, it may well be presumed to be monthly. [A.I.R. 1972 S.C. 1121, Applied; A.I.R. 1952 S.C. 23 and A.I.R. 1949 Nag. 265, Foll.; A.I.R. 1972 Madh. Pra. 100, Overruled]: A.I.R. 1975 Madh. Pra. 230 (F.B.).

Where an unregistered and insufficiently stamped lease deed, compulsorily registerable, is admitted in evidence, *held*, it may not be effective as a lease deed for its purported duration, yet it can certainly be looked into, even if it is not signed by the parties, for the collateral purpose of showing the permissive nature of possession over the land: A.I.R. 1979 All. 184.

Where lease deed is inadmissible in evidence being unregistered, the tenancy can be proved by other evidence as by the doctrine of part-performance: 105 I.C. 172: A.I.R. 1928 Pat. 89; 111 I.C. 358: A.I.R. 1928 Nag. 338. But *see* A.I.R. 1930 Lah. 675.

Agricultural lease for a term exceeding one year—Must be registered—Unregistered lease not admissible in evidence—No other evidence of its terms can be given under S. 91, Evidence Act: I.L.R. 43 Pat. 201: A.I.R. 1964 Pat. 1 (F.B.).

Agricultural lease—Unregistered patta—Possession delivered to lessee and rent accepted—Lease can be proved by possession and acceptance of rent—Suit by lessee against trespasser for ejectment—Terms of lease need not be proved: 29 Cut.L.T. 428: A.I.R. 1964 Ori. 16.

Unregistered lease—Oral evidence to prove relationship of parties, not admissible: 148 I.C. 558: A.I.R. 1934 Lah. 743.

Lease—Proof—Unregistered kabuliyat can be put in evidence to show that in fact there was a lease and that the lessee was in possession: 1961 Nag.L.J. (Notes) 86.

A lease deed of immovable property for 3 years is required by law to be registered; such an unregistered lease deed, not admissible to prove the lease, is nevertheless admissible for collateral purpose. However, where the contention was whether the superstructure was also leased out, *held*, it was not a collateral purpose; the deed was hit by S. 91: (1984) 97 Mad.L.W. 212.

Where the document purported to create a lease for 4 years but was not registered, *held*, it cannot be used for proving the duration of the lease by either party for 4 years; it could, however, be used to establish the status of the tenant as such; as the Courts below had decided the case by excluding the lease deed from consideration, it is remanded for fresh decision on consideration of the lease deed as well: A.I.R. 1974 Mys. 7.

Where the rent note is one that requires registration and has not been registered, it is inadmissible not only to prove the terms of the contract but also to prove the fact that it contained all the terms of the contract. There is no bar, therefore, under S. 91 to the reception of other evidence consisting of an entry in the record of rights to prove the nature of the tenancy: I.L.R. 58 Bom. 419: A.I.R. 1934 Bom. 194. *See* also 1938 O.A. 785: 1938 O.W.N. 1080; 1939 A.M.L.J. 148.

Where in a suit for recovery of possession of land after removal of superstructure, the tenant claimed protection from eviction under S. 9 of the Madras City Tenants Protection Act, 1955 as he was a tenant in possession prior to the date of the Act's commencement and relied upon an unregistered lease deed signed by the landlord's attorney alone, *held*, even if it was an inchoate or incomplete document not admissible to prove the terms of the lease, it was certainly admissible for the collateral purpose of proving the nature and character, as also the date of inception, of the tenancy. [A.I.R. 1957 Mad. 73, Rel. on]: (1973) 86 Mad.L.W. 451.

Where the tenant was proved to be in possession of the land ever since 1942 but there were two unregistered lease deeds, executed in his favour on 14-6-1942 for eight years and 12-2-1956 for ten years, and there was no other legally admissible written lease in his favour, *held*, all other evidence to prove the terms of the lease is barred under S. 49 of the Registration Act; that, however, does not mean that the tenant cannot adduce other documentary proof of his tenancy and there was enough of it on record including an averment in the plaint that after the redemption of the mortgage, the tenant had in law and fact completely surrendered his tenancy: A.I.R. 1973 Mys. 40: (1973) 1 Mys.L.J. 120.

Unregistered Kirayanama for three years reserving monthly rent—Admissibility in evidence. *See* T.P. Act, 1882, S. 106: A.I.R. 1968 Pat. 26.

Mortgage deed.—Though a mortgage by deposit of title deeds may be created by mere deposit of title deeds and requires no contract in writing, *held*, but if a written contract of such mortgage is entered into, it must be got registered; no oral evidence of such a mortgage, if unregistered, can be allowed to be adduced or considered: A.I.R. 1971 Andh. Pra. 359: (1970) 2 An.W.R. 161: (1971) 2 A.P.L.J. 115: (1971) 2 An.L.T. 39 (D.B.).

Memo merely recording the fact of deposit of title deeds with the Bank to secure repayment of loan is not required by law to be compulsorily registered. Because in such a case the crucial question is: Did the parties intend to reduce their bargain regarding the deposit of the title deeds to the form of a document? If so, the document requires registration. If on the other hand, its proper construction and the surrounding circumstances lead to the conclusion that the parties did not intend to do so, then, there being no express bargain, the contract to create the mortgage arises by implication of the law from the deposit itself with the requisite intention, and the document being merely evidential does not require registration: A.I.R. 1971 S.C. 1613.

The mortgagor of occupancy holding is not debarred from proving his title to the holding although the mortgage deed, being not registered, was not receivable in evidence and other evidence to prove the nature of the transaction was not admissible: 1932 All.L.J. 101: A.I.R. 1932 All. 259. But *see* (1931) 33 Punj.L.R. 227: A.I.R. 1932 Lah. 276.

A mortgage other than the one by deposit of title deeds can be effected only by a registered deed signed by the mortgagor and attested at least by two witnesses; as there was no such deed executed between the parties, *held*, the lower appellate Court erred in holding that the contract of mortgage between the parties was proved: A.I.R. 1973 Raj. 208: 1972 Raj.L.W. 522: 1972 W.L.N. 784.

Endorsement of payment on mortgage bond not registered—Admissibility of oral evidence to prove payment: 100 I.C. 129: A.I.R. 1927 Lah. 237.

Equitable mortgage—Deed executed in relation to—Non-registration—Admissibility in evidence to prove mortgage. *See* I.L.R. (1952) Bom. 715: A.I.R. 1952 Bom. 315.

Unregistered mortgage—Factum but not terms of mortgage can be proved by entries in *jamabandi*: A.I.R. 1959 Punj. 609.

Miscellaneous.—Once an exchange deed touching lands of the value of more than Rs. 100 is reduced to writing, even if the Transfer of Property Act is not applicable, it is compulsorily registerable; unless registered, it would be inadmissible in evidence; no oral or other proof including entries in *jamabandis* and *khasra girdawaris* is admissible to prove the exchange: 1987 Punj.L.J. 124.

Where in suit for recovery of money on *hundis*, the plaintiff had no independent cause of action apart from the *hundis* which were found to be insufficiently stamped and therefore inadmissible, *held*, the suit was rightly dismissed on that ground; merely because they were marked and admitted in evidence on the formal evidence of a person not a witness to their execution and by non-application of mind would not make them legal evidence; S. 91 was an absolute bar to their being proved by oral evidence. [A.I.R. 1934 Lah. 606, Foll.]: 1991 Punj.L.J. 591: (1991-2) 100 Punj.L.R. 226: (1991) 2 Rev.L.R. 294.

An unregistered patta cannot be admitted in evidence in a suit for possession of land for the purpose of proving the plaintiff's title. Nor can the plaintiff be allowed to prove his title by the production of rent receipts or by the general circumstances of the case. S. 49 of the Registration Act and S. 91, Evidence Act are a bar to such proof: 18 Pat.L.T. 1012. This case was doubted in the undermentioned decision. Where a contract of sale of immovable property has been reduced to writing and is followed by delivery of possession, party is not debarred under Ss. 91 and 92 of the Evidence Act, from proving his possession as a means of conveying the property. The fact there was an unregistered instrument does not stand in the way of proving title by delivery of possession where under the law title could pass in that manner. If the acts of parties disclose a state of affairs consistent with the existence of an agreement or arrangement mutually recognised and acted upon, as if the instrument were binding upon the parties, although the written instrument may be defective as a valid and finally concluded agreement or arrangement, the defects may be supplied by the subsequent actings and conduct of the parties: Ss. 91 and 92 of the Evidence Act would not bar such proof by looking to the other materials on record for the purpose of proving the character of possession: I.L.R. 29 Pat. 628: A.I.R. 1951 Pat. 277.

As a private unregistered award dealing with immovable property of over Rs. 100 is inadmissible in evidence, no secondary evidence of its contents can be given. Though it cannot be said to be a contract or a grant it would fall within the category of any other 'disposition of property' and, hence, under S. 91, no oral evidence can be given in proof of its terms: 1942 All.W.R. (Rev.) 502: 1942 O.A.(Supp.) 528: 1942 O.W.N. (B.R.) 758.

Unregistered deed of ekramama creating charge—Oral evidence to prove terms—Admissibility. *See* A.I.R. 1952 Pat. 73: I.L.R. 30 Pat. 1161.

4. Suit on promissory note.—Where a party sues upon promissory note, he must produce that note or give a satisfactory explanation as to why he is unable to produce it; else, he is not entitled to rely upon a relative and ancillary document such as a receipt which formed part of the same documents upon which both the promissory note and the receipt were inscribed. Courts should refuse to exercise their powers in favour of a litigant who is deliberately concealing important material and relevant information: 151 I.C. 123: A.I.R. 1934 All. 837.

Where a creditor lent a loan, and had taken a receipt, and a promissory note to evidence it, his claim for recovery of loan without producing the promissory note is not maintainable. If, however, the cause of action is antecedent to the making of promissory note, then there is nothing to prevent the creditor from maintaining a suit on the original cause of action founded on the loan: (1967) 2 Mys.L.J. 369: A.I.R. 1968 Mys. 148.

When a contract is wholly contained in a promissory note, *i.e.*, where it forms the substance of the contract with all its terms, S. 91 would preclude proof of the contract otherwise than by the document itself : A.I.R. 1936 Nag. 225; A.I.R. 1936 Pesh. 146; A.I.R. 1937 All. 439: 1937 All.L.J. 235.

If such promissory note is inadmissible for any reason, the contract cannot be proved by any extraneous oral evidence, nor can money be recovered as money had and received, *i.e.*, as a debt independently of the promissory note: A.I.R. 1936 Nag. 225. Where in a suit for recovery of money lent under a pronote, the pronote is not produced in evidence, but the payment of money is proved, and it was contended in revision against the dismissal of the suit, that on the finding of the trial Court that the defendant had borrowed the amount, a decree should be passed, even if the non-production of the pronote be for the reason it was insufficiently stamped and so inadmissible in evidence. *Held* (dismissing the revision), oral evidence offered for the payment of money is admissible; the terms on which the payment was made are covered by the provisions of S. 91 and require the production of document for proof of them. In view of the provisions of S. 91 and the various decisions of the High Court, it is not possible to hold that even in the event of non-production of a promissory note, the Courts can either allow proof of the undertaking to pay or presume to the same effect: 1952 All.L.J. 303: A.I.R. 1952 All. 877. But where the promissory note is executed in satisfaction of a pre-existing liability, the inadmissibility of the promissory note by reason of its being insufficiently stamped does not preclude proof of the pre-existing liability by oral evidence: A.I.R. 1936 Nag. 225.

Even in cases where the lending of the money and the execution of an instrument are contemporaneous, the lender is entitled to maintain a suit for recovery of the money lent and to adduce evidence, other than the instrument itself, in order to prove the loan: I.L.R. (1957) Cut. 361: A.I.R. 1957 Ori. 212.

Where in a suit to recover a sum of money advanced to the predecessor-in-interest of the defendant, a promissory note and a contemporaneous receipt are produced and the promissory note is found inadmissible in evidence for want of proper stamp, on a question whether other evidence was admissible, it was held that the loan could be proved by other evidence including the receipt: I.L.R. (1943) All. 610: 1943 All.L.J. 189: A.I.R. 1943 All. 220 (F.B.).

Although a loan and a promissory note for the loan form part of the same transaction, a suit will lie on the original consideration. If there is a loan, that itself gives a cause of action, and the fact that there is a loan can never be a term of the contract contained in the promissory note; it is, therefore, open to the creditor to prove that there was a loan independently of S. 91. It does not matter whether the loan was made at the same time as the promissory note which is the evidence of it or whether it is not properly stamped and, therefore, inadmissible in evidence: (1938) 40

Bom.L.R. 174: A.I.R. 1938 Bom. 286. But *see* I.L.R. 53 All. 114: A.I.R. 1931 All. 183 (F.B.); 144 I.C. 130: A.I.R. 1933 All. 280; I.L.R. 57 All. 434: A.I.R. 1935 All. 129: 14 I.C. 433; A.I.R. 1934 All. 271; I.L.R. 9 Luck. 267: A.I.R. 1934 Oudh 5; also 140 I.C. 117: A.I.R. 1933 All. 109; 95 I.C. 704: A.I.R. 1927 Lah. 89; A.I.R. 1922 Lah. 307.

Where a pronote is inadmissible for want of proper stamp duty, the plaintiff may recover his money by proving orally the advance of the loan: A.I.R. 1933 Nag. 37(2): 29 Nag.L.R. 131; I.L.R. 7 Luck. 666: A.I.R. 1932 Oudh 235 (F.B.). *See* also A.I.R. 1927 All. 236: I.L.R. 49 All. 257; 103 I.C. 634: A.I.R. 1927 All. 503; 1937 All.L.J. 360: 1937 All.W.R. 322. *Held* by the Full Bench (*Stodart, J.*, dissenting), that the answer to the question whether a person who has lent money on a promissory note, which is inadmissible in evidence owing to defect in the stamping can sue to recover the debt apart from the note, depends on the circumstances under which the instrument was executed. If the note was given in respect of an antecedent debt, or as collateral security or by way of conditional payment or if the note does not embody all the terms of the contract, the true nature of the transaction can be proved. But if the promissory note embodies all the terms of the contract, no suit on the debt will lie as S. 21 of the Evidence Act and S. 35 of the Stamp Act bar the way. The fact that the execution of the promissory note is contemporaneous with the borrowing cannot, however, exclude the possibility of the instrument having been given as collateral security or by way of conditional payment: I.L.R. (1938) 2 Mad. 933: A.I.R. 1938 Mad. 785: (1938) 2 M.L.J. 189 (F.B.).

Where in a suit for recovery of money, it was clearly pleaded that the borrowing and execution of the promissory note were integral parts of the same transaction and the pronote was admittedly insufficiently stamped, *held*, the promissory note was obviously inadmissible; oral evidence to prove the terms of the pronote was barred under S. 91. [A.I.R. 1973 Andh. Pra. 342, Rel. on]: A.I.R. 1985 Andh. Pra. 26: (1985) 1 An.W.R. 284.

Where it is alleged in the plaint and proved by evidence that the pronote, rendered inadmissible for being deficiently stamped, did not incorporate all the terms and conditions of the loan agreement and was executed by way of collateral security or conditional payment, *held*, the plaintiff may succeed on the original loan; S. 91 or S. 92 would not bar it. But if there is no such plea or proof, the plaintiff cannot maintain the suit by resorting to the theories of implied promise or money had and received or *quasi* contract or unjust enrichment or any other equitable ground; there is no escape from the effect of Ss. 91 and 92. [A.I.R. 1938 Mad. 785 (F.B.), Approved; A.I.R. 1964 Andh. Pra. 188 (F.B.), Overruled]: A.I.R. 1973 Andh. Pra. 342 (F.B.).

Suit on original consideration permissible when debt is provable apart from promissory note: 26 All.L.J. 416: A.I.R. 1928 All. 479.

Pronote inadmissible in evidence—Suit on original cause of action—Maintainability: A.I.R. 1950 Raj. 10.

Where the debt and execution of the pronote are contemporaneous, the debt can be proved only by the note and where it is insufficiently stamped, plaintiff cannot apply by amendment to convert his suit into one on the original consideration: 139 I.C. 361: A.I.R. 1932 Mad. 687; 1932 Mad.W.N. 1260: A.I.R. 1933 Mad. 71; I.L.R. 58 Mad. 261: A.I.R. 1935 Mad. 23: 67 M.L.J. 595; A.I.R. 1934 Lah. 606. But *see* I.L.R. 7 Pat. 845: A.I.R. 1928 Pat. 426; 134 I.C. 254: A.I.R. 1931 All. 560; 95 I.C. 847: A.I.R. 1926 Bom. 357; 67 M.L.J. 912; I.L.R. 12 Rang. 500: A.I.R. 1934 Rang. 389 (F.B.); A.I.R. 1933 Pat. 584: 141 I.C.767: A.I.R. 1933 Pat. 159; I.L.R. 12 Pat. 862: A.I.R. 1933 Pat. 575 (F.B.).

When the promissory note was executed only in acknowledgment of a loan already advanced, the transaction of loan was clearly anterior to, and independent of, execution of the promissory note; the legal position in such circumstances is that the creditor is entitled to maintain a suit for recovery of debt based on the original contract of loan in case the promissory note is found to be defective; merely because the promissory note was executed on the very day on which the loan was advanced does not affect this position. S. 91 will not apply; merely because the promissory note is insufficiently stamped and incapable of being produced in evidence, the creditor who has advanced the loan is not precluded from pursuing his ordinary legal remedy of enforcing repayment by a suit based on the transaction of loan; the Stamp Act is only a fiscal measure to secure revenue and is not intended to arm a litigant with a weapon of technicality to deny his obligation and defeat the just claims of his opponent: 1977 Ker.L.T. 448: I.L.R. (1977)

1 Ker. 701 (D.B.); A.I.R. 1991 Ker. 16: (1990) 2 Ker.L.J. 323.

Where passing of consideration and execution of the promissory note are simultaneous or contemporaneous, *held*, S. 91 is attracted and the suit is competent only on the pronote and not on the original debt; however, where lending is earlier to the promissory note's execution, S. 91 is not attracted and the suit can be based on the debt if the promissory note is found to be inadmissible: (1993-2) 112 Mad.L.W. 505 (D.B.).

Where the contract of loan was not contemporaneous with the pronote, the contract pleaded indicated pledge of diamond on terms stated and payment of interest which found no place in the pronote which as per plaint was executed by the defendants after their breach of contract and not at the instance of the plaintiff but of some other persons, *held*, both the original contract as well as the pronote could be proved; the trial Court erred in shutting out the proof of the original contract. [A.I.R. 1936 Nag. 225, Foll.]: A.I.R. 1971 Madh. Pra. 245: 1971 M.P.L.J. 672: 1971 M.P.W.R. 478: 1971 Jab.L.J. 601 (D.B.).

Where money was borrowed on the basis of pronote which was first executed and the loan amount was taken later on, *held*, the advance of money was not an act independent of the pronote but based on it; if the plaintiff suing on the pronote has voluntarily and fraudulently caused material alteration in the pronote and has thereby destroyed evidence of his debt, he cannot claim decree on the original cause of action. [A.I.R. 1937 All. 439; A.I.R. 1958 Andh. Pra. 713; A.I.R. 1937 Pat. 572, Foll.]: A.I.R. 1983 All. 81: 1982 All.W.C. 795.

In cases where a promissory note is given in payment for goods sold and delivered, the presumption, would be that the note is given as conditional payment for the goods sold and delivered. In such cases when the note is inadmissible as being unstamped, the original debt can be availed of by the seller for the purpose of recovering the amount due to him irrespective of it, Per *Chief Justice* and *Pandrang Row, JJ.* (*Cornish, J.*, contra).—Where the promissory note is part and parcel of the transaction of loan, and itself contains all the terms, it must, in the absence of evidence to the contrary, be taken to be the contract, and no contract *aliunde* can be proved: I.L.R. 59 Mad. 68: A.I.R. 1936 Mad. 179: 70 M.L.J. 267 (F.B.). *See* also 1937 All.L.J. 360: 169 I.C. 780: A.I.R. 1937 All. 439.

Document insufficiently stamped—Not admissible for any purpose—Any purpose includes collateral purpose—Nature of consideration for promissory note cannot be made out from definition of promissory note—Suit on original loan when entertainable—Suit on promissory note—Amendment of plaint based on original loan when to be allowed: A.I.R. 1966 Ori. 18.

Stamp Act, 1899, S. 35—Parties entering into transaction and simultaneously executing a pronote—Transaction merges into pronote and pronote becomes basis of transaction—Provisions of S. 91, Evidence Act are clear bar to any other evidence except pronote—If pronote is not properly stamped and is inadmissible in evidence under S. 35 of Stamp Act, the whole suit must fail: 1966 Kash.L.J. 149: A.I.R. 1966 J.&K. 127.

When the loan is contemporaneous with the execution of an inadmissible promissory note, the debt can be proved by oral evidence independently of the promissory note only if the parties intended at the time of the execution of the promissory note that it was collateral to an oral contract by way of giving security for the loan or making conditional payment of the debt, antecedent or contemporaneous: A.I.R. 1936 Nag. 225. *See* also 1936 A.M.L.J. 37.

If, in such a case the defendant repudiates the promissory note as being a colourable document and neither party relies on the document, as embodying the substance of the contract, S. 91 does not apply, and the promissory note can be used as corroborative evidence on the point of the actual payment of the money: A.I.R. 1936 Nag. 225.

Usually in a promissory note all the necessary terms of the contract are not mentioned. When money is taken at the time of the execution of the promissory note, it will be considered that it was given as an additional or a collateral security. A suit on a promissory note can only be dismissed if there is something positive to show that it was taken in full discharge of the debt. In absence of any such material on record, it will be deemed that it was taken as a conditional security and if the promissory note is inadmissible, for want of stamp, the loan can be proved: A.I.R. 1956 Hyd. 32: I.L.R. (1955) Hyd. 725; A.I.R. 1957 Tripura 28.

Where the pleas raised and evidence adduced showed that the promissory note was taken by way of collateral security for the loan and was not intended either to constitute a contract between the parties or to merge in, or extinguish on execution of, the promissory note, *held*, the plaintiff could succeed on the basis of the original loan; S. 91 was not attracted; A.I.R. 1980 Ori. 10: (1979) 48 Cut.L.T. 79: I.L.R. (1979) 1 Cut. 580 (D.B.).

Where an unstamped pronote was obtained by way of collateral security and did not contain all terms of the loan contract, *held*, the creditor could maintain the suit for recovery of the original debt; S. 91 creates no bar: A.I.R. 1972 Andh. Pra. 282: (1972) 1 A.P.L.J. 316: (1972) 2 An.W.R. 55.

Suit not based on pronote but on original transaction of loan of Rs. 1000—Plaint allegations that pronote and receipt though insufficiently stamped were misplaced and not available—Original oral contract could be proved by evidence—S. 91 would not be a bar—Question whether or not pronote should be admitted in evidence in view of S. 35, proviso (*a*) of the Stamp Act did not arise: 1979 All.L.J. 1109.

Document containing definite promise to pay—No words prohibiting transfer—Document is promissory note payable to order—Unstamped note not admissible in evidence: 1961 Jab.L.J. 1247.

Promissory note inadequately stamped—Note not given in absolute discharge of loan—Suit on original loan maintainable—Right to interest on loan when maintainable: I.L.R. (1961) 11 Raj. 614: A.I.R. 1961 Raj. 235.

In any event, the plaintiff would be prevented from claiming interest as per terms of the promissory note and interest at best can be allowed only under S. 73, Contract Act, by way of damages: A.I.R. 1936 Nag. 225. *See* also 1936 A.M.L.J. 37.

Joint and several liability of executants under a promissory note—Oral agreement splitting up the liability into several and divisible—Liability of each can be proved: A.I.R. 1928 Mad. 173: 54 M.L.J. 150.

In a suit upon a promissory note by the endorsee thereof, the Court can properly look into the surrounding circumstances and also evidence *aliunde* to discover the capacity of endorser, when on the face of the instrument the capacity of the endorser does not appear: I.L.R. (1951) Hyd. 448: A.I.R. 1951 Hyd. 79(2).

A loan is a contract by which, in consideration of the lender lending the money to him, the borrower promises to repay the amount. If these terms are reduced in the form of a document, that is, if the contract is intended to be replaced by the document, then the document is the exclusive evidence of the terms and if for any reason the document is held inadmissible in evidence no other evidence can be offered to prove the terms; but where the terms are merely embodied or recorded in a document and are not intended to lose their independent existence, then the fact that the document cannot be admitted in evidence would not come in the way of their being proved by other evidence. A negotiable instrument is no more than a conditional payment of debt and not a satisfaction of the debt, unless the creditor agrees to accept it in satisfaction of the debt. If the negotiable instrument is not paid at maturity or is for some reason not available to the creditor, then in the absence of evidence that the parties intended otherwise, the creditor can always fall back on the loan: 8 Sau.L.R. 63: A.I.R. 1955 Sau. 74.

Promissory note for debt—Debt barred by limitation on date of note—Absence of specific recital that the promise is to pay such barred debt—Oral evidence to connect promise to pay with prior loan, if admissible: I.L.R. 63 Cal. 759.

Defendant executed a pronote for Rs. 5,000 and repaid Rs. 500. Defendant later sold his house to plaintiff and two others for Rs. 12,000, each contributing Rs. 4,000. On this date Rs. 4,700 were due to plaintiff on the pronote. Defendant pleaded that there was an agreement to wipe out this debt instead of plaintiff paying Rs. 4,000. Evidence of the other two purchasers was given to show that there was also a similar agreement with them. *Held*, that evidence of the agreement between plaintiff and defendant was admissible: 1959 Nag.L.J. (Notes) 47.

5. *Benami* transactions.—The combined effect of Ss. 91 and 92 in case of *benami* transactions is that the ostensible owner has all the rights and privileges of ownership of the property, except against its real owner: (1992-1) 109 Mad.L.W. 131 (D.B.).

6. Sale transactions.—Though an agreement for sale or reconveyance is not required by law to be registered but once written and registered, *held*, any subsequent oral evidence varying the terms of the deed would be inadmissible: A.I.R. 1973 Gau. 132 (D.B.).

Recitals in a sale deed as to the mode and time of paying consideration or legal necessity for sale are not terms of the contract; extraneous evidence to prove their modification or variation is admissible and not barred by S. 92: (1972) 2 Cut.W.R. 1298.

Ss. 91 and 92 completely bar a party to plead or prove that consideration paid for sale was more than what was mentioned in the conveyance or contract. [A.I.R. 1935 All. 529 (F.B.); A.I.R. 1955 Bom. 122; A.I.R. 1965 Mad. 147 and A.I.R. 1970 Mys. 270, Rel. on]: A.I.R. 1992 Ker. 115: (1991) 2 Ker.L.J. 648: (1991) 2 Ker.L.T. 728.

S. 91 of the Evidence Act would, bar only the proof of the terms of the document. The execution of a written sale deed, however, would not result in making the evidence of actual possession prior to the sale deed inadmissible. A party might have been in possession for a long time and a written sale deed might be executed susbequently. Prior possession of such a party is not under sale deed but is independent of it, and has nothing to do with the terms of the sale deed: 1965 All.L.J. 938.

The want or failure of consideration, a condition precedent for the transfer, *held*, can be proved, despite recitals to the contrary, by independent evidence; contents of the document of disposition in this respect are not conclusive: A.I.R. 1985 Pat. 94: 1985 B.L.J.R. 736: 1984 Pat.L.J.R. 659: 1985 B.B.C.J. (H.C.) 463.

Entries made in the mutation register by a Patwari in the discharge of his public duties or the orders passed thereon by the Revenue Officer is disputably relevant evidence under S. 35 to prove any fact in issue or a relevant fact; but a copy of the mutation is admissible only to prove the factum of sale and not the terms and conditions thereof in view of the bar under S. 91. [(1979) 81 Punj.L.R. 27, Overruled]: A.I.R. 1986 P.&H. 143: 1986 Rev.L.R. 42: 1985 Punj.L.J. 583: (1986-1) 89 Punj.L.R. 109: I.L.R. (1986) 1 P.&H. 90 (F.B.); 1989 Punj.L.J. 15.

As A.I.R. 1986 P.&H. 143: 1986 Rev.L.R. 42 (F.B.) has rendered the certified copies of mutations as inadmissible in evidence for ascertaining the terms and conditions of the sale transactions without producing the certified copies of the sale deeds, *held*, application for allowing the additional evidence in order to produce the sale deeds, subject matter of mutations, during pendency of appeal, was to be allowed, in view of aforesaid change of law by the Full Bench judgment: (1989) 1 Rev.L.R. 361.

In a suit for specific performance, the contract of sale must be definite and precise and if it is uncertain it must be held to be void under S. 29 of the Indian Contract Act. Specific performance is an equitable relief and the contract of which specific performance is sought must appear to be correct and precise and if it is uncertain no oral evidence is admissible to add to the terms or contents of the contract of sale: A.I.R. 1971 All. 494.

It is permissible to establish by oral evidence that a written agreement was not intended to operate as an agreement but was brought into existence solely for the purpose of creating evidence of some other matter.

Where, therefore, a suit for possession of a house was filed on the strength of a sale deed and the defendant sought to prove that the sale deed had not been executed as to operate as a sale deed but was executed as a sequel to another transaction of agreement to sell which the defendant had entered into with the plaintiff regarding the sale of his land. *Held*, that such defence did not run counter either to S. 91, or to S. 92 of the Evidence Act: 1962 M.P.L.J. (Notes) 100: 1962 M.P.C. 450: A.I.R. 1963 Madh. Pra. 210.

When a sale deed has been executed and registered in respect of certain immovable properties, in a suit for possession by the vendee, it is not open to the vendor to let in oral evidence to show that the terms of the contract between the parties were different or were at variance with the terms contained in the registered document: A.I.R. 1962 Mys. 44.

Suit for possession based on sale deed—Defendant can allege and prove that transaction was one for loan only: 1962 M.P.L.J. (Notes) 199.

A letter which merely states that a certain sale is a fictitious transaction, does not purport or operate to extinguish any right, and is admissible in evidence: I.L.R. (1945) Nag. 510; A.I.R. 1945 Nag. 102; 1945 Nag.L.J. 89.

Where a registered agreement for sale of a property was resisted by the vendor on the ground that it was in fact executed by way of security for the loan advanced to him by the

vendee, *held*, the Court below had rightly permitted him to adduce oral evidence of the real nature of the transaction pleaded by him. [A.I.R. 1936 P.C. 70; I.L.R. (1956) 1 Cal. 59; A.I.R. 1954 Cal. 48; A.I.R. 1954 Cal. 379; A.I.R. 1967 Cal. 351, Foll.]: A.I.R. 1972 Cal. 207: (1971-72) 76 Cal.W.N. 116 (D.B.).

Where the vendor contended that the vendee in connivance with the scribe had misdescribed the property agreed to be sold in the agreement of sale and the Courts below decreed his suit for a different property on the vendor's oral evidence, *held*, the parties were bound by the written agreement; the vendor had sued on, and not *de hors*, the document; assuming for argument's sake that the vendor could lead evidence to explain the terms of the agreement to identify the land agreed to be sold, yet a strong presumption attaches to the document and strong evidence is required to show that the vendor had signed it in ignorance: evidence on record, on facts, found insufficient to rebut the evidence: (1986) 34 B.L.J.R. 464.

Where under a sale deed, scribed and executed the same day, the consideration of Rs. 5,150 was to be paid but the vendee contended that he had already paid Rs. 4,950 to the vendor and only Rs. 200 remained payable which he could not pay for want of funds, *held*, it clearly amounted to varying or contradicting a term of the deed; the two versions in the deed and oral evidence are mutually exclusive and cannot stand together; the oral evidence was inadmissible: (1993-1) 41 B.L.J.R. 215.

Where two brothers entered into an agreement for sale of their two ancestral houses for a consideration of Rs. 2,250 and received Rs. 200 by way of earnest money, the vendee was put in possession of the two houses, and the sale deed was agreed to be executed after lifting of attachment of the houses, *held*, the vendee could not maintain the suit for specific performance in respect of only one of the two houses; it was not at all open to him, in view of Ss. 91 and 92, to contend that the agreement of sale was in fact two separate agreements whereby each house was to be sold for consideration of Rs. 1,125 out of which earnest money of Rs. 100 had been paid to each of the brothers: A.I.R. 1976 Bom. 342: 1976 Mah.L.J. 224.

7. Reconveyance deed.—Where in a reconveyance deed, the time limit had been fixed and the trial Court without framing an issue or allowing opportunity to the parties to adduce evidence found the time fixed therein to be the essence of the contract, *held*, as laid down in A.I.R. 1974 Bom. 136 (D.B.), conditions applicable to ordinary contracts of sale donot apply to deeds of reconveyance; terms of the reconveyance including time have to be strictly construed; if the plaintiff fails to perform his part of the contract within the time fixed, he loses the right to claim reconveyance; no issue or evidence on the point needed to be framed or adduced; as the parties were completely prohibited under S. 91 to adduce any other evidence except the deed of reconveyance itself: A.I.R. 1988 Pat. 229: 1988 B.L.J. 672.

Suit for specific performance of contract of reconveyance—Defendant relying on written agreement denied by plaintiff—Latter relying on oral contract—If debarred from leading oral evidence: A.I.R. 1949 Assam 80.

8. Wakf.—Although a wakf may be created by word of mouth, once the terms of the dedications have been put in writing, the document itself or secondary evidence of the same should be tendered: I.L.R. 8 Pat. 484: A.I.R. 1929 Pat. 410.

9. Terms of grant.—Although the terms of a grant can be proved under S. 91 only by the production of the document containing the grant or by the secondary evidence, the fact of the grant can be proved by such evidence which is admissible as a copy of an entry in a public record: I.L.R. 22 Luck. 522: A.I.R. 1948 Oudh 307.

10. Lease/Rent deed.—Ss. 91 and 92 do not prohibit the Court from importing into the lease deed reduced to writing the covenants or conditions implied in the tenancies under S. 108 of the Transfer of Property Act; a provision of law is neither a statement of a witness nor a document produced for the Court's inspection; Ss. 91 and 92 do not purport to override the provisions of the Transfer of Property Act or any other law; besides, when proviso (5) of S. 92, despite the prohibition contained in the section, expressly permits proof of any usage or custom whereby incidents not expressly mentioned in any contract are usually annexed to contracts of that description; but such usage or custom must not be repugnant to or inconsistent with the contract's express terms; it would be absurd

to suggest that provisions of law whereby such incidents are annexed to contracts should be kept out: A.I.R. 1980 Pat. 120: 1980 B.B.C.J. (H.C.) 123: 1980 B.L.J.R. 255.

There is no provision of law which requires the production of the original lease in order to prove merely the factum of the lease. Under S. 91, the original lease would have to be produced only for the proof of any of its terms: 1944 All.W.R. (Rev.) 76: 1944 R.D. 132.

A unilateral document executed by a lessee stating that he is holding land at a certain monthly rental, nor being a lease, does not come within the purview of S. 107 of the T.P. Act. It amounts merely to a written admission by him that he is liable to pay a certain sum as rent for the land held by him. There is nothing in the law of evidence which prevents this document from being put in evidence as an admission. The intention of S. 107, para. 3 of the T.P. Act was, not to enable a person to avoid the effect of an admission made by him: A.I.R. 1952 Cal. 352.

Lease silent as to place of payment of rent—Evidence is admissible to prove subsequent agreement as to the place: 23 Nag.L.R. 26: A.I.R. 1925 Nag. 281.

Lease for manufacturing purpose—Thirty days, notice to quit given—Eviction suit—Lease deed impounded and deficit stamp duty not being paid becoming inadmissible—Tenant in written statement and in evidence admitting payment of monthly rent—S. 91, Evidence Act no bar to use of admission in written statement to determine character of tenancy—*Held*, such tenancy was monthly tenancy terminable with thirty days' notice: 1968 All.L.J. 721.

The first appellant obtained on lease a theatre belonging to the respondent. When he failed to pay the rent, respondent, had to file a suit for eviction. The matter was compromised. According to the compromise, the appellant had to continue in possession of the theatre, on a lesser rent. The appellant also gave a letter Exhibit A-19 stipulating that he would effect structural alterations of the value of Rs. 10,000 to the theatre. On the next day they entered into a registered lease deed, stipulating the rent, duration of the lease, etc. When the appellant failed to deliver the theatre after the expiry of the term of the lease, the respondent took proceedings under the Rent Control Act, and obtained eviction order against him. The respondent ultimately secured possession of the theatre. The respondent filed suit for recovery of Rs. 10,000 which the appellant agreed to spend on the structural alterations to the theatre, as stipulated in the letter Exhibit A-19 but failed to implement the condition. The respondent also claimed certain amount towards damages. The Court below decreed the suit. On appeal to the High Court, the appellant contended the letter Exhibit A-19 was not admissible in evidence, as the same was unregistered and in variance of the terms of the registered lease deed, and therefore, hit by S. 49(*c*) of the Registration Act and S. 91 of the Evidence Act.

Held: The condition stipulated in Exhibit A-19 is a personal obligation of the 1st defendant collateral to the lease and this personal obligation does not alter or vary the incidents of the lease. Exhibit A-19 is relied upon by the plaintiff only for a collateral purpose to prove that there was a personal obligation on the part of the 1st defendant to effect structural alterations upto the value of Rs. 10,000 and leave them intact on the expiration of the lease period. This stipulation is the result of the compromise to which reference is made in Exhibit A-19 also. Exhibit A-19 is not being relied upon as evidence of any right, title or interest to the immovable property but has been relied upon as a claim for damages. S. 49(*c*) of the Registration Act is not applicable to such cases as what is prohibited is the use of an unregistered document in any legal proceeding in which such a document is sought to be relied on in support of a claim to enforce or maintain any right, title or interest to or on immovable property. The claim for damages is personal and, therefore, such a document does not require registration. Reliance is placed on Exhibit A-19 in this case not to prove the terms of compromise but to establish that under the design or scheme of the compromise arrived at between the parties, there was a collateral agreement to the lease under which the 1st defendant gave an undertaking. Therefore, neither S. 91 of the Evidence Act nor S. 49(*c*) of the Registration Act operates as a bar to the reception of Exhibit A-19 in evidence: (1969) 2 An.W.R. 33: (1968) 2 An.L.T. 240.

Suit in respect of property—Title based upon permanent lease deed and subsequent sale deed—Deeds not produced—Affidavit of lessor and evidence of lessee being vendor

of plaintiff to prove title—Title not supported by legal evidence: 1964 All.L.J. 701.

Lease by public auction of agricultural land for 7 years—Defendant's bid accepted—Possession for 4 years—Plaintiff's suit in ejectment alleging subsequent agreement of lease for one year in writing. *Held*, that as it was an agricultural lease, it could be made orally, and that the document which came into existence subsequently did not supersede the oral lease: A.I.R. 1963 Mad. 451: 64 M.L.J. 676.

Partnership or lease—No sharing of profits but one person required to pay fixed sum periodically to the other and carry on business in his own name on the property of the other—Transaction *held* to be lease and not partnership—Oral evidence showing transaction to be lease—*Held*, could not be rejected: (1963-64) 68 Cal.W.N. 786: 1963 Cal.L.J. 75.

S. 91 only excludes other evidence of terms of a document but not of existence of the contract or the relationship of landlord and tenant brought about by possession and payment of rent: 1968 Pat.L.R. 3: 1968 B.L.J.R. 93: I.L.R. 46 Pat. 1315: A.I.R. 1968 Pat. 302 (F.B.).

See Tenancy Laws—Bihar Tenancy Act (VIII of 1885), S. 5(2): A.I.R. 1968 Pat. 302 (F.B.).

Oral evidence of the terms of a partnership deed is excluded under S. 91; further the two partners under S. 92 are debarred from leading oral evidence contrary to the written terms of the partnership deed. The version of a party, that the premises were let to a partnership firm, contrary to record cannot be accepted as correct; when premises were taken by the tenant who later on admitted another person as a partner and on dissolution of partnership assigned the premises to the other partner, *held*, was guilty of sub-letting or assignment or parting with possession within the meaning of S. 14(1)(*b*) of the Delhi Rent Control Act: (1982) 2 Ren.C.J. 607 (Del.).

Where a tenancy for a limited period contemplated under S. 21 of the Delhi Rent Control Act was permitted to be created on recording evidence of the parties and on the basis of a 'proposed lease' then not signed by the tenant and the lease deed in terms thereof was executed a day thereafter, *held*, on execution for eviction of the tenant on expiry of the limited term of the tenancy, the tenant could not be permitted to plead or prove that he was already a contractual tenant when the permission to create the limited tenancy was allowed: A.I.R. 1982 N.O.C. 277: 1982 Rajdhani L.R. 442: (1982) 22 Del.L.T. 48: (1982) 2 Ren.L.R. 86: (1982) 1 Ren.C.R. 642.

Where a limited tenancy under S. 21 of the Delhi Rent Control Act is created with permission of the Rent Controller, *held*, it is not open to the tenant to contend after the lapse of the tenancy period that the tenancy under S. 21 was only a camouflage for creating a general tenancy; bar of S. 91 is attracted: A.I.R. 1994 N.O.C. 336: (1993) 50 Del.L.T. 257.

Suit for ejectment—Plaintiff proving authority of Rent Control and Eviction Officer granting permission under S. 3, U.P. (Temporary) Control of Rent and Eviction Act (III of 1947) by documentary and oral evidence—Defendant neither challenged such authority at the time of granting permission nor adduced any evidence to disprove the authority—Presumption would be that Rent Control and Eviction Officer had such authority: 1964 All.W.R. (H.C.) 413.

Where in a suit for ejectment the plaintiff alleged that there was written compromise deed between him and the defendants and the defendants committed breach of it; but the plaintiff failed to produce the compromise deed: *Held*, that as the plaintiff had not established that the defendants had violated the agreement, the suit was liable to be dismissed. Further, under S. 91, when the terms of a compromise is in writing, proof of the terms of the compromise can only be given by production of the compromise deed or by secondary evidence, if admissible, and not by oral evidence: A.I.R. 1968 All. 275.

11. Mortgage deed.—As to secondary evidence of contents of mortgage document, *see* I.L.R. 5 Rang. 650: A.I.R. 1928 Rang. 32. Factum of mortgage or passing of consideration is not 'contents of a document' within meaning of S. 91. Proving of the factum of a mortgage is not the same thing as proving the terms of the mortgage nor is proving the consideration for a mortgage the same thing as proving the terms of the mortgage: 1958 Raj.L.W. 457. Where a gift has been effected by an instrument only, the conduct of the parties can be considered for the purpose of showing that the transaction is not what it purports to be: 104 I.C. 229: A.I.R. 1927 Oudh 278.

Where a mortgage deed is alleged to have been executed and registered, oral evidence to prove the transaction is inadmissible: 14 L.R. 148 (Rev.): 17 R.D. 241.

Where the mortgage deed is clear and unambiguous and actually applies to existing facts, parole evidence is inadmissible: 147 I.C. 633: A.I.R. 1934 All. 100(2).

Mortgage by deposit of title deeds—Intention to create security necessary—Proof of—Oral evidence—Admissibility: A.I.R. 1968 Mad. 223 (F.B.).

Mortgage executed in favour of creditor—Debtor if can subsequently ask for taking of accounts regarding amounts covered by mortgage: (1926-27) 31 Cal.W.N. 178: A.I.R. 1926 P.C. 129 (P.C.).

Suit for recovery of possession of mortgaged land—Non-production of original registered mortgage deed accounted for by oral evidence—Case for producing, secondary evidence not made out—Neither certified copy of mortgage deed nor oral evidence could be looked into as proof of terms of mortgage deed: 1969 Cur.L.J. 271 (Punj.).

Where a mortgage was alleged to be in writing but the same was proved by circumstantial evidence, such as recitals in deeds referring to the mortgage extracts from account books and by a transfer of a share of the mortgage, *held*, that the written mortgage not having been proved, the circumstantial evidence was not rendered inadmissible by S. 91 of this Act, or S. 49 of the Registration Act. *Held*, also, that there being no prejudice, the plaintiff could abandon the written mortgage and contend that it was unwritten: I.L.R. 52 Bom. 875: A.I.R. 1928 Bom. 484.

Equitable mortgage—Letter recording transaction giving list of deeds deposited—Admissibility without registration—Oral evidence of mortgage—Admissibility. *See* I.L.R. 26 Pat. 260.

Where the mortgage deed provided compound interest, oral agreement to pay simple interest cannot be proved under Ss. 91 and 92: 27 All.L.J. 866: 119 I.C. 92.

12. Partition deed.—Where a registered partition deed contains a specific reference to three earlier partition deeds and also a recital that one of the parties, having a share in an undivided *pangu* was being conveyed some other property in lieu thereof, *held*, it constitutes an admission of the earlier as well as the latest partitions; parties relying on the registered partnership deed are estopped from partitions mentioned in the deed. Both S. 91 and S. 115 embody rules of evidence, the latter projects a positive state of affairs; the Courts of law are to render justice, not to encourage multiplicity of proceedings: (1985) 98 Mad.L.W. 887.

Where a deed of partition drawn and signed by some one is lost in transit when it was sent to the others for signature and was not registered is no 'document' within the meaning of S. 91, Evidence Act and cannot be a bar to the admission of oral evidence to prove the partition: 1952 All.W.R. (H.C.) 7: A.I.R. 1952 All. 782.

Partition affected by registered deed—Oral evidence in proof of partition—If barred—*Held*, that oral evidence is inadmissible to prove the fact of possession: 1981 All. Ren. Cas. 602: 1981 (U.P.) R.C.C. 570.

Award effecting out-and-out partition—Extrinsic evidence to show that some members remained undivided—Admissibility of: A.I.R. 1928 Mad. 1064: 55 M.L.J. 132.

Partition—Court refusing to admit proof of unregistered deed—Commission to ascertain details of partition, held, could not be issued: A.I.R. 1970 Cal. 192.

Partition deed—Document containing admission of both parties that they were joint till 1954—Oral admission of partition in 1951—Admissibility—Court should not persuade itself to hold that there was an oral partition between parties in face of admissions in written partition deed: 1969 Mah.L.J. 838: (1970) 72 Bom.L.R. 32: A.I.R. 1970 Bom. 160.

S. 91 of the Evidence Act, is not attracted to a document which is not a deed of partition, but a memorandum wherein is recorded a description of the properties partitioned and the '*modus operandi*' adopted to ascertain which of the properties would be possessed by one or the other of the parties. Such a document cannot be admissible under that section as proving the factum of partition. It is, however, admissible as a piece of evidence to prove that partition had already taken place and explain the correct position of the respective parties, as proved by other pieces of relevant evidence: A.I.R. 1952 Cal. 579: (1952-53) 57 Cal.W.N. 356.

See also (1973) 86 Mad.L.W. 468 [Where the alleged gift deed was in fact found to be a partition arrangement between father and son].

Where the partition deed was not challenged by a specific plea of fraud that its recitals are not correct or allocations of shares therein were not commensurate with their real shares, *held*, the deed cannot be permitted to be challenged by adducing oral evidence which is barred by Ss. 91 and 92: A.I.R. 1991 Pat. 145.

13. Gift deed.—Under the Mahomedan Law, three things are necessary for creation of a gift: (*i*) declaration, (*ii*) acceptance and (*iii*) delivery of possession. Thus, in the absence of independent oral evidence of delivery of possession, *held*, the contents of the deed by themselves prove the gift; the oral evidence as to delivery of possession is not hit by S. 91: A.I.R. 1973 Gau. 105 (D.B.).

Gift—Oral evidence—Admissibility—Gift in favour of member of H.U.F.—Proof. *See* 1981 All.L.J. 1182.

14. Deposition of a witness.—The record by Court of the deposition is the only evidence admissible of the statement alleged to have been made by the witness and if it is not shown to have been read out to the witness, he cannot be convicted of perjury: I.L.R. 42 Mad. 561: 36 M.L.J. 296.

Since the act of deposing is a physical act which can always be proved by any one who has heard the statement being made, the fact of deposing might be proved by any one who has seen and heard the witness: 115 I.C. 147: A.I.R. 1929 Mad. 187. But *see infra*. Where a deposition is not taken in accordance with S. 369, Cr.P.Code, it is inadmissible in evidence and other evidence is shut out by S. 91: 18 Cr.L.J. 966: 42 I.C. 326. *See* also (1972) 85 Mad.L.W. 150.

15. Confessional statement.—[*See* also notes under Ss. 24 and 25, *supra*]. S. 91, Evidence Act, would not be a bar to admission of oral evidence to prove a confessional statement when it is made to the Sub-divisional Magistrate which he was not bound to record under Ss. 164 and 364, Cr.P.Code: A.I.R. 1955 Pat. 425: 1955 Cr.L.J. 1377.

A statement made by an accused at a departmental enquiry is not within S. 91, as it is not required by law to be reduced to the form of a document. Such confession can be proved at the time of the prosecution: I.L.R. 36 All. 222: 25 I.C. 321.

The confession of an accused made to a Magistrate holding an enquiry is a matter which must be reduced to the form of a document within the meaning of S. 91: I.L.R. 35 All. 260: 14 Cr.L.J. 211.

Offence under S. 161, I.P.Code—Magistrate going to trap accused—Confession to Magistrate not reducing to writing—Admissibility in evidence. *See* A.I.R. 1953 Pespu 182; Search list—Proof of: 2 Weir 776. *See* also 21 M.L.J. 281; Previous convictions—Proof of: I.L.R. 28 Cal. 689; Criminal trial—Proof of previous conviction—Oral evidence—Admissibility: 1959 Cr.L.J. 1263: A.I.R. 1959 All . 695; Warrant; it should be produced in a case of assault of process server: L.B.R. (1872-1892) 572.

16. Dying declaration.—[*See* also S. 32, *supra*]. Witnesses should not be allowed to prove a dying declaration as if it is a substantial piece of evidence in the case: 67 I.C. 577: A.I.R. 1924 Lah. 12.

The only way proving a dying declaration is by the evidence of some witness who heard it made, the witness being at liberty to refresh his memory by referring to the note made by him or read over to him at or about the time the statement is made: A.I.R. 1924 Lah. 12.

17. Recovery memo.—Recovery memo. of personal search signed by witnesses—Not a statement to a Police Officer, under S. 161—Not rendered inadmissible in evidence under S. 162: (1963) 65 Punj.L.R. 745.

18. Exception 1.—*See* (1988) 2 Raj.L.W. 647: (1989) 2 Cal.L.T. (H.C.) 116.

19. Miscellaneous.—Person claiming to be manager of certain property ought to produce document to that effect and in absence of such document, *held*, an adverse inference could be drawn: 1979 Jab.L.J. 164: 1979 M.P.L.J. 266: (1979) 1 Ren.C.R. 670: (1979) 2 Ren.C.J. 191.

Where the contract of employment was silent as regards the permission to do private practice, *held*, oral evidence cannot be allowed to be adduced in order to add to or supplement the terms of the contract: 1980 Lab.I.C. 1140 (Goa).

Where documentary evidence was to *kabuliats* purportedly executed by the plaintiff's son, first for cutting timber and the other for cultivating the lands for periods not more than one year, *held*, the trial Court erred in holding that the *kabuliats* were inadmissible for want of registration; being agricultural leases for terms not exceeding one year, they were not required to be registered; they could certainly be used, if proved, for the collateral purpose of establishing the plaintiff's possession of the land arising out of the lease agreements: A.I.R. 1971 Andh. Pra. 395: (1971) 2 An.W.R. 18 (D.B.).

Kabuliyat not executed by lessor—Contract is invalid—Terms of contract cannot be proved by any other evidence. *See* A.I.R. 1957 Pat. 331.

Recitals in a document constitute admissions; no oral evidence to contradict them is admissible: A.I.R. 1989 N.O.C. 157: (1988) 2 An.L.T. 504.

Where the recital in the contract as to the names of the transferees in reference to existing facts was unmeaning in the context of earlier recitals and the parties' case, *held*, it is permissible for the Court to allow oral evidence to ascertain whether transfer was made to a single person having two names or two different persons: A.I.R. 1982 N.O.C. 228 (All.).

Where a document contained the terms of contract, *inter alia*, providing for payment of discount on the pumps, motors and cables sold to private parties and overriding commission for supplies made to the Government agencies, *held*, there being no ambiguity in the language used, no extrinsic evidence as to its terms was permissible: (1989-1) 30 Guj.L.R. 456: (1989-1) 9 Guj.L.H. 495 (D.B.).

Bye-laws of East India Jute & Hessian Exchange Ltd. requiring that terms of contract are to be in writing and in the prescribed form *i.e.*, Bought and Sold Notes.—Difference in Terms of Bought & Sold Notes—*Held*, for finding out the contract relating to arbitration, the Court cannot go outside the terms of the said Notes and, thus, no evidence, other than that afforded by those notes, could be looked into for the purpose of finding out the terms of the agreement: A.I.R. 1971 S.C. 2289.

Where certain terms and trade practices emanating from an agreement falling within the mischief of the Monopolies and Restrictive Trade Practices Act were clear and decisive and their meanings were unambiguous, *held*, no oral evidence could be permitted to deduce their meaning or to vary them; Ss. 91 and 92 were clearly attracted: A.I.R. 1977 S.C. 1285: (1977) 3 S.C.C. 227: (1977) 3 S.C.R. 455.

Where terms and conditions for opening a cash credit account with the Bank were reduced in writing, *held*, the document so written and executed constituted the repository of the parties' rights and obligations; as no variation thereof was pleaded by the Bank, Ss. 91 and 92 completely prohibit adduction of any evidence except the document itself as proof of its terms: A.I.R. 1976 Del. 115.

While considering whether a particular trade practice set out in an agreement has, or may have, the effect of preventing, distorting or restricting competition so as to constitute 'a restrictive trade practice' which has to be judged in the light of various relevant considerations which involve contradicting, varying, adding to or subtracting from the terms of the agreement, *held*, Ss. 91 and 92 are not attracted: A.I.R. 1979 S.C. 798.

Bill of exchange or hundi does not necessarily embody the whole contract, between parties. If it embodies the whole contract, other evidence to prove the terms cannot be allowed: I.L.R. 51 All. 530: A.I.R. 1929 All. 254.

Where execution of what purported to be a hire purchase agreement was admitted by the defendant but he was consistent throughout the trial that he had not taken the truck on hire-purchase and had given cogent explanation therefor and having a ring of truth, *held*, the defendant's evidence was not hit by Ss. 91 and 92: A.I.R. 1978 All. 123 (D.B.).

Where a forest contract provided for extension of time to complete the work and by a supplementary contract extension of time was completely barred but the contractor was allowed to execute the supplementary contracts pending decision of his request for its modification as had been allowed to certain other contractors, held, it was open to the contractor to contend that he was not bound by the supplementary contract; neither S. 91 nor S. 92 is attracted because (1) evidence is admissible to prove subsequent conduct of the parties, (2) the evidence sought to be led is not oral but documentary and (3) what is sought to be

proved is a condition precedent admissible under proviso (3) to S. 92: A.I.R. 1984 J.&K. 10.

Ejectment suit—Permanent occupancy claimed in defence—Compromise not stamped or registered—Decree merely dismissing suit—*Held*, that the compromise was not admissible to prove the recognition of occupancy rights: 14 L.R. 513 (Rev.): 17 R.D. 660. *See* also 1940 Nag.L.J. 85: A.I.R. 1940 Nag. 116.

In order to explain a decree, one can look at the judgment and at the pleadings, where, however, the point of doubt is not determinable from them, the Court may permit oral evidence to be adduced, order to correct the misleading descriptions in the decree: (1933) 35 Punj.L.R. 20: A.I.R. 1934 Lah. 181.

Bond silent as to interest—Oral evidence to prove agreement to pay interest is admissible: 100 I.C. 794: A.I.R. 1927 Nag. 195.

Alteration in instrument—Passing of consideration and execution found simultaneous—Effect of: (1957) 2 M.L.J. 196: A.I.R. 1957 Mad. 715.

Prior oral agreement held inadmissible—Written statement regarding indent transactions—Proof of usage at variance with the terms of contract—Admissibility: I.L.R. 54 Cal. 549.

Railway—Risk-note though available not produced at trial—Proof in direct evidence cannot be allowed. *See* A.I.R. 1956 Hyd. 193.

Goods carried at owners risk note—Consignee alleging that goods were sent at Railway risk note—Consignee to produce certificate obtained under S. 74-A(2) Railways Act—Oral statement to that effect inadmissible: A.I.R. 1967 Pat. 447.

Construction of contracts—Language of contracts susceptible of two interpretations: A.I.R. 1968 Del. 68.

Construction of document—Power of Court to strike out words or phrase—Doctrine of false demonstration—Applicability: A.I.R. 1968 Cal. 532.

Objection as to mode of proof—Lack of best evidence—Objection to oral evidence waived—Objection cannot be raised at stage of arguments: A.I.R. 1967 Cal. 390.

Agreement affecting jurisdiction of Courts—Agreement specifying place where terms of contract were to be carried out, *i.e.*, where cause of action was to be deemed to arise, is not illegal. In absence of plea which might enable to avoid binding effect of agreement, evidence in derogation of agreement is inadmissible under S. 91, Evidence Act, 1872: 1967 All.L.J. 343.

Admissibility (*i*) of oral evidence to prove deposition of witnesses. Rat. 334; (*ii*) deposition not read over to witness: 13 Cr.L.J. 569; (*iii*) deposition of accused: I.L.R. 6 Cal. 762: 8 C.L.R. 292; 54 P.R. 1887 (Cr.); 21 M.L.J. 411: 9 I.C. 262; (*iv*) admission of guilt in departmental enquiry: I.L.R. 36 All. 222; (*v*) Confession to Magistrate—Proof by oral evidence: I.L.R. 9 Mad. 224: 2 Weir 125; I.L.R. 35 All. 260; 14 Cr.L.J. 211; 11 All.L.J. 286; 10 B.H.C.R. 166.

Oral evidence of consent of the nearest reversioner to an alienation made by a Hindu widow is not rendered inadmissible by reason of an endorsement made in writing by him on the sale deed reciting the fact that he knew the contents of the deed. Such an endorsement is not a record of contract entered into between him and the purchaser: A.I.R. 1951 Nag. 390: 1951 Nag.L.J. 202.

Under Mahomedan Law, divorce is not a contract within the meaning of S. 91 except in those cases where the husband and the wife agree to dissolve a marriage for consideration. Accordingly, oral evidence is admissible to prove the factum of divorce if the deed of divorce is not forthcoming although it is unstamped: (1946) 48 Punj.L.R. 532: A.I.R. 1947 Lah. 306.

Defendant party to document—Plaintiff claiming through her father who was either donor or vendor under document—Evidence cannot be led to show that document is what it does not purport to be. [A.I.R. 1955 Bom. 122, Rel. on]: 36 Cut.L.T. 551: A.I.R. 1970 Ori. 203.

Ancient grant—Original Sanad produced—No ambiguity—Conduct of parties cannot be looked into in interpreting the sanad. *See* A.I.R. 1954 Pat. 586, cited under S. 8, *supra*. Where a party has to establish that there is a particular contract binding on the Government, and a written document executed in a particular manner as required by law for such a contract, it can only be proved by such a document under S. 91, Evidence Act: A.I.R. 1952 Pat. 393.

92. Exclusion of evidence of oral agreement.—When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Section 92—Synopsis.

[*See* **also Note 2 under S. 91,** ***supra***].

1. Applicability and scope.
2. Section applicable only to parties to instrument or their representatives.
3. Section 92 *vis-a-vis* section 115.
4. Lease deed/Rent note.
5. Mortgage deed.
6. Sale transactions.
7. Promissory note.
8. Gift deed.
9. Will.
10. Adoption deed.
11. Proviso (1)—General.
12. Proviso (1)—Fraud.
13. Proviso (1)—Want or failure of consideration.
14. Proviso (1)—Mistake in fact or law.
15. Proviso (2).
16. Proviso (3).
17. Proviso (4).
18. Proviso (5).
19. Proviso (6).
20. Miscellaneous.

---

1. Applicability and scope.—The bar imposed by S. 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction; in that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted, as between the parties, for contradicting or modifying its terms. This section is not attracted when the party contends that the transaction recorded in the document was never intended to be acted upon and the document is a sham; such question arises when the party sets up a different transaction altogether and asserts that what is recorded in the document was intended to be of no consequence whatsoever; oral evidence is admissible to show that the document was never intended to operate as an agreement but some other agreement altogether, not recorded in the document, was entered into between the parties. It is open to the party to lead parole evidence in support of the plea. [A.I.R. 1936 P.C. 70, Rel. on]: A.I.R. 1982 S.C. 20: (1982) 1 S.C.C. 4: 1982 U.J.(S.C.) 1: (1982) 1 S.C.R. 1176: 1982 M.P.L.J. 1: (1982) 95 Mad.L.W. (S.N.) 138: (1982) 2 Guj.L.H. 92 (S.C.); (1980) 1 M.P.W.N. 38.

The bar of S. 92 applies only when it is sought to be proved that the terms of the transaction were different and not that the transaction itself was different than what it purported to be. Both Ss. 91 and 92 Evidence Act are based on the best evidence rule. S. 92 is only supplementary to S. 91 and it, in terms, excludes, as between the parties and their representatives, any oral evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of the document except when the case falls under any of the six provisos to the section.

The question of construction of two documents must be approached on the settled principles of construction which are merely incorporated in the relevant sections of the Evidence Act. If there is no inconsistency and if the language of the document is not ambiguous or obscure and the case does not fall in any of the six provisos to S. 92, the document would have solely to be construed on its own terms. This prohibition, however, is only as regards the different terms being sought to be established; there is no prohibition from proving that the transaction is different than what it purports to be. The oral evidence as regards intention would, therefore, always be admissible to prove the real nature of the transaction. In case of inconsistency or repugnancy between various clauses, the document would have to be interpreted as one whole and attempt would have to be made to reconcile various clauses and it is only the last resort, if harmonious reconciliation is not possible that earlier provision would be given effect to so as to override the later provision.

A possessory mortgage and a rent-note, with the rent equivalent to the interest on the mortgage sum, were executed contemporaneously on the same date. In the suit for

Proviso (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, [1][want or failure] of consideration, or mistake in fact or law.

Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify and such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved:

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts.

---

1. Substituted for "want of failure", by Act 18 of 1872, S. 8.

---

eviction and arrears of rent, filed by the mortgagee, the mortgagor, contended that there was no relationship of a landlord and tenant between the parties because the two documents constituted a single transaction of mortgage. *Held*, that it was not a question where the consideration of intention would be ruled out by S. 92. The real question being what is the true nature of the transaction, the same would have to be found out by looking at the contents of the document, the surrounding circumstances and by resorting even to the oral evidence of the parties. *Held*, further that, looking at the rent note there were two different relationships with two different legal consequences and following the rule of harmonious construction, both the document could be given effect to at the same time. There was no inconsistency between the two documents. In such cases merely because the Court thought that in substance the transaction was a device, it would not be open to the Court to ignore the true legal position and seek to vary the terms of documents deliberately arrived at between the two parties who were a *sui juris*. When there was no inconsistency there could also be no question that the earlier part of the transaction, *viz.*, the mortgage would prevail over the subsequent part, *viz.*, the lease, because both the parts could be given effect to. In such a case there would be no room for application of any of the provisos to S. 92 and the bar would remain absolute. The documents must be construed on their terms: A.I.R. 1969 Guj. 169: (1969) 10 Guj.L.R. 600.

It is a settled rule of construction that when a term of a written document is not clear and unambiguous, extraneous evidence is admissible to ascertain the meaning of such a term. Thus, where parties entered into oral partnership and a subsequent deed merely recited existence of partnership, *held*, extraneous evidence regarding capacity of partner at the time of entering into partnership is admissible: 1974 M.P.L.J. 689 (D.B.).

S. 92 pre-supposes a contract in existence; a party thereto pleading absence of the contract, its being sham, is entitled to establish by oral evidence that the parties did not intend to bring the contract into existence: A.I.R. 1977

Illustrations

(*a*) A policy of insurance is effected on goods "in ships from Calcutta to London". The goods are shipped in a particular ship which is lost. The fact that that particular ship was orally excepted from the policy, cannot be proved.

(*b*) *A* agrees absolutely in writing to pay *B* Rs. 1,000 on the 1st March, 1873. The fact that, at the same time, an oral agreement was made that the money should not be paid till the thirty-first March, cannot be proved.

(*c*) An estate called "the Rampore tea estate" is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed cannot be proved.

(*d*) *A* enters into a written contract with *B* to work certain mines, the property of *B*, upon certain terms. *A* was induced to do so by a misrepresentation of *B*'s as to their value. This fact may be proved.

(*e*) *A* institutes a suit against *B* for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. *A* may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(*f*) *A* orders goods of *B* by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. *B* sues *A* for the price. *A* may show that the goods were supplied on credit for a term still unexpired.

(*g*) *A* sells *B* a horse and verbally warrants him sound. *A* gives *B* a paper in these words "Bought of *A* a horse for Rs. 500". *B* may prove the verbal warranty.

(*h*) *A* hires lodgings of *B*, and gives *B* a card on which is written—"Rooms, Rs. 200 a month". *A* may prove a verbal agreement that these terms were to include partial board.

A hires lodgings of *B* for a year, and a regularly stamped agreement, drawn up by an attorney, is made between them. It is silent on the subject of board. *A* may not prove that board was included in the terms verbally.

(*i*) *A* applies to *B* for a debt due to *A* by sending a receipt for the money. *B* keeps the receipt and does not send the money. In a suit for the amount, *A* may prove this.

(*j*) *A* and *B* make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with *B*, who sues *A* upon it. *A* may show the circumstances under which it was delivered.

Karn. 173: I.L.R. (1977) 1 Karn. 416: (1977) 1 Karn.L.J. 181.

When the recitals in documents are absolutely clear and are expressed in unmistakable terms, there is no room for adducing evidence *aliunde* to contradict the recitals of these documents, and any evidence so adduced is clearly hit by Ss. 91 and 92: 1974 Kash.L.J. 331.

Where the language of a document is plain and unambiguous, *held*, no party is entitled to lead oral evidence in order to vary its plain meaning for deciding whether it is a will or not: (1993) 2 Hindu L.R. 637 (Bom.).

What is the precise legal connotation of the expression 'terms' used in Ss. 91 and 92? Terms of a contract necessarily postulate a contract in existence containing statements in the nature of terms; the expression 'terms of a contract' would not apply to a statement contained in a written document which is in the nature of a condition precedent to the very formation of that contract; 'terms' must relate to statements, assertions or representations contained in a written contract relating to its subject-matter and to something to be done or not to be done under the contract: A.I.R. 1972 Bom. 365: (1972) 74 Bom.L.R. 509: 1972 Mah.L.J. 756.

Ss. 91 and 92 are very clear; under S. 91 when a transaction is reduced to the form of a document, whether by the parties' consent or agreement or by requirement of law, that document alone must be regarded as the sole appropriate evidence of the terms of the contract; so long as the document exists, and is within the party's power, no other evidence of

the transaction is admissible; under S. 92, when the parties voluntarily and deliberately set down in writing the terms of a transaction, it is presumed between themselves and their privies that they intended the document to be a full and final statement of their intentions and they are, therefore, precluded under S. 92 from giving any extrinsic evidence to contradict or vary its terms; nothing in S. 92 warrant that its bar extends only to agreements required by law to be registered; however, it does not preclude the parties that the document was not really the contract between them but only a fictitious or colourable device to cloak something else; all contracts must be made *animo contrabandi*; parole evidence, it is settled law, is admissible to prove absence of such animus. [A.I.R. 1936 P.C. 70; A.I.R. 1938 Nag. 335 (F.B.); A.I.R. 1962 Mad. 360, Foll.]: A.I.R. 1975 Gau. 43: 1974 Assam L.R. 158 (D.B.). But *see* (1990) 2 Ker.L.T. 327.

For the applicability of S. 92, there should be a concluded contract. The section has no application to negotiations: A.I.R. 1954 Cal. 48: (1952-53) 57 Cal.W.N. 743.

Ss. 91 and 92 only apply when the document on the face of it contains or appears to contain all the terms of the contract: I.L.R. 56 Bom. 180; A.I.R. 1932 Bom. 151. *See* also I.L.R. 6 Cal. 328; 76 I.C. 215; A.I.R. 1923 Bom. 236.

The Evidence Act is not altered by the Negotiable Instruments Act; S. 46 of the Negotiable Instruments Act does not exclude the application of S. 92 of the Evidence Act in suits on negotiable instruments; S. 46 of the Negotiable Instruments Act and S. 92 of Evidence Act must be read together: I.L.R. (1942) Kar. 516: A.I.R. 1943 Sind 67.

The Court in considering whether oral evidence can be given or not has to look to the Evidence Act and the equitable considerations which have influenced the English Courts in like cases have no application in this country: (1933) 35 Bom.L.R. 1197: A.I.R. 1934 Bom. 39.

S. 92 clearly refers to a contract, grant or other disposition of property entered into by agreement between the parties to the document. It cannot refer to a decree which is imposed upon one of the parties by *force majeure*: A.I.R. 1941 Lah. 149: I.L.R. (1941) Lah. 383 (F.B.); 1950 All.L.J. 261: A.I.R. 1950 All. 437; 91 I.C. 705: A.I.R. 1926 Cal. 643. But *see* I.L.R. 50 Mad. 897: 53 M.L.J. 533: A.I.R. 1927 Mad. 911. *See* also I.L.R. 6 Rang. 573: A.I.R. 1928 Rang. 316 (oral agreement varying or affecting settlement is not barred).

The section cannot, therefore, bar the setting up of an oral contract to operate as an adjustment of a decree. (Per *Young, C.J.*): A.I.R. 1941 Lah. 149: I.L.R. (1941) Lah. 383 (F.B.). *See* also A.I.R. 1943 Pesh. 29.

Evidence to prove an oral adjustment of a decree is not inadmissible under the section: I.L.R. (1943) 1 Cal. 195: A.I.R. 1943 Cal. 634. *See* also I.L.R. 58 Mad. 994: 69 M.L.J. 451; A.I.R. 1935 Bom. 303.

Oral evidence to prove a subsequent adjustment under which part of a decree was paid and the rest agreed not to be executed against the judgment debtors is not inadmissible by reason of S. 92: A.I.R. 1929 All. 79. *See* also A.I.R. 1929 Cal. 437: I.L.R. 56 Cal. 201.

Where a decree based on an award is ambiguous in its terms, the evidence of the arbitrator is admissible for the purpose of interpreting the decree as S. 92 does not govern decrees: 165 I.C. 429: A.I.R. 1937 Lah. 168.

Terms of agreement clear and unambiguous—No oral evidence could be permitted: A.I.R. 1969 Andh. Pra. 88.

Terms of document not ambiguous—Evidence of subsequent conduct of parties as to how they understood them not admissible: 1961 Ker.L.T. 138: 1961 Ker.L.J. 206: A.I.R. 1961 Ker. 293.

Where the party in possession of the original document was unable to produce on the ground that it had not been preserved, *held*, its proof by oral evidence of its contents, the best evidence in the circumstance, is admissible and may be taken into consideration: (1947-48) 52 Cal.W.N. 785: A.I.R. 1948 P.C. 108.

Though an agreement to give a discharge in future may, if it is oral, be hit by the section there is nothing in the section to preclude evidence being let in, in proof of an oral agreement which is otherwise valid and enforceable and in pursuance of which an amount somewhat less than the amount due under the mortgage is paid in full discharge of the mortgage: A.I.R. 1949 Mad. 852: (1949) 1 M.L.J. 295.

The evidence of discharge under a contract, even though at variance with the terms of the contract, *held*, is perfectly admissible in law; if the defendant has in his possession the receipts given by the plaintiff which show

that the latter received *warram* rent in full discharge for any particular year, it is certainly admissible in evidence to prove the discharge or payment of rent for that year: (1955) 1 M.L.J. 221.

The section merely prescribes a rule of evidence. It does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances: 107 I.C. 658: A.I.R. 1929 Nag. 91.

Where the wording of the contract is capable of different interpretations, the Court is justified in finding with what intention a particular expression was used as matter of pure construction; S. 92 has no reference to the interpretation of the terms of a contract: I.L.R. 55 Cal. 808: A.I.R. 1928 Cal. 737; (1985) 2 Cal.L.J. 337 [When bill of lading is ambiguous, the Court may look to extrinsic evidence to determine the parties' intention].

Oral evidence of intention is not admissible for the purpose of construing a deed or ascertaining the intention of the parties. The case has to be decided on a consideration of the contents of the document with such extrinsic evidence of surrounding circumstances as might be required to show in what manner the language of the document was related to the existing facts: (1944) 46 Punj.L.R. 101: A.I.R. 1944 Lah. 175.

When the facts are fully set out in a document and are admitted, a party's opinion about the legal effect of those facts is of no consequence in construing it. Evidence of the acts and conduct of parties is inadmissible to show that the document is not what it purports to be, although subsequent conduct is admissible to prove that the deed was acted upon: A.I.R. 1957 Pat. 278: I.L.R. 36 Pat. 471.

It is perhaps a moot point whether oral evidence is admissible to determine the intention of the parties. It is certainly not admissible if the document is unambiguous but if there is doubt then it is permissible: I.L.R. (1938) Nag. 604: A.I.R. 1938 Nag. 434,

The rule that the conduct of the parties in respect to an instrument may be looked to in construing a document, is subject to this reservation that it can be admitted only after every other means to construe a deed have been exhausted: 108 I.C. 418; A.I.R. 1928 Pat. 225.

Oral evidence of intention of parties is inadmissible. But evidence under S. 92(2) regarding the attendant circumstances is admissible: A.I.R. 1929 Mad. 807. *See* also 171 I.C. 702: A.I.R. 1937 Rang. 142.

Parole evidence is admissible to show who is the real principal in order to charge him on a contract, but such evidence would not be admissible if the contract is in writing and the evidence would contradict that writing. This follows from the general rule of inadmissibility of parole evidence to contradict a written document. It is also well established law that a person cannot claim to be a principal to a contract, if this would be inconsistent with the terms of the contract itself nor can anybody claim in similar circumstances to make him liable on the contract as a principal. A contract which is signed by *A* as *B*'s licensee is a contract on the face of it, with *A* in his personal capacity. To allow parole evidence to be given to show that the contract, which is in writing, is really not with *A* in his personal capacity but as an agent of *B* would be to contradict the writing, and would, therefore, be inadmissible: I.L.R. (1951) 1 Cal. 420.

As regards admissibility of oral evidence to prove acts, conduct and intention of parties varying contract, *see* I.L.R. 22 All. 149 (P.C.) the leading case. *See* also 42 Mys.H.C.R. 257; I.L.R. 25 Mad. 7; (1903-04) 8 Cal.W.N. 101; I.L.R. 34 Bom. 59; I.L.R. 56 Cal. 201: A.I.R. 1929 Cal. 437; A.I.R. 1937 Rang. 142: 171 I.C. 702; I.L.R. 22 All. 149.

Intention of parties—Fraud—Oral evidence to prove—Representation of intention on which the deed is silent: 13 I.C. 389: 13 Cr.L.J. 50. *See* also A.I.R. 1938 Nag. 434: I.L.R. (1938) Nag. 604.

As to admissibility of oral evidence to prove extension of time in respect of the date of performing contract. *See* 18 S.L.R. 320. *See* also I.L.R. 13 Rang. 22: A.I.R. 1934 Rang. 316.

Oral evidence of surrounding circumstances: 104 I.C. 736: A.I.R. 1928 Nag. 4. Evidence of conduct of parties to prove partition: 92 I.C. 1028: A.I.R. 1926 Mad. 402. *See* also I.L.R. (1938) Nag. 604: A.I.R. 1938 Nag. 434. Relinquishment of interest by mortgagee: I.L.R. 48 All. 705: A.I.R. 1926 All. 693.

In a case of joint purchase in the name of several persons, parole evidence is admissible to prove tenancy in common: A.I.R. 1929 P.C. 72: 56 M.L.J. 643 (P.C.). So also to prove that a lease in the name of one member was in fact on behalf of the entire joint family: 133 I.C. 897.

The section does not prevent a party to a contract from showing by oral evidence that the consideration is different from that described in the contract. What is not allowed by the section is to contradict the terms of the document: I.L.R. 7 Rang. 292: A.I.R. 1929 Rang. 240; 28 S.L.R. 266: A.I.R. 1935 Sind 48; A.I.R. 1933 All.L.J. 1364: A.I.R. 1933 All. 576; (1953) 2 M.L.J. 450: A.I.R. 1954 Mad. 84: I.L.R. (1954) Mad. 271. *See* also 1939 M.L.R. 12 (C); (1936-37) 41 Cal.W.N. 734: 65 Cal.L.J. 255.

S. 92 forbids extraneous evidence to be let in to prove a different intention of the parties than what they reduced into writing in a deed executed between them. For the purpose of this rule, it is immaterial whether the extraneous evidence consisted of oral evidence or evidence as to the acts and conduct of the parties. Hence, where the language of the written instrument evidences an outright and unconditional sale, oral evidence to show that it was only intended to operate as a mortgage or a trust deed is not admissible, as it would amount to contradiction, variation, addition or subtraction from the written grant: I.L.R. (1956) Trav.-Co. 411: A.I.R. 1956 Trav.-Co. 193; (1959) 2 An.W.R. 23.

Oral evidence to vary terms of contract is wholly inadmissible: A.I.R. 1958 Pat. 61.

If evidence is proposed to be led to vary or modify the terms of a document or a writing, there must be a proper plea raised which brings the case within any of the proviso to S. 92: A.I.R. 1956 Bom. 165.

In order to ascertain as to what really was intended by the transaction was set down in the document or the document was merely meant to be something different which the parties sought to hide by their collateral agreement, *held*, it is permissible to adduce evidence of the parties' subsequent conduct and other surrounding circumstances; Ss. 91 and 92 are not attracted: A.I.R. 1981 N.O.C. 94: 1981 M.P.L.J. 391.

S. 92 is hedged in by the six provisos which are exceptions to the general rule contained in the main provision; they envisage different situations wherein oral evidence may be admissible even if it contradicts, varies, adds to or subtracts from the terms of contract, grant etc.; any oral evidence not falling within the ambit of any of the provisos to that extent is inadmissible: (1993-1) 41 B.L.J.R. 215.

S. 92 only excludes oral evidence to vary the terms of a written contract; it is not concerned whether the parties had agreed to contract on the terms set out in the contract; there is thus a distinction in law: the evidence to vary the terms of a written agreement is not admissible but evidence to show that the document was never intended to be acted upon but was created solely as evidence of some other matter is admissible. [A.I.R. 1936 P.C. 70, Rel. on]: A.I.R. 1972 Goa 25.

All that S. 92 excludes is oral evidence to contradict, vary, add to or subtract from terms of the contract in writing; it does not preclude a party from showing that the writing did not embody the real contract and was merely a fictitious or colourable device to cloak something else: A.I.R. 1989 Ker. 317: (1989) 1 Ker.L.J. 709.

S. 92, no doubt prohibits proof of facts different from the terms of a written contract; but the section is also subject to S. 58 which provides that facts admitted need not be proved; however, consideration mentioned in the deed is not affected by either of the sections: A.I.R. 1983 J.&K. 44: 1982 Srinagar L.J. 546 (D.B.).

Where the plaintiff executed a sale deed which was never intended to be or in fact acted upon and no consideration had passed between the parties thereto either, *held*, it was open to the purported vendee to give evidence in a subsequent case for enforcement of his agreement with a third party that the earlier transaction, being fictitious and sham, was never acted upon; S. 92 casts no bar on such oral evidence: A.I.R. 1989 Ker. 317: (1989) 1 Ker.L.J. 709.

Without impeaching the validity of a document, *held*, a party cannot be permitted to lead evidence contrary to the express recitals embodied in the document: A.I.R. 1989 N.O.C. 178: (1989) 1 An.L.T. 91.

S. 92 is not a bar to show that the document which apparently was a sale was not a sale but gift or was the result of the family arrangement: A.I.R. 1971 All. 151.

Where the oral agreement, if permitted to be enforced, is likely to defeat provisions of S. 92 Evidence Act, *held*, agreement was hit by S. 23 of the Contract Act, 1872 : I.L.R. (1979) 1 Del. 84: 1979 Rajdhani L.R. 7.

If there was *ab initio* a stipulation between the parties that the contract would not be enforced or acted upon, oral evidence in support of such a plea may be given; true, unde

Ss. 91 and 92 when the terms of a contract have been reduced to writing, extrinsic evidence as to what transpired subsequent to the contract is not admissible for ascertaining the terms and no oral agreement or statement is admissible contradicting, varying, adding and subtracting from its terms. S. 92 does not preclude a party from showing that the writing is not really a contract but only a fictitious or colourable device which cloaked something else: 1972 Jab.L.J. 632: 1972 M.P.L.J. 852 (D.B.).

S. 92 is no bar to the admission of oral evidence to prove that the transaction was intended to be something other than what it purports to be; oral evidence is admissible (*i*) to show that the signed document was not to operate as it purports to be until a specified condition is fulfilled, and (*ii*) to prove that the document was never intended to operate as one which it purports to be but was brought about solely with the object of creating evidence of some other matters. Even if proviso (1) to S. 92 was not there, nothing in S. 91 or S. 92 could exclude oral evidence to show that there was no agreement between the parties, and therefore, no valid contract as per the terms embodied therein. [A.I.R. 1936 P.C. 70; I.L.R. (1966) Cut. 236, Rel. on]: (1972) 1 Cut.W.R. 504.

Whether a transaction embodied in a document is sham or fictitious and not real may be proved by inferences which may reasonably be drawn from the intrinsic evidence respecting the transaction itself or from extrinsic circumstances surrounding the transaction; such evidence is not barred under Ss. 91 and 92: A.I.R. 1978 All. 123 (D.B.).

A contract note is not conclusive of the real relation of the parties to the contract and evidence can be given to prove whether a party contracted as agent or in the capacity of seller or buyer in the transaction: A.I.R. 1954 Cal. 179.

Oral evidence can be given by the petitioner, suing *in forma pauperis*, to prove that he was personally present when the petition was presented by his counsel or that he himself presented the petition, and that a note contrary to that by the Judge is wrong: (1934) 36 Punj.L.R. 100: A.I.R. 1934 Lah. 452(1). As to application of section to criminal cases, *see* 11 Cr.L.J. 738: 8 I.C. 952.

That a sale deed is only a mortgage: A.I.R. 1928 Mad. 459 (Contemporaneous agreement not in writing not admissible): A.I.R. 1928 Nag. 182. That an apparent mortgage deed was really intended to be different: 7 Pat.L.T. 293; A.I.R. 1925 Bom. 501; I.L.R. 5 Rang. 644: A.I.R. 1928 Rang. 58.

Oral evidence inadmissible to prove that two documents executed and registered on same day are part and parcel of one transaction: 103 I.C. 399: A.I.R. 1927 All. 696.

Recitals in a document constitute admissions; no oral evidence to contradict them is admissible: A.I.R. 1989 N.O.C. 157: (1988) 2 An.L.T. 504.

In a suit for partition and separate possession of his share by one of the purchasers named in the deed, it is permissible for the defendant to contend that no title was intended to be passed to the plaintiff whose name was added merely to secure the loan advanced by him to the defendant to purchase the house. S. 92 only prohibits letting in of evidence to contradict, vary or subtract from the terms of the instrument; the parties thereto are not, and could not be considered to be, a term of the instrument itself; it is open to the defendant to show who the real party to the document is and in what character and for what purpose it was impleaded as a party to the document: (1974)1 M.L.J. 188.

Extraneous evidence is admissible to clarify the scope of the recitals in the surety bond executed under S. 514, Cr.P.Code. [A.I.R. 1971 S.C. 1722, Disting.; A.I.R. 1955 S.C. 478 and A.I.R. 1934 Cal. 569, Rel. on]: 1973 All.W.R. 228: 1973 Cr.L.J. 1208: I.L.R. (1973) 1 All. 393 (D.B.).

Document whether mortgage by conditional sale or sale with condition for transfer—Question is one of determination of real character of the transaction to be ascertained from provisions of document viewed in light of surrounding circumstances: (1966) 1 S.C.A. 431: A.I.R. 1966 S.C. 902.

Where most of the sanads are in a stereotyped form, in any particular case, the intention of the parties could be ascertained by reference to the terms of the settlement embodied in the correspondence: (1934) 36 Bom.L.R. 158: A.I.R. 1934 Bom. 145.

Provisions of, have not ceased to be operative after extension of Indian Evidence Act and Transfer of Property Act to Mysore State—S. 5 not void on ground of repugnancy to above Central Acts—Nor is it impliedly repealed: A.I.R. 1965 Mys. 54.

Terms of contract—Section does not exclude oral evidence to show who are real contracting parties: 1965 B.L.J.R. 193: A.I.R. 1965 Pat. 463.

Oral evidence is permissible to show as to who were the actual contracting parties in case of *benami* transaction: A.I.R. 1985 Cal. 2.

The combined effect of Ss. 91 and 92 in case of *benami* transactions is that the ostensible owner has all the rights and privileges of ownership of the property, except against its real owner: (1992-1) 109 Mad.L.W. 131 (D.B.).

In the case of conveyance deeds executed, *held*, no oral evidence for the purpose of adding to their terms can be admitted under Ss. 91 and 92: 1973 Rev.L.R. 484: 1973 Cur.L.J. 599 (Punj.).

Where the consideration set out in the document was the Bank's (future) readiness to advance some loans when the loans had already been advanced and were not to be advanced afresh, *held*, it is settled law that if a document mentions a wrong consideration, oral evidence is admissible to show what the real consideration was; Ss. 91 and 92 restrict oral evidence regarding the contract's terms; its consideration is certainly not a term of the contract. A contract is nothing but a promise to do or forbear to do something; anything which enlarges or limits or conditions the promise is alone hit by the bar. [A.I.R. 1938 Mad. 320 and A.I.R. 1939 Nag. 91, Rel. on]: A.I.R. 1984 Guj. 93: (1983) 3 Guj.L.H. 829 (D.B.).

By written agreement, parties creating between themselves a limited interest in the estate—It cannot be enlarged by oral testimony of beneficiary when it is contrary to terms of document itself: (1965) 67 Punj.L.R. 770: 1965 Cur.L.J. 320.

Where deeds of sale and lease were sought to be unsuccessfully proved to create or witness a loan to which the Bengal Money Lenders' Act was attracted, *held*, S. 92 would apply; no oral evidence of the parties' real intention could be allowed to be adduced. [(1899) 27 Ind. Apps. 58 (P.C.), Disting.]: A.I.R. 1984 Cal. 399 (D.B.).

S. 40(6) of the Bengal Money Lenders' Act overrides the operation of S. 92; thus, where the borrower shows that S. 40(6) of the Bengal Act is attracted and the document relied upon creates or witnesses a loan, he can lead evidence of an oral agreement or statement whereby the document's terms were contradicted or varied or added to or subtracted from: A.I.R. 1984 Cal. 130: (1983-84) 88 Cal.W.N. 551: (1984) 1 Cal.H.N. 246: (1984) 1 Cal.L.J. 204.

S. 92 merely prohibits admission of oral evidence contrary to the terms of any contract, grant or other disposition of property; names of persons possessing lands on the boundaries of vended land are no part of the grant's stipulations; their names are necessary to be recited only for identification of the vended land. Thus, when the sale of the vended land was sought to be pre-empted on the ground that the purchasers were not adjoining raiyats as claimed in recitals of the sale deed, *held*, S. 92 did not bar consideration of documents for proving that they in fact were the boundary raiyats; besides, S. 92 prohibited only adduction of oral evidence and not documentary evidence: A.I.R. 1994 Pat. 42: (1993-2) 41 B.L.J.R. 1140.

Receipt of notice under S. 80, C.P.Code, acknowledged by defendant—Onus to prove that it was defective is on him: A.I.R. 1968 All. 321.

It is open to prove that an agreement purporting to provide for maintenance was never intended to be given effect to or acted upon but was in fact brought about with the sole object of securing an acknowledgment of the undivided status of the person by the insertion of a recital to that effect as a preamble to the deed of maintenance: 36 Mad.L.W. 817: 63 M.L.J. 707.

In cases to which S. 12(1) of Kerala Act (I of 1964) will not apply, document has to be interpreted subject to Ss. 91, 92 of the Evidence Act: A.I.R. 1970 Ker. 16: 1969 Ker.L.R. 108: 1969 Ker.L.T. 62: 1969 Ker.L.J. 181 (F.B.).

S. 93 of the Evidence Act forbids the filling in of blanks in a deed with the aid of extrinsic evidence but it does not affect the Court's power to fill in blanks and omissions by the ordinary rules of construction of deeds: 1960 All.L.J. 193: 1960 All.W.R. (H.C.) 164: A.I.R. 1960 All. 420: I.L.R. (1959) 2 All. 561.

Rectification of document—Equitable jurisdiction of Court—Necessary conditions: A.I.R. 1957 Assam 49.

Wrong description of name in deed is a latent ambiguity and parole evidence is admissible: 7 O.W.N. 1195: A.I.R. 1931 Oudh 54.

In case of a clerical mistake, it can be proved by parole evidence under S. 92: A.I.R. 1930 All. 387(1).

Extraneous oral evidence is inadmissible especially when the terms of the bond are clear. The parties must be presumed to know the difference between interest on interest and compound interest and if they deliberately chose to use one expression they cannot be permitted to prove that they meant the other: A.I.R. 1931 Nag. 25.

Acknowledgment is not a document contemplated in S. 92. It is neither a contract, grant nor disposition of property nor analogous to any of them: 26 Nag.L.R. 320: A.I.R. 1930 Nag. 298.

Oral promise made at the time of acknowledgment of a contract of loan is admissible: 26 Nag.L.R. 320: A.I.R. 1930 Nag. 298.

The law is well settled that to prove an acknowledgment of liability, oral evidence of the intention of the party said to have made the acknowledgment is not admissible for construing the writing given. It is equally settled that in construing such a writing, it is legitimate to look to the surrounding circumstances: (1940-41) 45 Cal.W.N. 208.

Where the parties had orally agreed for sale of the property and both of them wrote to the Housing Co-operative for approval and transfer of membership, *held*, such an agreement was partly oral and partly in writing; bar of S. 92 was not attracted to it; it was open to the parties to prove the terms of sale orally agreed to by them: A.I.R. 1992 Cal. 47: (1991-92) 96 Cal.W.N. 485.

Where it is alleged in the plaint and proved by evidence that the pronote, rendered inadmissible for being deficiently stamped, did not incorporate all the terms and conditions of the loan agreement and was executed by way of collateral security or conditional payment, *held*, the plaintiff may succeed on the original loan; S. 91 or S. 92 would not bar it. But if there is no such plea or proof, the plaintiff cannot maintain the suit by resorting to the theories of implied promise or money had and received or *quasi* contract or unjust enrichment or any other equitable ground; there is no escape from the effect of Ss. 91 and 92. [A.I.R. 1938 Mad. 785 (F.B.), Approved; A.I.R. 1964 Andh. Pra. 188 (F.B.), Overruled]: A.I.R. 1973 Andh. Pra. 342 (F.B.).

Where in an engineering works contract the word 'sock' was erroneously typed instead of the word 'rock', which alone gave meaning to the contract, *held*, oral evidence to get the error rectified does not amount to adding to or modifying or altering the terms of the contract; a manifest typing error, even without extraneous evidence can be corrected: A.I.R. 1972 Guj. 192 (D.B.).

The bar in S. 92 is not attracted when the party's plea is that the transaction recorded in the document was never intended to be acted upon and the document embodied a sham transaction; it is same as when the party asserts that the real transaction intended was different from the purported transaction; it is settled that oral evidence to prove such plea is admissible but not to contradict or vary the terms of the written agreement. Thus, where owners of a building had borrowed money from the defendant on the security of the building and handed over its possession to the defendant on the condition that he would pay certain amount per month by way of surplus profits, with further right to bring the property to sale for realization of the mortgage money but later on the owners contended that the parties had intended to create a lease rent, *held*, the cumulative effect of the recitals indicated that the parties had intended to create a mortgage, not a lease, and there being no ambiguity in the terms of the document, the Court could not look into surrounding circumstances and other facts to ascertain the parties' real intention: A.I.R. 1994 Ker. 141: (1994) 1 Ker.L.J. 89.

Where under an agreement of reconveyance, the vendee agreed to resell the property to the vendor till a certain date and the vendor, dissuading the vendee to obtain loan on unconscionable terms to pay the consideration, extended the time of purchase by two months but when the vendee had arranged money and called upon the vendor to execute the sale, the vendor declined on the ground that the time was already over; in the suit for specific performance, the vendor pleaded that the oral agreement to extend the time could not be proved because of the bar of S. 92 while the vendee pleaded waiver giving rise to the plea of estoppel; *held*, the proof of waiver giving rise to estoppel is not barred by S. 92; it is open to the parties to waive their contractual rights embodied in a document and, if on that representation, the other party does

something to its own prejudice, the party waiving its rights is not entitled to strict performance according to the original contract; it is estopped from doing so: 1972 M.P.L.J. 122.

2. Section applicable only to parties to instrument or their representatives.—S. 92 is applicable only to parties to the instrument and their representatives. *See* I.L.R. 10 All. 421; I.L.R. 25 All. 337; 2 Cal.L.J. 338; I.L.R. 42 Bom. 512; 1930 All.L.J. 724; I.L.R. 4 Luck. 68: A.I.R. 1928 Oudh 472; I.L.R. 6 Rang. 376; 1930 All.L.J. 926; A.I.R. 1932 Oudh 168; (1934) 36 Bom.L.R. 158: A.I.R. 1934 Bom. 145; (1933-34) 38 Cal.W.N. 1004: A.I.R. 1934 Cal. 821; A.I.R. 1939 Rang. 139: 1939 Rang.L.R. 622. *See* also 1937 Rang.L.R. 13; 1940 Mad.W.N. 19: A.I.R. 1941 Mad. 345.

Under S. 92, the prohibition with reference to the proof of an oral agreement applies only as between the parties to an instrument or representatives in interest and not between one of the parties to an instrument and a third party: A.I.R. 1949 Mad. 852: (1949) 1 M.L.J. 295.

S. 92 is not attracted, as held in A.I.R. 1958 S.C. 448, when the dispute is between a party to the document and a stranger: (1974) 87 Mad.L.W. 412: (1974) 1 M.L.J. 146.

The subject-matter of S. 92 are contracts, grants and other disposition of property, whether embodied in a document by the parties' consent or requirement of law; therefore, the words 'no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument' refer both to the words 'contract, grant or other disposition of property' in the beginning of the section and the words 'any matter required by law, etc.' immediately following them. Thus, a party to a document alone is prohibited under S. 92 from adducing oral evidence to contradict, vary, add to or subtract from the terms of the agreement in writing: A.I.R. 1972 Goa 25.

Section is not applicable to strangers, *i.e.*, persons not parties to the contract: 104 I.C. 736: A.I.R. 1928 Nag. 4; 1937 Rang.L.R. 13: A.I.R. 1937 Rang. 220.

The words 'between the parties to any such instrument' in S. 92 refer to the parties who on the one side and the other came together to make the contract or disposition of property, and do not apply to questions raised between the parties on the one side of a deed regarding their relations to each other under the contract: A.I.R. 1941 Pat. 211: 194 I.C. 739.

There is nothing to prevent a person arrayed on the same side to give evidence to vary terms: 54 I.C. 962; 1 Bur.L.J. 160: 77 I.C. 923.

A pre-emptor who was not a party to the sale deed could adduce oral evidence to show the intention of parties: A.I.R. 1928 Oudh 472: I.L.R. 4 Luck. 68. *See* also 1938 All.L.J. 668: A.I.R. 1938 All. 519; A.I.R. 1938 Nag. 434.

In a suit for pre-emption, the vendee can show by cogent evidence that in fact the amount paid as the price of the land is much more than that mentioned in the sale deed: A.I.R. 1969 J.&K. 28.

Though a contemporaneous oral agreement, for re-purchase between the parties to a conveyance, cannot be proved as between the parties, it can be proved if one of the parties is not actually a party to the conveyance: I.L.R. 6 Rang. 376: A.I.R. 1928 Rang. 244. *See* also I.L.R. 5 Rang. 836.

Where both grantor and grantee are dealing with the property of an owner who is a third person who was not in the language of S. 92, either a party to the instrument or a representative-in-interest of a party to the instrument, there is no bar under S. 92 as to the admissibility of evidence in regard to the real nature of the transaction between the original parties: A.I.R. 1952 Bom. 425: (1952) 54 Bom.L.R. 492.

Where the official assignee moves the Insolvency Court under S. 55 of the Presidency Towns Insolvency Act, for a declaration that a deed of gift executed by the insolvent in favour of his wife and sons, appellants, was void, it is open, to the appellants to lead oral evidence to show that the transaction evidenced by the deed of gift was in reality a transfer for consideration. S. 92 of the Evidence Act is wholly inapplicable to the proceedings. The application of the rule contained in S. 92, Evidence Act, is limited to cases as between parties to the instrument or their representative-in-interest. Persons other than those who are parties to the document are not precluded from giving extrinsic evidence to contradict, vary, add to or subtract from the terms of the document. This position is made absolutely clear by the provisions of S. 99 itself. Though it is only variation which is specifically mentioned in S. 99, there can be no doubt that the third party's right to lead evidence which is recognized by S. 99 would include a right to lead

evidence not only to vary the terms of the document, but to contradict the said terms or to add to or subtract from them. When the official assignee moves the Insolvency Court under S. 55 of the Presidency Towns Insolvency Act, he cannot be said to be the representative-in-interest of the insolvent in those proceedings. The rule of exclusion enunciated by S. 92 applies to both parties to the document and is based on the doctrine of mutuality. It would be inequitable and unfair to enforce that rule against a party to a document or his representative-in-interest in the case of a dispute between the said party or his representative-in-interest on the one hand and the stranger on the other. In this view, the appellants, who are the representatives-in-interest of the insolvent, can avoid the application of S. 92 and are entitled to lead oral evidence in support of the plea raised by them: A.I.R. 1958 S.C. 448.

A perusal of Ss. 91 and 92 makes it clear that it restricts oral evidence against the terms of the sale deed between the 'parties'. The word 'parties' used in these sections contemplates vendor on one side and the vendee on the other and their representatives. Thus, the provisions of Ss. 91 and 92 are not applicable to a case where there is a dispute between vendees *inter se* and the Court will be justified in considering the oral evidence regarding the shares of the parties against the terms of the sale deed: 1982 All.L.J. 264: 1982 All.W.C. 156: 1982 All.L.R. 173.

Where in a sale deed, it was mentioned that one of the vendees had contributed half the amount of consideration but his share in the property in the deed was mentioned as $^1/_{21}$, *held*, the deed could be rectified to show proper shares of the vendees under S. 45, of the Transfer of Property Act; S. 92 was not attracted because the dispute was not between the vendor and the vendees but between the vendees *inter se*. [A.I.R. 1936 All. 258; A.I.R. 1963 S.C. 1, Rel. on]: A.I.R. 1982 All. 273: 1982 All.C.J. 174.

A, a Hindu lady, offered to sell her house to *X*, another Hindu lady, who was willing to purchase it. They acted through their respective husbands, *B* and *Y*. *B* and *Y* entered into an agreement under which *Y* on behalf of *X* agreed to purchase the house from *A* for Rs. 2,625 and paid Rs. 350 as advance at once. According to *Y*, he also paid a further sum of Rs. 1,275 to *B*. Thereafter, the sale deed was executed by *A* in favour of *X* for the balance of Rs. 1,000. *A* not having herself received Rs. 1,275 filed this suit against *X* and *Y* for recovering that amount with interest. On the question whether *A* was entitled to plead that the price fixed was more than Rs. 1,000: *Held*, that in the circumstances of this case neither *A* nor *B* were estopped under S. 92, Evidence Act from so pleading: (1953) 2 M.L.J. 249: A.I.R. 1954 Mad. 94.

3. Section 92 *vis-a-vis* section 115.—Both Ss. 92 and 115 are provisions of the same Evidence Act. They have to be read together. Reading the two sections together the effect is to exclude the plea of estoppel when the proof of the oral agreement on which the estoppel is based would be contrary to the provisions of S. 92. S. 115 would apply only when the representation is in writing, but would not help when it is oral in the face of S. 92. It is wrong to suppose that S. 115 is substantive law, while S. 92 alone is procedural law. If the two are read together, both can operate. There is nothing in S. 115 to show that it overrides S. 92. There is no estoppel against a statute. It is clear, therefore, that no estoppel can be pleaded against the statutory bar of S. 92: 1979 Rajdhani L.R. 7: I.L.R. (1979) 1 Del. 84.

Delhi Rent Control Act (59 of 1958) Ss. 16(3), 17(1)—Estoppel—Ss. 92 and 115 Evidence Act must be read together—Alleged oral representation made by party not provable under S. 92—S. 115 cannot be invoked to support oral representation—Oral consent by landlord not enough to validate sub-tenancy under S. 16(3) Rent Act—S. 115 will not help to prove sub-tenancy: 1979 Rajdhani L.R. 7: I.L.R. (1979) 1 Del. 84.

See also A.I.R. 1974 Madh. Pra. 193 (D.B.), cited under Note 17, *infra*.

4. Lease deed/Rent note.—The proposition of law is well-settled that if the recitals in the lease itself and the terms thereof make out non-agricultural purposes and are free from all ambiguity, the only guide for determination of the nature of the lease would be the lease deed itself. But if the terms are not decisive and free from ambiguity, extraneous evidence will be admissible for the purpose of determining the nature of the lease: I.L.R. (1957) Cut. 509: A.I.R. 1957 Ori. 276.

Where the clear-cut terms of the registered document showed him to be so, *held*, the defendant could not contend that he was not a lessee; oral agreement to the contrary could

not be proved; even documentary evidence to avoid the mischief of S. 92 could only be another registered deed. [A.I.R. 1952 S.C. 153, Foll.]: A.I.R. 1978 Pat. 91: 1978 Pat.L.J.R. 232: 1978 B.L.J.R. 259 (D.B.).

Where a lease deed is in favour of *X* and *Y*, S. 92 of the Evidence Act, 1872, is clearly a bar to the plea by *X* that *Y* is merely a surety. [I.L.R. 10 All. 421, Foll.]. If there is plurality of lessees, the surrender must be by all the lessees in favour of the lessor. Under the lease which is an indivisible joint one, a right to enjoy immovable property has been created in favour of the lessees jointly and surrender by only one of such lessees, cannot prejudice or affect the rights of other lessees: I.L.R. (1964) 1 Mad. 443: (1964) 2 M.L.J. 242: (1963) 76 Mad.L.W. 431.

Lease deed—Recitals in—Parties (lessor or lessee) despite recitals not precluded from showing to the contrary—A.I.R. 1965 Pat. 39.

Where the Court has got the lease deed on the terms of which the tenure of a village has to be determined and there is no ambiguity in its construction, any evidence, which merely consists of isolated piece of subsequent conduct, has little relevance in determining the question: I.L.R. (1956) Mad. 897: (1956) 1 M.L.J. 82: A.I.R. 1956 Mad. 72.

Written lease—Oral evidence to show that one of conditions was not intended to be acted upon is not admissible: 1966 All.W.R. (H.C.) 1.

Where a lease from month to month is registered, contract of lease is not admissible in evidence: A.I.R. 1939 Pat. 428. No oral agreement is admissible, to prove variation of the terms of a registered lease including a term as to the payment of rent, notwithstanding the fact that the lessee has paid and the lessor has accepted, rent at a reduced rate for many years: 206 I.C. 401: A.I.R. 1943 Pat. 152.

Where a tenancy for year to year was created by an unregistered deed, *held*, the deed was inadmissible and is no valid proof of the terms of the tenancy; however, where parties agreed for a subsequent period that the tenancy had become monthly on enhanced monthly rent, the landlord was entitled to plead and prove oral agreement of monthly tenancy in the suit for recovery of the arrears of rent thereunder. [(1966) 32 Cut.L.T. 478; A.I.R. 1968 Pat. 302 (F.B.), Foll.]: A.I.R. 1977 Ori. 76: I.L.R. (1977) Cut. 263.

Where a person occupied a property under a rent note executed by him with the tenant without the landlord's consent, *held*, in proceedings for eviction on the ground of subletting, they could not contend that the rent note was a sham document unless any proviso of S. 92 provided therefor: A.I.R. 1981 P.&H. 94.

A rent note containing agreed terms of the lease, *held*, is a contract for disposition of property; it falls within the purview of S. 92; no evidence is admissible to show that the real tenant was other than the one named therein: A.I.R. 1981 P.&H. 73: (1981) 83 Punj.L.R. 104.

Where a rent note described the property let out as a 'plot' and 'premises' almost in equal measure, *held*, the oral evidence as to the nature and condition of the property at the time it was let, does not tend to contradict or vary the terms of a contract; the bar of S. 92, thus, is not attracted: (1989) 37 Del.L.T. 278.

Where an agreement between the landlord and the tenant providing for payment of increased rent was in variation of their written contract, *held*, its evidence is barred under S. 92; a variation of rent envisaged by a registered lease deed must necessarily be made by another registered deed. [A.I.R. 1967 Mad. 57 (F.B.), Affirmed] A.I.R. 1974 S.C. 818: (1974) 1 S.C.C. 424: (1974) 2 S.C.R. 629.

Where a tenancy for a limited period contemplated under S. 21 of the Delhi Rent Control Act was permitted to be created on recording evidence of the parties and on the basis of a 'proposed lease' then not signed by the tenant and the lease deed in terms thereof was executed a day thereafter, *held*, on execution for eviction of the tenant on expiry of the limited term of the tenancy, the tenant could not be permitted to plead or prove that he was already a contractual tenant when the permission to create the limited tenancy was allowed: A.I.R. 1982 N.O.C. 277: 1982 Rajdhani L.R. 442: (1982) 22 Del.L.T. 48: (1982) 2 Ren.L.R 86: (1982) 1 Ren.C.R. 642.

Where rent was paid by an occupant, other than the tenant, *held*, he cannot thereby himself become a tenant; no oral evidence of rescission of the lease deed is admissible under S. 92; the original tenant continues to be the tenant: (1993-2) 104 Punj.L.R. 370: 1993 Punj.L.J. 395 (D.B.).

In a suit for recovery of rent, *held*, oral evidence to prove the recision of the

registered lease was inadmissible: A.I.R. 1933 Lah. 278: 145 I.C. 176.

Oral evidence of the terms of a partnership deed is excluded under S. 91; further the two partners under S. 92 are debarred from leading oral evidence contrary to the written terms of the partnership deed. The version of a party, that the premises were let to a partnership firm, contrary to record cannot be accepted as correct; when premises were taken by the tenant who later on admitted another person as a partner and on dissolution of partnership assigned the premises to the other partner, *held*, was guilty of sub-letting or assignment or parting with possession within the meaning of S. 14(1)(*b*) of the Delhi Rent Control Act: (1982) 2 Ren.C.J. 607 (Del.).

Partnership or lease—no sharing of profits but one person required to pay fixed sum periodically to the other and carry on business in his own name on the property of the other—Transaction *held* to be lease and not partnership—Oral evidence showing transaction to be lease could not be rejected: (1963-64) 68 Cal.W.N. 786.

Where there is a registered kabuliyat providing for the payment of rent any oral agreement between the parties as to the retention of such rent for interest due on loan cannot be allowed in evidence as it varies definite terms of the registered instrument: 1942 O.W.N. (B.R.) 420: 1942 O.A. (Supp.) 317.

Oral evidence to prove a subsequent agreement relinquishing portion of rent reserved under a kabuliat is inadmissible: I.L.R. 56 Cal. 201: A.I.R. 1929 Cal. 437.

5. Mortgage deed.—Where an oral agreement subsequent to a mortgage does not in any way modify or rescind any provisions in the mortgage deed, but only provides a method of payment by appropriation of the profits towards principal and interest, the party setting up such an agreement is not prohibited by the provisions of S. 92 from proving its terms: I.L.R. 23 Luck. 74: A.I.R. 1948 Oudh 129.

Memo merely recording the fact of deposit of title deeds with the Bank to secure repayment of loan is not required by law to be compulsorily registered. Because in such a case the crucial question is: Did the parties intend to reduce their bargain regarding the deposit of the title deeds to the form of a document? If so, the document requires registration. If on the other hand, its proper construction and the surrounding circumstances lead to the conclusion that the parties did not intend to do so, then, there being no express bargain, the contract to create the mortgage arises by implication of the law from the deposit itself with the requisite intention, and the document being merely evidential does not require registration: A.I.R. 1971 S.C. 1613.

Where in a mortgage deed by conditional sale, the mortgagor specifically admitted his liability to pay various amounts, aggregating to Rs. 45,000 to his 3 creditors, *held*, oral evidence to vary or contradict the terms of the document was inadmissible for being barred under S. 92: A.I.R. 1984 All. 219: 1984 All.C.J. 185 (D.B.).

Where mortgage deed stated that property mortgaged was separate property of executant, *held*, evidence to show that the property mortgaged was joint family property or was thrown into the common stock cannot be admitted, as it is barred under S. 92: 1977 Mah.L.J. 185 (D.B.).

Prior correspondence to vary terms of mortgage deed inadmissible: A.I.R. 1933 Lah. 1024. *See* also 12 Mys.L.J. 11. But where a letter was sent by mortgagee, acting as agent of mortgagor and containing the scope of the security and the terms, *held*, it was admissible: 148 I.C. 721: A.I.R. 1934 Rang. 51.

Where an usufructuary mortgage is reduced to writing but is unregistered no other evidence of its terms could be given because of S. 92: 1938 Nag.L.J. 123.

Where the mortgagee under a simple mortgage happens also to be a tenant of the mortgagor, and the former sets up an oral agreement between him and his mortgagor, that the rent due by him for the land is to be set off against the interest due to him from the mortgagor, there is no bar to the proof of such an agreement: I.L.R. (1946) All. 357: A.I.R. 1946 All. 283.

It is open to a judgment-debtor to plead a predecretal agreement which does not attack the decree but which states that the decree cannot be executed under certain conditions or it can be executed only in part. Such an agreement is not affected by S. 92, Evidence Act, as it does not amount to a modification, alteration or variation of the decree. Hence, a judgment-debtor in a suit on mortgage can

plead in execution of the decree that prior to the passing of the final decree there was an agreement by which certain amounts were received by the plaintiff in full quit, and that as he subsequently claimed the entire sum in the suit, the decree is not executable: A.I.R. 1955 Mad. 339: (1955) 68 Mad.L.W. 233.

An oral agreement to take less than what is due under a registered mortgage bond would be inadmissible. But a discharge by paying less is admissible: 136 I.C. 317: A.I.R. 1932 Mad. 141; 30 Mad.L.W. 293: A.I.R. 1929 Mad. 794; (1928) 30 Bom.L.R. 1455: A.I.R. 1928 Bom. 522; A.I.R. 1930 All. 721; I.L.R. 6 Rang. 191: A.I.R. 1928 Rang. 144 (F.B.). *See* also I.L.R. 9 Lah. 597: A.I.R. 1928 Lah. 873; A.I.R. 1930 Nag. 235 (calculation of reduced rate of interest immaterial). *See* on this point: I.L.R. 54 Mad. 889; 61 M.L.J. 556.

That a mortgage with possession was intended to operate only as a simple mortgage: 165 I.C. 510 (Pesh.). Suit under S. 5, Mysore Agriculturists' Relief Act on usufructuary mortgage for sale of property—Plaintiff can show that alleged usufructuary mortgage was simple mortgage. *See* A.I.R. 1957 Mys. 86. As to scope of section. *See* I.L.R. 38 Cal. 822: 38 I.A. 196: 21 M.L.J. 1105 (P.C.).

Document, whether a Canom or a mortgage depends upon interpretation of document: A.I.R. 1970 Ker. 16: 1969 Ker.L.R. 108: 1969 Ker.L.T. 62: 1969 Ker.L.J. 181 (F.B.).

In view of the specific stand taken by the plaintiffs that their father, the mortgagee was never put into possession, it has to be determined on the evidence on record as to whether the plaintiffs were really in possession. The first proviso to S. 92 of the Evidence Act would cover the present case. The mortgagee was entitled to possess under the mortgage and he has not been put into such possession. S. 68(*d*) of the T.P. Act protects the interest of the usufructuary mortgagee when he does not get possession. The first proviso to S. 92 of the Evidence Act would apply to such a case and the plaintiffs would be entitled to show that they have not been put into possession though under the contract of mortgage, they were so entitled: A.I.R. 1971 Ori. 218: (1970) 1 Cut.W.R. 261.

Where a document is on the face of it, a registered mortgage deed, it is not open to any of the parties to plead or to lead oral or circumstantial evidence to show that the transaction was other than what it appears to be: A.I.R. 1939 Lah. 104.

Mortgage deed—Oral evidence to show that deed was in reality sale deed, not admissible: A.I.R. 1959 Pat. 230: 1958 B.L.J.R. 738.

Where there is nothing showing that there had been an inadvertent misdescription of property in a mortgage deed and that the property which was intended to be mortgaged was something over and above what was actually described and specified in the document, the mortgagees are barred by the provisions of Ss. 92 and 94 from showing that the intention of the parties was different from what appears from the terms of the mortgage deed itself: I.L.R. (1938) All. 494: 1938 All.L.J. 477: A.I.R. 1938 All. 364.

An oral agreement to discharge a mortgage debt cannot be proved because of the provision of S. 92 of the Evidence Act: 1960 Nag.L.J.(Notes) 117.

Where a deed of possessory mortgage also provides for a lease back to the mortgagor on a monthly rent corresponding to the monthly interest on the mortgage debt, and a rent-note is executed giving effect to the lease, effect must be given to each deed according to its terms and the Court cannot by reading the two together spell out a transaction totally different in character. They being component parts of the same transaction, it does not mean that the two deeds were inconsistent with each other. Nor are the circumstances that rent was liable to be appropriated towards interest and rent tallied with each other and that interest like rent was payable every month, inconsistent with the transaction being a lease. Thus, in a suit for eviction by the mortgagee based on the rent-note which is executed as a sequel to the mortgage deed, it is not open to the mortgagor to plead that he is not in fact a tenant. It is no doubt true that where both parties give a particular form to a transaction different from its real nature with a view to cause loss to the third party, the Court may in an action in which that third party is concerned tear off the veil and take into account its real nature. But where in the ordinary bargain between competent persons transaction bearing particular legal form is deliberately entered into, it is not the function of the Court to ignore it and read it as something else merely because it suits one of the parties to it at a particular moment: 1964 M.P.L.J. 674: 1963 Jab.L.J. 174: A.I.R. 1963 Madh. Pra. 265.

Registered mortgage deed—Subsequent oral agreement varying terms of mortgage deed—*Held* that no unregistered agreement varying the terms of the mortgage could be recognised: 1964 Raj.L.W. 439: I.L.R. (1964) 14 Raj. 1096: A.I.R. 1965 Raj. 3.

Where a mortgage with possession provides that redemption would be effected on payment of the 'entire mortgage money' by the mortgagor, evidence of a subsequent oral agreement for delivery of possession on payment of a portion of the mortgage money is inadmissible. But this does not preclude the Courts from coming to a finding on the question of fact whether the mortgagor's possession of the property was unlawful or by consent of parties: I.L.R. 12 Luck. 567: A.I.R. 1937 Oudh 1. *See* also 15 Mys.L.J. 237.

Registered mortgage deed—Contemporaneous written varthamanam providing for payments towards mortgage deed is admissible. The varthamanam is not compulsorily registrable under S. 17(*b*) of Registration Act: 27 Mad.L.W. 47: A.I.R. 1928 Mad. 382.

Contract Act 1872, S. 63—Suit on mortgage—Defence that plaintiff has agreed to receive lesser amount than under mortgage, by oral agreement—*Held*, S. 63 was not applicable—Oral agreement was inadmissible in evidence, and therefore, plaintiff was not estopped from claiming whole amount under mortgage—Passing of receipt by plaintiff for part payment of amount agreed also did not estop him from claiming whole: (1966) 2 An.L.T. 198.

G executed usufructuary mortgage of his tenancy holding to *R*. *R* had applied under S. 112-A of Bihar Tenancy Act for reduction of rent on the holding as if he were the tenant and it had been allowed. The survey entries showed *R* as the vendee and *G* as the vendor of the holding. *B* purchaser of the equity of redemption from *G*'s successors-in-interest sued for redemption which was refused by two Courts. On second appeal, it was held that the plain meaning of the language and the words used in the document showed it was a deed of usufructuary mortgage for Rs. 100. The evidence admitted as regards the subsequent conduct of the parties or of the intention of the parties are inadmissible under S. 92, Evidence Act. The usufructuary mortgage could not on such inadmissible evidence be held as an out and out sale: A.I.R. 1952 Pat. 431.

Where a registered mortgage deed itself provided escalation of the rate of interest by the mortgagee, *held*, enhancement of the rate of interest pursuant thereto by the mortgagor is assimilated in the original deed itself; no fresh registered deed for such enhancement need be executed: A.I.R. 1984 Andh. Pra. 36: (1983) 2 An.W.R. 456: (1983) 2 An.L.T. 393 (D.B.).

Mortgage deed—Interest agreed to be paid at one per cent, per month. Words 'per cent' omitted inadvertently—Admissibility of oral evidence—Evidence Act, S. 93, is not applicable as there is no latent ambiguity: 7 O.W.N. 14: A.I.R. 1930 Oudh 95.

Oral evidence to prove that mortgagee agree to charge lower rate of interest or receive less than that entered in the deed is inadmissible: 95 I.C. 1019: A.I.R. 1926 Oudh 273. *See* also A.I.R. 1928 Mad. 233: 53 M.L.J. 863; 1942 A.M.L.J. 22; 52 M.L.J. 224: A.I.R. 1927 Mad. 1111.

Where in defence to the suit on a simple mortgage, the mortgagor pleaded that at the time of executing the deed the parties had agreed that the mortgagee's taking possession of the property would be in lieu of interest provided for in the deed, *held*, the plea was not available to the mortgagee; it was barred under S. 92: (1988-1) 101 Mad.L.W. 517.

Section bars proof of an oral agreement not to charge interest when one mortgage bond in terms provided for payment of interest: 1959 M.P.L.J. 301: A.I.R. 1959 Madh. Pra. 172.

6. Sale transactions.—Ordinarily, the title to immovable property transferred by sale passes on the registration of the sale deed. But the parties may agree that title shall not pass until the consideration is completely paid. In contracts of sale there are recitals of the receipt of the purchase money as well as terms providing for the passing of the property. The strictly contractual part, that is to say, the arrangement as to when the property shall pass, if the contract has been reduced to writing, to be determined solely from the words of the writing and evidence is not admissible for the purpose of contradicting, varying, adding to, or subtracting from its terms as mentioned in S. 92. The question when the property is to pass is a matter of contract. If the terms of the contract as to when the property is to pass are ambiguous, then recourse may be had to external evidence to determine what the

intention of the parties was, but if the intention of the parties has been stated in unambiguous terms, then the terms must remain the sole criterion of the intention of the parties, and evidence cannot be introduced for the purpose of showing that the contract means something other than what it expressed in unambiguous terms: I.L.R. 17 Pat. 318: A.I.R. 1938 Pat. 505.

An express covenant for title or for freedom from incumbrances cannot be regarded as a mere recital which can be contradicted by oral evidence. Such a covenant is a term of the contract of sale itself and any oral evidence to contradict the same falls within the mischief of S. 92, Evidence Act. Even the statutory covenant for title must be deemed to be embodied in every sale deed in the absence of a contract to the contrary. When, therefore, the sale deed expressly recites that the seller has not created any incumbrance on the property, oral evidence cannot be admitted to show that the sale was in fact subject to an incumbrance: A.I.R. 1945 Mad. 205: (1945) 1 M.L.J. 323.

An agreement as to implied warranty regarding the correctness of the extent of the property sold should be established on the terms of the sale deed and it is not open to the plaintiff to travel outside the deed and to adduce evidence to prove that there was a warranty, *de hors* the instrument: I.L.R. (1957) Ker. 475: A.I.R. 1957 Ker. 181.

When a document purports to be an absolute sale, oral evidence of conduct of the parties to the transaction is not admissible in evidence for purpose of ascertaining the intention of the parties in arriving at a finding as to the true nature of the transaction: I.L.R. (1955) Hyd. 440: A.I.R. 1955 Hyd. 179.

There are three types of cases of sale deeds, namely: firstly, where there is an independent clause to the effect that the title would pass independently of the passing of consideration; secondly, where there is a dependent clause that the passing of title would be solely dependent on the passing of consideration and thirdly, where there is an involved clause, where the terms regarding passing of title, passing of consideration and the vendee being made the owner in respect of the property sold are so intermingled that it is very difficult to make out from the recitals a definite position that in fact the parties intended that title would pass independent of the question of consideration. The question, under which category the clause in a sale deed falls, is a question of construction of the document which is a question of law. Where a sale deed falls in the last category, the Court has to decide on the question as to the passing of the title, by ascertaining the intention of the parties and for that purpose refer to the surrounding circumstances. Where any part of the consideration has not been paid to the vendor, and the property is not delivered to the vendee and the sale deed is in the custody of the vendor himself, it cannot be held that the title to the property has passed to the vendee, as these are telling circumstances to show that it was not the intention of the parties that title would pass irrespective of non-payment of consideration: I.L.R. (1964) Cut. 551: A.I.R. 1964 Ori. 239.

Recitals in a sale deed as to the mode and time of paying consideration or legal necessity for sale are not terms of the contract; extraneous evidence to prove their modification or variation is admissible and not barred by S. 92: (1972) 2 Cut.W.R. 1298.

The question whether a document is a mortgage by conditional sale or a sale out and out with a condition of repurchase, *prima facie*, has to be determined with reference to the terms of the contract embodied in the document. If the recitals in the document are ambiguous from which the intention of the parties is not clearly deducible, then a reference may be made to the surrounding circumstances to find out the true intention of the parties: (1971) 1 Cut.W.R. 689.

It is not open to a party to a registered sale deed to prove an oral agreement by evidence either oral or documentary contemporaneous with the sale deed that in spite of a certain property, belonging to the vendor, being entered in the sale deed, title to it would not pass to the vendee: 118 I.C. 589: A.I.R. 1929 All. 578(2).

The onus is normally on the plaintiffs to prove their title and the plaintiffs can recover only on the strength of their own title and not by the weakness of that of the defendants. But where in a suit for possession, the plaintiff based his title on a registered sale deed executed in his favour and the defendant based his title on subsequent sale deed in his favour alleging that the previous sale deed in favour of the plaintiff was without consideration and that the same was subsequently cancelled by the vendor, it was *held* that the onus was on the

defendant to prove the absence of consideration for the sale in favour of the plaintiff, the defendant having admitted the execution of the sale deed: A.I.R. 1961 Ori. 19.

A Court cannot go behind a deed of sale which embodies the terms and enforce a prior agreement. The negotiations which led to the sale cannot be taken into consideration and the parties are bound by the terms of the deed of sale. It is not open to a party to a document to prove by oral evidence a variation in the amount of consideration for the document, though it is open to him to prove want of consideration or failure or a difference in kind of consideration. [58 M.L.J. 240, Foll.]: 1950 Nag.L.J. 28.

Where a person enters into a contract for sale of an agricultural land to him for building purposes on the representation of the seller that the permission of the authorities for conversion of the land to building sites was expected to receive shortly, the representation cannot be regarded as a term of the contract and, therefore, oral evidence as to the representation cannot be excluded: A.I.R. 1956 Bom. 252.

Once a party is proved to have executed a sale deed, *held*, no oral evidence is admissible to contradict it unless the case falls specifically under any proviso of S. 92: A.I.R. 1971 Madh. Pra. 172: 1971 M.P.L.J. 438: 1971 Jab.L.J. 545 (D.B.); (1981) 2 M.P.W.N. 67.

Ss. 91 and 92 completely bar a party to plead or prove that consideration paid for sale was more than what was mentioned in the conveyance or contract. [A.I.R. 1935 All. 529 (F.B.); A.I.R. 1955 Bom. 122; A.I.R. 1965 Mad. 147 and A.I.R. 1970 Mys. 270, Rel. on]: A.I.R. 1992 Ker. 115: (1991) 2 Ker.L.J. 648: (1991) 2 Ker.L.T. 728.

In a suit for specific performance, the contract of sale must be definite and precise and if it is uncertain it must be held to be void under S. 29 of the Indian Contract Act. Specific performance is an equitable relief and the contract of which specific performance is sought must appear to be correct and precise and if it is uncertain no oral evidence is admissible to add to the terms or contents of the contract of sale: A.I.R. 1971 All. 494.

In deciding the intention of the parties as to the time of passing of title, the document under which the properties were intended to be sold, if unambiguous, remains the sole criterion. If the terms are indecisive and ambiguous, then only the Courts will take into consideration other extraneous circumstances: A.I.R. 1992 Ori. 170.

S. 92 does not bar the plea or proof what was ostensibly a sale deed was a *non est factum* and that the deed was intended by the parties to be only a mortgage deed; it is a common place defence in India: (1980) 2 An.W.R. (N.R.C.) 17.

A subsequent purchaser from a party who was the vendor in a prior sale deed of the very same property will be a representative-in-interest of the said vendor within the meaning of S. 92 of the Evidence Act and he would be precluded from contending that the first sale deed was only a mortgage and not a sale deed: A.I.R. 1960 Manipur 11.

Sale and agreement to reconvey not embodied in one and same—Seller, if precluded from showing that transaction was not an out and out sale but something between mortgage and sale: A.I.R. 1958 Madh. Pra. 295.

That a sale deed is only a mortgage: I.L.R. 34 Bom. 59: (1909) 11 Bom.L.R. 113; I.L.R. 35 Bom. 231; (1912-13) 17 Cal.W.N. 1053; 106 I.C. 18: A.I.R. 1928 Mad. 459.

Sale deed—Whether oral agreement to resell can be proved. *See* 105 I.C. 482: A.I.R. 1927 Rang. 314. Mortgagor and mortgagee—Intended sale of mortgaged property to mortgagee—Settlement as to money due under mortgage—Proof of: 11 O.W.N. 254: A.I.R. 1934 Oudh 115. *See* also A.I.R. 1937 Rang. 142.

'Mortgage by condition sale' and 'sale with condition of repurchase'—Distinction—Test—Document purporting to be absolute sale with condition of repurchase in express and clear terms—Intention of parties to be determined from documents itself and not from surrounding circumstances—Inadequacy of price or payment of cost of stamp by executant cannot alter its nature: A.I.R. 1962 Pat. 53.

Where a deed was contended to be an outright sale and not a mortgage by conditional sale when it stipulated that property was sold and delivered on the condition that if the principal amount of consideration was not refunded to the vendee within 10 years, it would amount to a sale deed, *held*, it nowhere imposed on the vendors the obligation to recover the property on payment of the price

but merely gave an option; no evidence of the parties' contemporaneous conduct having been adduced, their subsequent conduct in executing documents some fifty years thereafter showing contrary direction would be inadmissible; it was a sale deed. [A.I.R. 1960 S.C. 301, Foll.]: A.I.R. 1973 All. 234.

Where a registered agreement for sale of a property was resisted by the vendor on the ground that it was in fact executed by way of security for the loan advanced to him by the vendee, *held*, the Court below had rightly permitted him to adduce oral evidence of the real nature of the transaction pleaded by him. [A.I.R. 1936 P.C. 70; I.L.R. (1956) 1 Cal. 59; A.I.R. 1954 Cal. 48; A.I.R. 1967 Cal. 351, Foll.]: A.I.R. 1972 Cal. 207: (1971-72) 76 Cal.W.N. 116 (D.B.).

Where it was contended by the vendor that she had executed the agreement of sale only for the purpose of securing the loan as the vendee required her to do, *held*, it is not open to her to plead that the terms of the agreement, in view of its real purpose, be ignored; S. 92 is a complete bar to such plea: (1993-2) 112 Mad.L.W. 205 (D.B.).

Agreement of sale of business—Trifling consideration—Second document stipulating for payment of further sum as maintenance till death and thereafter to his wife till her demise at a fixed sum per mensem was admissible—Sale of business at under value can be a consideration for second document—Evidence to prove further consideration than the one stated in sale deed is admissible—Vendee under obligation to pay maintenance to widow till her death: (1961-62) 66 Cal.W.N. 8.

Where a document unambiguously appeared to be a sale deed but it was contended by the plaintiff that it was in fact intended by the parties to be a mortgage, *held*, S. 92 constitutes no bar to admission of oral evidence to prove that the transaction was intended to be something other than what it purported to be. [(1972) 1 Cut.W.R. 504, Foll.]: A.I.R. 1984 Ori. 62: (1984) 1 Ori.L.R. 135.

Where a valid contract of sale was duly registered and sought to be revoked by an unregistered contemporaneous deed which imposed a blanket ban on the vendee not to dissipate or alienate the land generation after generation, *held*, the unregistered document is hit by the bar of S. 92. [A.I.R. 1973 Ori. 22, Foll.]: 1989 Punj.L.J. 364 (Him. Pra.).

Sale deed registered—Recital that vendee should, as part consideration for the sale, discharge debts of the vendor—Oral evidence to show that the recital was false and the liability intended to remain with vendor is inadmissible: A.I.R. 1928 Oudh 148; A.I.R. 1939 Pat. 142. *See* also 1979 All.W.C. (Rev.) 86.

Transfer of Property by sale deed—Vendor alleging that he had never contracted to sell property—Oral evidence permissible to prove antecedent contract: 1961 M.P.L.J. (Notes) 127.

Sale of immovable property—Consideration not paid—Title, if passes—Evidence of intention of parties when sale deed is ambiguous. *See* A.I.R. 1957 Ori. 243. Passing of property in goods—Evidence of—Rules as to, *see* (1956) 2 M.L.J. 384: A.I.R. 1956 Mad. 695.

Where a registered sale deed of land was executed and immediately thereafter another agreement between the parties in violation of S. 10 of the Transfer of Property Act and S. 23 of the Contract Act whereby the vendee and his heirs were prohibited to alienate or fitter away the land so purchased, *held*, once a sale is completed, it clothes the vendee with beneficial ownership; the right to alienate the property is incidental to, and inseparable from, such ownership; an absolute restraint on such right is repugnant to the concept of sale; and subsequent agreement is inadmissible: A.I.R. 1989 Him. Pra. 11: (1988) 2 Sim.L.C. 126.

Whether a vendor can deny the fact of giving possession to the vendee in view of clear terms in that respect in the sale deed. *See* 1978 Jab.L.J. (Notes) 87.

Sale of land with superstructures under registered document—Vendee under contemporaneous unregistered agreement agreeing to pay compensation in case he failed to build hospital on land sold—Agreement cannot be enforced—Agreement not admissible in evidence. *See* A.I.R. 1957 Assam 68.

Sale of property in Punjab—Stipulation in sale deed that balance of consideration would be paid 'as soon as possible but at a time when vendee would be in position to make payment'—Construction—Stipulation whether a contingent contract—Evidence of intention of parties: I.L.R. (1964) 1 Punj. 143: A.I.R. 1964 Punj. 123.

Where under a sale deed scribed and executed the same day, the consideration of

Rs. 5,150 was to be paid but the vendee contended that he had already paid Rs. 4,950 to the vendor and only Rs. 200 remained payable which he could not pay for want of funds, *held*, it clearly amounted to varying or contradicting a term of the deed, the two versions in the deed and oral evidence are mutually exclusive and cannot stand together; the oral evidence was inadmissible: (1993-1) 41 B.L.J.R. 215.

7. Promissory note.—In a suit based on a promissory note, *held*, the defendant cannot raise any plea or adduce oral evidence which has the effect of varying the terms of the contract; however, it is permissible for him to plead and prove complete discharge of the note: A.I.R. 1973 Mad. 479: (1973) 2 M.L.J. 108: (1973) 86 Mad.L.W. 497.

In a suit on a promissory note executed in respect of the amount due under a prior promissory note plus the amount of costs incurred in a suit on the prior promissory note, the defendant is entitled to adduce evidence to prove that he had paid some amount towards the prior note and to that extent his liability under the renewed note should be proportionately reduced. S. 92 is not a bar to the consideration of this question: (1927) 40 Mad.L.W. 706: 67 M.L.J. 650. Cash loan can be proved to be rent due: I.L.R. 5 Rang. 822.

One of the co-executants of a promissory note cannot be allowed to let in evidence that he signed the note only as a surety: (1933) 35 Bom.L.R. 1197: A.I.R. 1934 Bom. 39; A.I.R. 1933 Lah. 965; 92 I.C. 667: A.I.R. 1926 Sind 156; A.I.R. 1935 Mad. 643; 1939 A.M.L.J. 84, a plea of benami: A.I.R. 1939 Rang. 139 (Plea of agency). *See* 95 I.C. 512: A.I.R. 1926 Rang. 94.

Oral evidence to prove that a pronote was executed only as security is admissible: 107 I.C. 510. *See* also I.L.R. 49 All. 464: 25 All.L.J. 305; A.I.R. 1927 Rang. 463; A.I.R. 1932 Nag. 62: 28 Nag.L.R. 325.

The making of a pronote by way of security for a sum of money advanced or given to the maker does not shut out oral evidence as to the purpose for which the money is given: 13 Bur.L.T. 239: 64 I.C. 33.

In a suit on pronote, oral evidence to prove that money had been borrowed by both the defendants and that defendant having 'witness' before his signature, was one of the excutants and not a witness, is admissible: A.I.R. 1930 All. 709.

Oral evidence as to representation of intention to deliver goods not embodied in pronote. *See* 13 I.C. 386: 4 Bur.L.T. 99.

Evidence to prove that some executants of the promissory note signed in the capacity of surety only is inadmissible under S. 92. Even where the contention is that one of the debtors signed as surety to the knowledge of the promisee, evidence to prove it is not admissible and it cannot affect the right of the promisee: A.I.R. 1937 Rang. 82. *See* also I.L.R. 18 Luck. 81: A.I.R. 1942 Oudh 273.

Demand pronote—Suit on—Collateral agreement to receive usufruct of certain plots in repayment put in defence—Oral evidence in respect of such collateral agreement to prove the discharge of liability was admissible: A.I.R. 1960 All. 746.

8. Gift deed.—Ordinarily in construing a deed of gift what the Courts have least to see is the intention of the donor as evidenced by the deed or the surrounding circumstances at the time of the deed and no amount of dealing by the donee should convert a limited into an absolute grant. But there can be no doubt that subsequent dealings by the donee with the consent or acquiescence of the other members of the tarwad may constitute good evidence as against the tarwad on grounds of estoppel: 1956 Ker.L.T. 803: A.I.R. 1957 Trav.-Co. 77.

Where the plea was that the gift in question had not been acted upon at all, *held*, in such a case oral evidence could certainly be led and looked into to establish whether the gift had in fact been acted upon or not, which is one of the essential ingredients of a valid gift: A.I.R. 1991 Ori. 151.

Where a gift of the remainder which was invalid under the Mahomedan Law was sought to be validated by evidence as to the consent of the donee of the life estate to such an arrangement, such oral evidence is clearly inadmissible: 108 I.C. 637: A.I.R. 1928 Mad. 613.

Where in the deed of gift itself it is stated that the property is transferred to the donee in consideration of her obedience and submission to the donor, then any extraneous evidence to prove that the gift made to her is not only in lieu of obedience and submission but also in lieu of her accepting two liabilities, namely, that of paying off all the debts to the creditors of the donor and of maintaining him till his lifetime, is bound to result, firstly, in

adding to the term of consideration and, secondly, in contradicting it. Hence, such extraneous evidence to prove that the deed of gift is not what it purports to be cannot be admitted in evidence as is laid in S. 92, Evidence Act: I.L.R. 34 Pat. 440: A.I.R. 1955 Pat. 458.

Gift—Oral evidence—Admissibility—Gift in favour of member of H.U.F.—Proof. *See* 1981 All.L.J. 1182.

9. Will.—Two wills executed on two dates—Later will raising ambiguity on face of it as to whether it was in substitution for or in addition to earlier will—External evidence can be admitted to ascertain testator's intentions: I.L.R. (1964) 1 Ker. 532: A.I.R. 1965 Ker. 122.

In a suit for specific performance of an agreement whereby the defendant agrees to purchase from the plaintiffs their reversionary shares of certain trust funds, each of such funds being a will fund and a settlement fund, the Court cannot properly admit extrinsic evidence to remove a latent ambiguity in the will regarding the title of the plaintiffs to the reversionary shares: (1958) 1 W.L.R. 422.

10. Adoption deed.—Where a party admits the existence of a deed of adoption and of its non-production in the Court, the admission would not render oral evidence inadmissible because it is not by virtue of deed of adoption that a change of status of a person can be effected. Such a deed cannot be likened to a document which by sheer force brings a transaction into existence. It is no more than a piece of evidence and the failure of a party to produce such a document in a suit does not render oral evidence in proof of adoption inadmissible: 1966 B.L.J.R. 781: (1966) 2 S.C.W.R. 184: (1967) 11 Law Rep. 195: 1966 S.C.R. (Supp.) 280: A.I.R. 1967 S.C. 109.

11. Proviso (1)—General.—*See* on this proviso: I.L.R. 59 Cal. 1111: A.I.R. 1932 Cal. 708; 139 I.C. 221; (1932) 34 Bom.L.R. 971; 140 I.C. 104: A.I.R. 1932 Pat. 332; I.L.R. 56 Bom. 180: A.I.R. 1932 Bom. 161; (1930-31) 35 Cal.W.N. 279: A.I.R. 1932 Cal. 25. The statement of law in Amir Ali's Evidence that though evidence to vary the terms of an agreement in writing is not admissible, yet evidence that there is not an agreement at all is admissible, is too wide and must be qualified by the express provisos (1) to (3), S. 92: I.L.R. 49 All. 680: A.I.R. 1927 All. 422.

Proviso (1) has no application in a case where the instrument represents what the parties intended to put down in writing, though it might not be in accordance with what they intended to do and with the legal effect that they secretly wanted to bring about, but which, for some reason, they did not want to put in writing. Where a person transfers certain property by a deed of gift, it is not open to him to say that when he gave the property he did not do it. The donor is not himself entitled to have the deed set aside on the ground that his intention was that it should operate on his death especially so when there is no evidence that the donor, giving away practically the whole of his property wanted to retain any sort of control after the date of gift: 171 I.C. 702: A.I.R. 1937 Rang. 142. *See* also A.I.R. 1945 Pat. 311.

Where in a printed form of a promissory note after mentioning, the interest payable there is an omission to state that it is—per cent, oral evidence can be let in to show what was the agreement between the parties and it is a case to which proviso (1) applies: 1939 All.L.J. 196: A.I.R. 1939 All. 308.

The wording of the proviso (1) and especially the use of the words 'such as' clearly show that the illustrations are not meant to be exhaustive: 1939 Nag.L.J. 33: A.I.R. 1939 Nag. 20.

The section does not exclude oral evidence to prove that the transaction evidenced by a written instrument is fictitious or benami. It is only in case the contract, grant, etc., are admitted or proved and their real nature is not challenged that the section would bar oral evidence to contradict or vary its terms: 1958 Raj.L.W. 231: A.I.R. 1958 Raj. 280.

Provisos (1) to (3)—Applicability—Execution of sale deed—Oral agreement set up in defence that if sale deed was not presented for registration on the same day on which it was written and if consideration was not paid before Sub-Registrar, sale deed should be regarded as cancelled, null and void—Agreement *held* did not fall under any of the provisos to S. 92 and could not be allowed to be proved: A.I.R. 1962 Mys. 203.

See also A.I.R. 1982 S.C. 20, cited under Note 1, *supra*.

Admissibility of oral evidence to validate document—Such evidence is admissible to show that document was never intended to operate according to its terms: I.L.R. (1966) Cut. 236.

A usufruct mortgagee not put into possession is protected under S. 68(*d*) of the Transfer of Property Act; a plea of never being put into possession of the mortgage property is permissible to him under S. 92, proviso (1): A.I.R. 1971 Ori. 218: (1970) 1 Cut.W.R. 261.

Where a plaint makes no claim for rectification regarding the rate of interest contained in the mortgage instrument, the proviso (1) does not empower a plaintiff suing on an unambiguous, unreformed and registered deed, to lead evidence to show that by a mistake a term has been omitted from the deed: I.L.R. 54 Mad. 973: A.I.R. 1931 Mad. 785: 61 M.L.J. 437.

Where under a kabuliyat two halls of land were settled with a tenant at a certain rate, a separate oral agreement that one of the halls would be given rent free is not admissible in evidence although evidence that the kabuliyat was not intended to be acted upon at all would be admissible under proviso (1): I.L.R. (1938) 1 Cal. 48: A.I.R. 1938 Cal. 356.

Under proviso (1), it is open to a Life Insurance Company to prove facts which show that the contract of insurance was illegal. The company is, therefore, entitled to prove facts showing that the insurance was really effected by the assignee of the policy for his own use and benefit and not for the use and benefit of the assured: (1940) 42 Punj.L.R. 801: A.I.R. 1941 Lah. 33.

Certain persons including defendants 1 and 2 entered into a partnership for carrying on the business of cloth. The licence required under the Cloth Control Order was obtained by defendant 1. It was the case of defendant 2 that he was only a benamidar for defendant 1. On the question whether oral evidence could be given in support of this case which would have the effect of varying the terms of the deed of partnership. *Held*, that proviso (1) of S. 92 was not applicable to the case as the mere fact that the 2nd defendant had no licence in his own name for dealing in cloth did not render the partnership agreement void or unlawful and did not incapacitate him from entering into an agreement of partnership with others who did hold a licence for carrying on business in cloth in their own names. *Held*, further that proviso (6) was also not applicable as there was no ambiguity in the language of the partnership deed which required to be explained: A.I.R. 1956 Bom. 165.

12. Proviso (1)—Fraud.—The word 'fraud' used in the proviso is wide enough to include a fraud on the registration law: Thus a party can show that an item was fictitiously put in: 1930 All.L.J. 926: A.I.R. 1930 All. 786.

In order to invoke the aid of proviso (1) to S. 92 of the Evidence Act, a mere averment of fraud without any particulars would be of no avail. In order to plead fraud effectively the particulars of fraud must be given by the party, and in the absence of such particulars there cannot be any proper averment of fraud. The fraud which is alleged must be such as enters into the transaction itself and enables the party to avoid the transaction, *i.e.*, fraud within the meaning of S. 17(3) of the Contract Act. No evidence of a contemporaneous agreement or promise or representation inconsistent with the written document could be admitted. S. 92, is a bar to the admissibility of such evidence. The fraud which is contemplated by proviso (1) of S. 92 is at the very inception a fraud which vitiates the transaction itself, and not any subsequent conduct or representation on the part of a party or his representative-in-interest which, however, reprehensible it may be, is not enough to vitiate the transaction. Evidence of such conduct or representation cannot be led under the proviso: (1952) 54 Bom.L.R. 492: A.I.R. 1952 Bom. 425.

Where there was an expressly alleged fraud such as that the promisee induced the surety to sign as executant or that he promised not to sue him except as such, then proviso (1) to S. 92 would come into operation: A.I.R. 1937 Rang. 82: 168 I.C. 477.

Where in a suit on mortgage bonds which stipulated for payment of compound interest, the defendant alleged that at the time of the execution of the bonds, he was persuaded to sign them only on the plaintiff's promising not to enforce that stipulation, *held*, that such evidence would be admissible under the first proviso to show that the signature to the document was obtained by fraud at the inception: I.L.R. 61 Cal. 344: A.I.R. 1934 Cal. 564.

Where the partition deed was not challenged by a specific plea of fraud that its recitals are not correct or allocations of shares therein were not commensurate with their real shares, *held*, the deed cannot be permitted to be challenged by adducing oral evidence which is barred by S. 91 and S. 92: A.I.R. 1991 Pat. 145.

S. 92 does not prevent proof of a fraudulent dealing with a third person's property or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance: I.L.R. 6 Rang. 741: A.I.R. 1929 Rang. 86.

13. Proviso (1)—Want or failure of consideration.—Proviso (1) to S. 92 of the Evidence Act would not permit a party to a contract to let in oral evidence to show that besides the actual consideration recited in the document evidencing the transaction and forming the basis of the contract, there was some other consideration agreed to between the parties. Proviso (1) only says that any fact be proved which would invalidate the document which, *inter alia* would show want or failure of consideration, or a difference in kind of the consideration specified in the document; it would not be competent for a party to prove a variation of the consideration recited. The consideration specified in a document is a term of the contract evidenced by it; and a party cannot be allowed under S. 92, to show that the consideration was either less or more than what is specified. The want or failure of consideration referred to in the proviso must be such as to invalidate the document. There should be a total lack of consideration recited in it, before the terms of the document in that regard are contradicted. To say that the consideration recited in the written contract is but a part of a larger consideration which is not specified in it would amount to nothing less than contradicting the very term as to consideration for the contract and it cannot be allowed. When the document is not silent in regard to the consideration and specifically recites the same proviso (2), also cannot be availed of to show that in addition to the consideration recited there was other consideration on which it is silent: I.L.R. (1964) 2 Mad. 841: (1965) 1 M.L.J. 371: (1964) 77 Mad.L.W. 622: A.I.R. 1965 Mad. 147. *See* also (1990) 2 Ker.L.T. 446: I.L.R. (1990) 2 Ker. 302.

Under the terms of the proviso (1) of S. 92 of Evidence Act, while it will be competent to the party to a contract to adduce evidence to prove want of consideration or failure of consideration or a difference in kind of consideration specified in the document, it will not be competent for him to prove a variation of the consideration recited in the document. Consideration specified in a document will be one of the terms of the contract evidenced by it. Thus, where consideration although specified to be of a particular kind, *e.g.*, cash, it can and will be shown to be for different kind or that it is false and that there was really no consideration. But this is different from a case where a party admits the passing of consideration specified in the document, but attempts to show that the consideration was either less or more than what is specified. This the party is not allowed to do.

According to S. 92 of the Evidence Act, no evidence of any oral agreement or statement can be admitted as between the parties thereto, for the purpose of contradicting, varying, adding to or subtracting from the term of consideration. This will indeed be clear if one closely examines the terms of proviso (1) to S. 92 of the Evidence Act. Want or failure of consideration must be such as to invalidate the document. That would mean that there should be total lack of consideration, before the terms of the document in that regard are contradicted. Therefore, to say that the consideration recited in the document is but a part of a larger consideration which is not specified in it, it will amount to nothing less than contradicting the very terms as to consideration for the document: (1964) 77 Mad.L.W. 622: I.L.R. (1964) 2 Mad. 841: (1965) 1 M.L.J. 371: A.I.R. 1965 Mad. 147.

Though a document says there was consideration and states exactly what it was, a party may show that there was none or that it has failed. In the same way there is no reason why the other party should not be allowed to show that the consideration was paid in full, not in cash but in kind: 1939 Nag.L.J. 33: A.I.R. 1939 Nag. 20; (1938) 1 M.L.J. 236.

Under proviso (1) evidence may be adduced to prove want or failure of consideration. This is, however, totally distinct from the amount of consideration. A statement in a document that a consideration has been paid is really a recital in a deed and does not constitute one of the terms of the contract. But the amount of consideration is obviously a term of the sale deed and, therefore, it is not open to a party to prove a variation in the amount of consideration: A.I.R. 1968 Pat. 61.

Plea of want of consideration may be proved in a suit on promissory note: 108 I.C. 158; A.I.R. 1934 All. 496: 148 I.C. 1124; (1980) 2 Karn.L.J. 409.

It is not open to a party to a document to prove by oral evidence, a variation in the amount of consideration of the document though it is open to him to prove want of consideration or failure of consideration or a difference in kind of consideration. A vendor cannot adduce oral evidence to prove that the consideration for the sale was that stated in the sale deed plus an undertaking by the vendee to discharge an existing mortgage on the property: A.I.R. 1930 Mad. 659: 58 M.L.J. 240. *See* also 189 I.C. 423: A.I.R. 1940 Pat. 379; A.I.R. 1938 Mad. 320: (1938) 1 M.L.J. 236.

There is no bar created in S. 92, against contradicting, varying, adding to, or subtracting from the recital of any fact stated in a document. Therefore, where in the documents executed in connection with the contract for sale of house in dispute in favour of the plaintiff, there was a recital with regard to the payment of earnest money by the plaintiff to the executant, it is open to the defendants, successors-in-interest of the executant, in a suit for specific performance, to show that the payment of earnest money was never made, and in order to explain how and why that amount was not paid, to plead a collateral oral agreement to the effect that the amount was to be paid by the plaintiff not in cash to the executant but to the mortgagee of the property and in fact no such payment was ever made by the plaintiff either to the executant or to the mortgagee. As the statement made in the contract for sale regarding the payment of consideration is a recital of fact, in law the bar as placed under S. 92 of the Evidence Act will not hit the defendants in proving either the collateral agreement as referred to above or the fact, that the consideration (earnest money) was, in fact, not paid to the executant of the contract for sale, or the mortgagee. Similar is the position in law with regard to the factum of payment of the amount under a receipt acknowledging payment of the amount as earnest money by the plaintiff to the executant of the contract as is evident from Illus. (*i*): 1964 B.L.J.R. 147.

S. 91 or S. 92 of the Evidence Act does not bar evidence to show that a certain receipt was a fictitious document in the sense that no money was paid: A.I.R. 1934 All. 1068: 153 I.C. 611.

Oral Evidence may be admitted that consideration did not pass: I.L.R. 45 All. 679: A.I.R. 1924 All. 70; I.L.R. 44 All. 53: A.I.R. 1922 All. 165. *See* also 94 I.C. 371: A.I.R. 1926 Sind 202; 92 I.C. 787: A.I.R. 1926 Oudh 301.

The prohibition in S. 92 is only as regards evidence sought to be adduced for the purpose of contradicting, varying, adding to or subtracting from the terms of a contract. So long as the passing of consideration is not a term of the contract, evidence adduced to show that it did pass, even though the contract does not recite it, is not within the scope of the prohibition in S. 92. Where a letter evidences the terms of a contract under which possession of land is supported on the basis of part performance, if the contract does not recite the consideration for the transfer there is no prohibition to proof *aliunde* of consideration: A.I.R. 1946 Mad. 452: (1946) 1 M.L.J. 346.

S. 92 applies even to those cases where terms of any contract though are not required to be in writing have been so recorded. The expression "required by law to be reduced to the form of a document" are not governed by the words 'any contract', in S. 92. Where a document recited payment of Rs. 7,000, it is not open to the executant thereof having admitted execution to contend that there was a partial failure of consideration. That is prohibited by S. 92. Of course the defendants could prove total failure of consideration, because such total failure invalidates the document in view of S. 25 of the Indian Contract Act. [8 B.L.R. 287 (295), Rel. on]: 1983 Mah.L.J. 462.

In ascertaining the intention of the parties to a document, no evidence other than the deed itself will be admissible to prove the intention except when there is a latent ambiguity. But evidence is admissible for the purpose of contradicting a recital in deed, *e.g.*, as to the payment of consideration: I.L.R. 27 Pat. 122: A.I.R. 1949 Pat. 364.

S. 92 does not preclude a party from showing that a recital as to the nature of the consideration for the contract embodied in the deed is incorrect; consideration for the deed is not a term of the contract: 53 Mys.H.C.R. 1.

S. 92 does not prevent the vendor from adducing evidences to show that the recital in the deed about consideration having been paid is incorrect and, in fact, it was not paid to him: A.I.R. 1989 Pat. 327: 1989 Pat.L.J.R. (H.C.) 772: (1990-1) 38 B.L.J.R. 210.

The want or failure of consideration, a condition precedent for the transfer, *held*, can

be proved, despite recitals to the contrary, by independent evidence; contents of the document of disposition in this respect are not conclusive: A.I.R. 1985 Pat. 94: 1985 B.L.J.R. 736: 1984 Pat.L.J.R. 659.

An obligor is not tied up from pleading any matter which shows that the bond was given upon an illegal consideration, whether consistent or not with the condition of the bond. The validity of a document may be challenged on the ground of the illegality of the transaction: I.L.R. 19 Pat. 424: A.I.R. 1940 Pat. 573.

Sale deed—Recital of payment of full consideration—Evidence to show that consideration has not actually been paid—Admissibility. *See* A.I.R. 1952 Pat. 263.

Even if the sale deed recites that consideration had been paid, *held*, nothing prevents the parties from adducing evidence to establish that the recital is untrue and no consideration had in fact passed; S. 92 is not attracted: A.I.R. 1978 Pat. 97: 1978 Pat.L.J.R. 255 (D.B.).

Where an agreement of sale purportedly fixed Rs. 30,000 as consideration but the Court on oral evidence found that the consideration agreed to between the parties was Rs. 50,000 but the lesser amount was mentioned on the insistence of a co-vendor, *held*, consideration was not a 'term' of the deed; non-payment or different payment of consideration than the one mentioned in the deed stand on the same footing; S. 92 does not bar oral proof of the same: A.I.R. 1983 J.&K. 44: 1982 Srinagar L.J. 546 (D.B.).

Where the real consideration as asserted by the parties was Rs. 15,000 and not Rs. 4,500 as set out in the document, *held*, it is merely a recital and not a term of the sale deed; S. 92 is not attracted: (1974) 87 Mad.L.W. 412.

14. Proviso (1)—Mistake in fact or law.—It is not every mistake in a written document which would invalidate it; that would depend on the parties' *animus contractandi*, their real intention; if the contract is challenged for mistake common to all parties, the remedy is rectification as their minds were one and due to mistake creeping in while it was being reduced to writing, the document failed to embody the contract actually entered into; what the Court has to do is not to rectify the contract but to put it in the form the parties really intended it to be in. But if the mistake is unilateral, *held*, there would in fact be no contract as the parties' minds had not met: A.I.R. 1972 Mys. 184.

The mistake contemplated by proviso (1) to S. 92 are genuine and accidental mistakes, just as a misdescription of the property: 184 I.C. 585: A.I.R. 1930 Pesh. 41.

The mistake contemplated by proviso (1) to S. 92 is not confined to unilateral mistake. It refers to unilateral as well as a mutual mistake. Under proviso (1) to S. 92, oral evidence can be led to show that due to a mistake common to all the parties, the written document does not correctly express the agreement, which the parties had really entered into. This is permitted in order to enable the Court to give effect to the agreement between the parties and not the mistaken expression of it: I.L.R. (1954) Bom. 930: A.I.R. 1954 Bom. 463.

Under proviso (1) to S. 92, oral evidence is admissible to prove that the expression of the contract is contrary to the concurrent intention of all parties due to a common mistake: I.L.R. (1951) Nag. 948: A.I.R. 1952 Nag. 90.

There is nothing in proviso (1) to suggest that the facts which may be proved under that proviso can only be proved in support of a claim to which those facts give rise, and such facts may be pleaded by way of defence only. The validity of every contract depends on the presence of *animus contractandi*, the intention to contract. When a written contract is challenged on the ground of mistake common to all parties, the remedy is rectification on the ground that the written statement does not give effect to the agreement which the parties actually entered into. All that the Court has to do in such case is to rectify, not the contract, but the document embodying it, and put that document into such a form as to carry out the contract which the parties really entered into. When there is unilateral mistake, the position is different because in that case there is, in fact, no contract. The minds of the parties were not at one; one intended one thing, and the other intended something else, and if any relief can be granted, it must be rescission: I.L.R. (1939) Bom. 149: A.I.R. 1939 Bom. 151.

It is ordinarily true that it is the document alone which is evidence of the terms settled between the parties and no extraneous evidence can be considered to construe the words of the bond or to contradict those words. But where the defendant executed a money bond under a mistake of fact that he was doing so not agreeing to any term to the effect that in the event of failure of an instalment the

remaining sum shall become due at once and in 'lump sum' but the words used in the bond were in themselves susceptible to such an interpretation, the case falls under S. 92, proviso (1) and the evidence is, admissible to prove the true state of facts: A.I.R. 1955 Pepsu 122.

Where by mistake of parties, the duration of a lease was wrongly entered in the written instrument, evidence can be let in to prove the real intention of the parties: L.R. 4 A. 302 (Rev.). *See* also A.I.R. 1938 Nag. 259.

Evidence to prove that a surety bond was executed under a mistake is admissible: A.I.R. 1929 Rang. 262.

Mistaken expression of agreement—Power of Court to rectify sale deed. *See* A.I.R. 1954 Nag. 328: I.L.R. (1954) Nag. 634: 1954 Nag.L.J. 673.

Under proviso (1), oral evidence is admissible to prove that the khasra numbers of the land sold were wrongly entered in the sale deed particularly when both the vendor and the vendee admit that a mutual mistake of fact had crept into the sale deed: (1940) 42 Punj.L.R. 222: A.I.R. 1940 Lah. 236.

Where the property sold under a sale deed was mis-described and a stranger, aware of the mistake, purchased it with the intention to take advantage thereof, *held*, oral evidence was admissible under proviso (1) to S. 92 to prove what precisely was the property which all the parties thereto concurrently intended to sell under the deed. [A.I.R. 1939 Oudh 10, Rel. on]: A.I.R. 1978 Madh. Pra. 189: 1978 Jab.L.J. 299: 1978 M.P.L.J. 527.

Mistake—Palpable error—Equity, if sanctions admission of evidence to expose error. *See* A.I.R. 1938 Nag. 259.

15. Proviso (2).—Where the document in question appears on the face of it, to be a document of an informal nature, not giving the complete terms of the compromise, it is open to the party to prove the other terms, left out from that document under proviso (2) to S. 92 which saves collateral agreements: A.I.R. 1959 Tripura 40.

It is well settled that if a document does not contain the parties' entire agreement but embodies only some of the conditions, oral evidence of the conditions agreed to but not included in the document are clearly admissible provided such conditions are not inconsistent with the conditions already contained in the document itself: A.I.R. 1973 Ori. 13.

A separate oral agreement on a distinct and collateral matter, although a part of the same transaction would come within proviso (2), if the original instrument is silent on the point which is the subject-matter of the agreement: I.L.R. (1937) 2 Cal. 752: (1936-37) 41 Cal.W.N. 1053: A.I.R. 1937 Cal. 619.

A separate collateral parole contract on a point about which the written principal contract is silent, is viewed with suspicion by Courts of law; it must be proved strictly. Not only the terms of such a contract but the existence of an *animus contractandi* of all the parties to it must be clearly established. The omission of any reference to the subject-matter of the parole contract by itself is no ground for holding that there was no such collateral contract: I.L.R. (1948) 2 Cal. 11.

Oral evidence is permitted by the second proviso as to 'any matter' on which the document is silent and secondly, any separate oral agreement as to such matter should not be inconsistent with 'the terms' of the document. Hence, if consideration is to be regarded as one of the terms of the transaction, no oral evidence under the second proviso can be permitted of a matter which would be to any extent inconsistent with the said term of the document. If a document actually states or sets out the consideration for the contract or for the transaction, it is not permissible by oral evidence to contradict, vary, add to, or subtract from the same. It is of course permissible to prove either that no consideration as set out in the document had been received or that a portion thereof alone had been received or that satisfaction has been received in respect of consideration in a manner otherwise than set out in the document. But those are matters which come more appropriately under the first proviso because that proviso permits proof of any fact which invalidates a document for example, absence of passing of consideration as set out in the document or as amounting to want or failure of consideration which is expressly stated in the proviso: (1970) 1 Mys.L.J. 489: A.I.R. 1970 Mys. 270.

'The degrees of formalities of a document' contemplated in proviso (2) does not mean that every document separately executed and stamped is to be deemed a formal document; it depends on facts and circumstances of each case; it is only when it can be reasonably believed that the document incorporated the agreed terms and conditions in entirety that

oral evidence of contrary terms is shut out; thus, where the document contained a mere acknowledgment of a debt, even if stamped, would not shut out the oral evidence as to the condition of payment of interest on the debt: A.I.R. 1978 All. 314.

It is well settled that a formal document is presumed to incorporate the entire agreement between the parties and that is why its oral evidence is prohibited; but if it is an informal document like a *hathchitha*, the bar of S. 92 is not attracted. [A.I.R. 1917 Cal. 210 and (1882) 9 Cal.L.R. 301, Foll.; A.I.R. 1916 Pat. 406(1) and A.I.R. 1923 Cal. 402, Disting.]: A.I.R. 1975 Pat. 312 (D.B.).

Subsequent oral agreement seeking to lay down the means by which the original contract was to be implemented or the means of satisfaction of the contract which is a mortgage-debt—To that extent it not merely does not contradict, vary, add to or subtract from the original mortgage but really seeks to fulfil the terms of the mortgage, and consequently, it is not hit by provisions of S. 92 but is fully covered by proviso (2) thereof: (1972) 1 Cut.W.R. 355: (1972) 38 Cut.L.T. 450.

Where there is no mention of any kind of interest in a registered mortgage deed, it is open to the parties to agree *aliunde* that the interest to be charged on accounting is to be compound interest. That would not be a variation of the original mortgage bond but would be an independent agreement and as such provable under the Evidence Act. The mortgage is not prevented by anything in that Act from showing that the interest is compound and he is entitled to plead an oral agreement and to prove that the interest agreed upon between the parties is really compound: I.L.R. (1951) Nag. 858: A.I.R. 1952 Nag. 25.

An oral contract for sale which is inconsistent with a deed of mortgage by conditional sale is inadmissible in evidence under S. 92. Proviso (2) to that section is inapplicable as it refers to a separate oral agreement not inconsistent with the terms of the written agreement. Proviso (3) is equally inapplicable if the alleged oral agreement for sale does not constitute a condition precedent to the attaching of any obligation under the mortgage by conditional sale: A.I.R. 1947 Cal. 453.

Where a sir land had been mortgaged by the proprietor who afterwards sold the equity of redemption, he cannot be allowed to give oral evidence of a separate agreement to give up exproprietary rights: 14 L.R. 425 (Rev.): 17 R.D. 500. Oral evidence is admissible to prove a collateral agreement regarding lessee's right of pre-emption: 138 I.C. 774: A.I.R. 1934 P.C. 231: 63 M.L.J. 408 (P.C.). *See* also A.I.R. 1939 All. 248: 1939 All.L.J. 46.

A subsequent oral agreement, under which the mortgagor puts the mortgagee in possession of the mortgaged property and authorises him to enjoy the usufruct for a certain terms of years in satisfaction of his dues under the mortgage, instead of contradicting, varying, adding to, or subtracting from the terms of the original mortgage merely seeks to lay down the means by which the original contract was to be implemented or the means of satisfaction of the mortgage debt. To that extent it not merely does not contradict, vary, add to, or subtract from the original mortgage but it really seeks to fulfil the terms of the mortgage. To that extent, therefore, it is not hit by the provisions of S. 92 and is fully covered by proviso (2): (1955-56) 60 Cal.W.N. 903: A.I.R. 1956 Cal. 625.

Where a deed of transfer is silent on the point of consideration, then parole evidence may be allowed to be given in order to show by surrounding circumstances that the transfer was for consideration: I.L.R. 34 Pat. 440: A.I.R. 1955 Pat. 458.

Where an agreement for sale of a Hindu joint family property entered into by a member of the family was reduced into writing without any condition whereby the executant undertook to persuade his brothers or his brothers undertaking to join in execution of the sale deed, *held*, oral evidence to prove such a condition is inadmissible and barred by S. 92, proviso (2): A.I.R. 1979 All. 65.

The parties to a conveyance are not in view of the second proviso, prevented from proving the existence of a separate oral agreement to the effect that the vendee would proceed no further in the prosecution of his claim for certain money debts not specified in the deed of conveyance and the vendor cannot be prevented from attempting to prove that there was such an agreement: I.L.R. 18 Pat. 31: A.I.R. 1939 Pat. 411.

A contract between the defendant who was an agent and secretary of a tea estate in charge of it and the plaintiff who was a dealer in tea provided *inter alia*, for the sale of the

entire output of a specified variety of dust produced in the estate for 12 months subject to certain reservations made in favour of the defendant. There was no assurance or stipulation as to any minimum or specified quantity to be supplied. The defendant was also given a discretion to make any portion of the tea produced into leaf grade, and such tea could be supplied by the defendant to others. The defendant could also supply a definite quantity of tea to persons outside the State in which the contract was made. The contract was preceded by a personal conversation, and the written contract purported to be a record of all the terms and conditions agreed upon between the parties as a result of that conversation. The plaintiff in suit for damages for breach of contract and short delivery wanted to adduce oral evidence to the effect that an assurance was given to him that he would be supplied with at least 20,000 pounds of dust every month, though the extent of tea produced which can be turned over into leaf grades was not fixed and was left over entirely to the discretion of the defendant. But no such oral agreement was set up in the plaint; it also appeared that if a minimum quantity of 20,000 pounds were supplied to the plaintiff every month, nothing would be left from out of the total produce for the defendant to turn over any part into leaf grade. *Held*, (*1*) that the alleged oral agreement would be consistent with the express liberty given to the defendant under the contract to turn over part of the produce into leaf grades, and would also be destructive of the express terms thereof, and therefore, could not be proved. *Held*, further that when the written record purported to reduce to writing all the terms of the contract between the parties and did not reserve any part of the earlier contract uncovered by the document, oral evidence would not be admissible. The Court could only look at the writing and the terms of the contract; it could not be ascertained by allowing parole evidence as to what transpired antecedent to the contract or what the parties did subsequent to the contract: 1952 Ker.L.T. 45: A.I.R. 1952 Trav.-Co. 117 (F.B.).

In a suit for specific performance of a contract to resell certain property sold, the letter containing the agreement to resell was objected to as being inadmissible in evidence as it was not registered and that the agreement being part of the terms of the original sale it could not be proved by any other way except by another registered instrument. *Held*, the transaction, as a whole, was in reality a combination of two agreements—One to be performed by the seller by the execution of the sale deed and the other to be performed by the purchaser by the execution of another sale deed. The two parts of such a transaction may or may not be embodied in one document. The sale may be by a registered instrument but the terms of the contract to be performed by the purchaser may or may not be in writing and may or may not be registered. It is doubtful if to such a composite transaction, consisting of grant or disposition of property and a collateral agreement, S. 92 in terms applies. But assuming it does, proviso (2) to that section clearly enables the proof of the agreement of re-sale as this would be a separate oral agreement as to a matter on which the document is silent and which is not inconsistent with its terms. Further, an agreement of re-sale does not require registration, as it does not create an interest in or over any immovable property: I.L.R. (1950) All. 32.

Where a sale of land is in truth a mortgage, the vendor cannot claim specific performance of an oral agreement to reconvey, for in that case the oral agreement would obviously contradict the terms of the deed and evidence of such agreement cannot be let in. But where there is an outright sale on oral agreement that upon the happening of a certain event it was to be followed by a reconveyance of what has been sold, the oral agreement cannot be held to contradict, vary, add to, or subtract from the terms of the sale deed. To add a stipulation which is quite unconnected with the terms of sale is not an addition of the kind struck at by S. 92. Accordingly, oral evidence is admissible to prove such agreement though it may be contemporaneous with the original sale: 75 I.A. 252: I.L.R. (1949) Mad. 487: A.I.R. 1949 P.C. 32: (1949) 1 M.L.J. 97 (P.C.).

Where the document is not silent in regard to the consideration, but recites the particular consideration which induced the party to execute the document, it will not be competent for the party to show that in addition to the consideration recited in the document there was some other inducement therefor, but on which the document is silent. To permit that will plainly be against the specific terms of S. 92 of the Evidence Act: (1964) 77 Mad.L.W. 622: I.L.R. (1964) 2 Mad. 841: (1965) 1 M.L.J. 371: A.I.R. 1965 Mad. 147.

Where the defence plea was that though the sale deeds and the handnote in respect of the truck was executed, there was a separate oral agreement between the parties that the defendant's name would be mutated in place of the plaintiff in the financer's records and Motor Vehicles Registration Office after compliance of the requisite formalities, *held*, such oral evidence was admissible under proviso (3); the oral agreement, not being inconsistent with the terms of the written agreement, is admissible under proviso (2) as well: A.I.R. 1971 Pat. 156.

Where a member of a Hindu joint family entered into an agreement for sale of a joint family property but without any mention therein as to his status in the family, *held*, it is permissible to prove by oral evidence whether or not he acted in the transaction as *karta* of the family: A.I.R. 1979 All. 65.

Purchase of goods on basis of oral representation of quality—Written contract silent on the point—Evidence of oral agreement is admissible: 1958 B.L.J.R. 108: A.I.R. 1959 Pat. 378.

Where two brothers entered into an agreement for sale of their two ancestral houses for a consideration of Rs. 2,250 and received Rs. 200 by way of earnest money, the vendee was put in possession of the two houses, and the sale deed was agreed to be executed after lifting of attachment of the houses, *held*, the vendee could not maintain the suit for specific performance in respect of only one of the two houses; it was not at all open to him, in view of Ss. 91 and 92, to contend that the agreement of sale was in fact two separate agreements whereby each house was to be sold for consideration of Rs. 1,125 out of which earnest money of Rs. 100 had been paid to each of the brothers: A.I.R. 1976 Bom. 342: 1976 Mah.L.J. 224.

Loan transaction—Reduced to writing—No mention of interest made in writing—Oral evidence to prove interest is inadmissible: 1962 Kash.L.J. 33: A.I.R. 1962 J.&K. 41.

An oral agreement between the endorser and the endorsee of a negotiable instrument that the endorsee will recover the amount of the instrument from the drawer only is admissible under proviso (2): 105 I.C. 747: A.I.R. 1928 Sind 50.

Where a promissory note was silent as to where money under it was payable and evidence was sought to be given on that point: *Held*, that the proviso (2) to S. 92, allowed proof of any separate oral evidence about any matter on which a document was silent and which was not inconsistent with its terms. The creditor was, therefore, entitled to prove that the parties agreed that the promissory note was to be paid at a specified place: Madh.B.L.R. (1954) Civ. 311: A.I.R. 1954 Madh. Bh. 184 (F.B.).

16. Proviso (3).—It was not intended by proviso (3) to permit the terms of a written contract to be varied by a contemporaneous oral agreement; the proper meaning of the proviso is that a contemporaneous oral agreement to the effect that a written contract was to be of no force at all until the happening of a certain event may be proved: I.L.R. (1942) Kar. 516: A.I.R. 1943 Sind 67.

When the parties have entered into a written contract, no oral evidence can be let in under S. 92 of the Act to vary, alter or modify the terms of the contract: (1971) 1 Mys.L.J. 258.

Proviso (3) presupposes that in a case to which it could be applied, the contract, grant or other disposition of property itself remains intact, but that, the condition precedent pleaded must in its very nature be extraneous to the contract, grant or disposition itself and as agreed must come into existence before the obligation attaches thereunder: (1939) 41 Bom.L.R. 1263: A.I.R. 1940 Bom. 54.

The words 'any obligation' mean any obligation whatever under the contract, and not some particular obligation which the contract may contain: A.I.R. 1932 Cal. 328: I.L.R. 59 Cal. 106. *See* also A.I.R. 1932 Lah. 549: (1931) 33 Punj.L.R. 712.

As to the meaning of the terms 'condition precedent'. *See* (1931) 33 Bom.L.R. 490: A.I.R. 1931 Bom. 297; I.L.R. (1939) Kar. 523: A.I.R. 1939 Sind 299; (1939) 41 Bom.L.R. 1263: A.I.R. 1940 Bom. 54.

Where a party to a document admits execution of the deed but pleads that the deed was never acted upon because of the non-performance of an agreement by the other party and that the deed was vitiated by fraud, it is open to him to offer evidence of fraud; and oral evidence to prove fraud or the existence of any oral agreement invalidating the deed is admissible under provisos (1) and (3) to S. 92: I.L.R. 24 Pat. 230: A.I.R. 1945 Pat. 311. *See* also A.I.R. 1947 Cal. 453.

In a suit on a promissory note payable on demand, it is not open to the defendant to plead or prove any contemporaneous oral agreement that no sum is payable until accounts have been taken in a certain partnership and then only so much as is shown to be due to the plaintiff's firm, because such an agreement is clearly an attempt to alter the express terms of the written contract embodied in the pronote is not admissible under S. 92: I.L.R. (1942) Kar. 516: A.I.R. 1943 Sind 67.

Where a promissory note is, by its express terms, payable on demand, that is at once, the obligation under the note attaches immediately. A collateral oral agreement not to make a demand until a specified condition is fulfilled has the intention and effect of suspending the coming into force of that obligation which is the contract contained in that note. Such an oral agreement constitutes a condition precedent to the attaching of the obligation and is within the terms of proviso (3) of S. 22 of the Evidence Act: (1967) 2 M.L.J. (S.C.) 32: 1966 S.C.R. (Supp.) 38: A.I.R. 1967 S.C. 333.

In a suit on a promissory note the defendant admitted the execution but pleaded that the consideration merely represented a part of the consideration for an usufructuary mortgage to be executed later in favour of the plaintiff and that the note was not enforceable under any circumstances: *Held*, that the plea could not be allowed to be proved by oral evidence, the effect of the plea being to nullify the promissory note itself: 21 Mys.L.J. 385: 49 Mys.H.C.R. 122.

Where the defendant in a suit on a pronote pleads absence of consideration and asserts that the note was executed as between such third person and himself as security for money which might be found due between such third person and himself, *held*, it is a plea that the proof of the existence of amount due to the third person is a condition precedent to the enforcement of the liability under the note and where the plaintiff admits the existence of such a condition precedent, the burden at once falls upon him to satisfy the Court that the condition precedent has already been satisfied: 1943 All.L.W. 82.

Where money is not advanced unconditionally upon promissory note, but is advanced after the note had been executed and on certain conditions previously agreed upon, the promisor is entitled to prove circumstances in repudiation of his liability: (1932) 34 Punj.L.R. 470: A.I.R. 1933 Lah. 456.

Where the defendant pleads that the note sued on was only a receipt for the earnest-money for a contract of purchase by the plaintiff that the purpose of the receipt of money has been wrongly stated in the promissory note, and that it was not intended to attach any obligation to the instrument as such, he is entitled to adduce oral evidence in support of such plea: S. 92 does not bar oral evidence to prove the same: 20 Pat.L.T. 514: A.I.R. 1939 Pat. 495.

It is necessary to distinguish a collateral agreement which alters the legal effect of the instrument from an agreement that the instrument should not be an effective instrument until some condition is fulfilled, or to put it in another form it is necessary to distinguish an agreement in defiance of the contract from an agreement suspending the coming into force of the contract. Where a promissory note is, by its express terms, payable on demand that is at once, the obligation under the note attaches immediately. A collateral oral agreement, not to make demand until certain specified condition is fulfilled has the intention and effect of suspending the coming into force of that obligation, which is the contract contained in the promissory note. Thus, the oral agreement constitutes a condition precedent to the attaching of the obligation and is within the terms of proviso (3): (1938) 40 Bom.L.R. 1075: A.I.R. 1938 P.C. 198: (1938) 2 M.L.J. 469 (P.C.).

The defendant executed an *isar chitti* in the plaintiff's favour acknowledging receipt of a certain amount and promising to get a registered sale deed executed when the balance is paid. In a suit by the plaintiff for specific performance, the defendant pleaded that there was an oral agreement under which the plaintiff should execute a deed of reconveyance before the execution of the sale deed by him. *Held*, that the oral agreement was not one to defeat a deed of sale or to vary the terms thereof, but was clearly a condition precedent to the implementing of the terms contained in the *isar chitti* and was, therefore, admissible under proviso (3) of S. 92: 1948 Nag.L.J. 328: I.L.R. (1948) Nag. 900: A.I.R. 1949 Nag. 15.

In a suit for damages for breach of a contract of lease executed by the defendant in favour of the plaintiff, the defendant sought to prove by oral evidence that the lease deed

had been executed by him merely by way of security for repayment of loan and that there was agreement that it would not be acted upon: *Held*, that the defendant could adduce oral evidence to prove an agreement suspending the coming into force of the contract contained in the lease deed or to prove that it was to impose no obligation at all until the happening of a certain event. Hence, the oral evidence to prove the contemporaneous oral agreement that the lease deed was only as a voucher or security for the loan and was not to be acted upon was rightly admitted by the Courts below: 1957 M.P.L.J. 399: 1957 Jab.L.J. 753.

The plaintiff sought to set aside a compromise decree on the ground of fraud. The understanding between parties was to the effect that the compromise filed in the suit according to the terms embodied in the decree itself, would have force or effect only on condition that all other civil and criminal litigations were withdrawn. Withdrawal of other cases was manifestly a condition precedent to the attaching of any obligation under the contract of the compromise. *Held*, that the case fell within the language of provisos (1) and (3) to S. 92, Evidence Act, and therefore, extraneous evidence apart from the compromise petition was admissible for the purpose of proving fraud. In most of the cases of fraud, it can be established only by introducing extraneous conditions and circumstances: A.I.R. 1956 Ori. 81: I.L.R. (1955) Cut. 95.

Agreement for sale of property within time specified and to deliver possession at the time of the execution of deed of conveyance—Separate oral agreement to the effect that the contract was subject to the condition that the vendor was able to persuade the lessee in possession to surrender his possession within the time specified for the sale is a condition precedent to the arising of obligations under the contract for sale and has not the effect of varying or contradicting the terms of the contract—Evidence of that agreement which falls within the third proviso to the section, can be given, since its effect is to prove the nature of the contract, *viz.*, that it is a contingent contract: A.I.R. 1954 Trav.-Co. 10.

Where there is a sale deed by *A* in favour of *B*, an oral agreement that the sale was to be effective only in case *A* dies of the illness without paying the expenses incurred by *B*, can be admissible under S. 92, proviso (3): I.L.R. (1956) Hyd. 328: A.I.R. 1956 Hyd. 114.

Plaintiff who purchased certain properties in Court auction subject to a mortgage in the defendant's favour agreed with third parties to sell some of them with the knowledge and consent of the defendant who agreed in writing to accept piecemeal payments from the plaintiff and to release the lands which plaintiff agreed to sell to the third parties. Plaintiff having sued for specific performance of the agreement, the defendant pleaded an oral agreement that the release deed was only to be given when the entire mortgage debt had been discharged and that he was bound to give it if called upon by the plaintiff after such discharge and not before. *Held*, that the arrangement set up by the defendant was not a 'condition precedent to the attaching of any obligation' within the meaning of proviso (3) and, hence, the oral arrangement could not be admitted in evidence: A.I.R. 1937 Mad. 124: 71 M.L.J. 599. *See* also A.I.R. 1936 Mad. 841: 71 M.L.J. 522.

Where a forest contract provided for extension of time to complete the work and by a supplementary contract, extension of time was completely barred but the contractor was allowed to execute the supplementary contracts pending decision of his request for its modification as had been allowed to certain other contractors, *held*, it was open to the contractor to contend that he was not bound by the supplementary contract; neither S. 91 nor S. 92 is attracted because (*1*) evidence is admissible to prove subsequent conduct of the parties, (*2*) the evidence sought to be led is not oral but documentary and (*3*) what is sought to be proved is a condition precedent admissible under proviso (3) to S. 92: A.I.R. 1984 J.&K. 10.

17. Proviso (4).—An agreement to convey, though reduced to writing, is not required by law to be in writing. The agreement was not registered under the Indian Registration Act. The agreement can, therefore, be validly modified by an oral agreement entered into between the parties: I.L.R. (1959) Mad. 552: (1959) 2 M.L.J. 324.

In the case of a document registered, oral evidence is permissible if the terms contained in the document are ambiguous and are not clear in order to determine the true intention of the parties, and the correct nature of the document: A.I.R. 1993 Karn. 257: (1992) 3 Karn.L.J. 207.

Proviso (4) to S. 92 lays down that though a subsequent oral agreement to rescind or

modify a contract, grant or disposition of property is admissible except where it is required by law to be in writing or has been registered; thus, where a contract in writing is registered either under compulsion of law or voluntarily, no evidence of a subsequent oral agreement to modify or rescind it, is admissible: A.I.R. 1973 Ori. 22.

S. 115 embodies the rule of estoppel while S. 92, proviso (4) embodies only a rule of procedure; thus, S. 115 must prevail over S. 92, proviso (4): A.I.R. 1974 Madh. Pra. 193: 1974 M.P.L.J. 329: 1974 Jab.L.J. 476 (D.B.).

Contract of debt—Oral agreement can be proved to modify the terms of a written contract of debt: A.I.R. 1953 Madh. Bh. 157. Proviso (4) to S. 92 only permits the proof of subsequent oral agreement to modify a contract; but if such agreement was entered into contemporaneously with the contract, it cannot be proved: I.L.R. (1943) All. 752: 1943 All.L.J. 411: A.I.R. 1943 All. 370.

It is erroneous to hold that proviso (4) to S. 92 comes into operation only when the document is compulsorily registrable and is registered. As soon as the parties get it registered, whether it is compulsorily registrable or not, it comes within the purview of proviso (4) to S. 92: 1948 A.M.L.J. 1.

Proviso (4) makes an exception in cases in which contract, grant or disposition of property has been registered according to the law in force for the time being as to the registration of documents. It does not exclude documents which are not compulsorily registrable. If a document has been registered that is sufficient for purposes of proviso (4). So evidence of any distinct subsequent oral agreement to modify an agricultural registered lease deed is inadmissible according to law: (1955) 1 M.L.J. 221.

The expression 'oral agreement' as used in proviso (4) is wide enough to include all unwritten agreements whether they are oral or they are implied from acts and conduct of the parties. But evidence of conduct is admissible to show that as between the parties the particular term was never intended to be acted upon or enforced, or to prove an estoppel or waiver: A.I.R. 1929 Pat. 717.

There is no law in India whereby a release of mortgage should be in writing and registered: A contract of release between the mortgagor and the mortgagee may require writing under proviso (4) and may require registration under the Registration Act. But the case is different when the contract to release is between the mortgagee on the one hand and a stranger who purchases the property released after the contract. Such an oral release is valid: 40 Mad.L.W. 942: 68 M.L.J. 91. *See* also 1937 Rang.L.R. 13: A.I.R. 1937 Rang. 220 (where a second mortgagee was held not entitled to plead the bar under this section of proof of oral agreement between mortgagor and first mortgagee to release some items of his mortgage from the mortgagee).

When there is a registered mortgage deed, *held*, subsequent oral agreement modifying terms of original mortgage deed is inadmissible under S. 92, proviso (4): 1979 Cur.L.J. (Civ.) 7 (Punj.) (D.B.).

Where the mortgagee of a registered mortgage deed endorsed on its back that he had received the principal but given up the interest accrued and delivered the deed to the mortgagor, *held*, the endorsement on the back of the deed, unregistered, was inadmissible both for want of registration as well as under S. 92, proviso (4). S. 114 is also of no help; the deed being in possession of the mortgagor merely raises a presumption which may be rebutted; it does not prove that the deed had been fully satisfied. [A.I.R. 1929 Mad. 794; A.I.R. 1931 Mad. 636; A.I.R. 1926 Cal. 170; A.I.R. 1930 All. 721 (F.B.) held not good Law in view of A.I.R. 1952 S.C. 153]: A.I.R. 1977 Mad. 298: (1977) 90 Mad.L.W. 248: (1977) 1 M.L.J. 528. *See* also (1980) 1 M.P.W.N. 318.

Where after the execution of a mortgage, the mortgagee is put in possession of the mortgaged property so that the rents and profits of the property might be adjusted towards the principal and interest, there is nothing in the provisions of S. 92 to bar the proof of this agreement in a suit on the mortgage. All that is done by the agreement is to provide for a method of payment which does not in any way affect any of the provisions of the mortgage deed. It cannot be said that the proviso (4) to S. 92 has any application to such a case: 1947 O.A. (C.C.) 350: 1947 All.W.R. (C.C.) 350.

Where in the case of a simple mortgage, the parties by a subsequent oral agreement, put the mortgagee in possession of the mortgaged lands for recovery of interest, it is merely an agreement creating a machinery for discharging interest and it is not hit by S. 92: A.I.R. 1958 Mys. 43.

Where a mortgage deed contains a stipulation that the only evidence which the parties could rely upon in support of any payments made in satisfaction of the mortgage debt should be payments endorsed on the mortgage deed itself, it does not preclude the parties from adducing other evidence to prove discharge. S. 92 does not bar such evidence: 192 I.C. 861: A.I.R. 1941 Pat. 246. *See* also 196 I.C. 645: 23 Pat.L.J. 379: A.I.R. 1942 Pat. 105. But see A.I.R. 1940 Pat. 49: 21 Pat.L.T. 437. [Though it is always open to a mortgagor to prove that on a certain day he paid the sum due under the mortgage, still when in the registered mortgage deed there is an express term that payment should be made in a certain way and unless endorsed on the deed it should not be regarded as payment at all, the mortgagor will not be allowed to prove discharge of the mortgage by subsequent oral agreement which goes to vary the terms of the mortgage.]

Oral agreement between one of several mortgagors and mortgagee for redemption of his share thereunder. Payment can be proved: 112 I.C. 559: A.I.R. 1928 Mad. 1050. Mortgage suit for sale—Defendant pleading subsequent oral agreement to accept properties in satisfaction of mortgage—Agreement not admissible: A.I.R. 1929 All. 615. But *see contra* A.I.R. 1937 Mad. 261: 71 M.L.J. 850. A distinct oral agreement between co-mortgagors subsequent to the deed should, in order to be admissible under this proviso, be in writing: 137 I.C. 285: A.I.R. 1932 Mad. 218.

When the document is in terms a possessory mortgage, evidence to show that the mortgage was in reality a simple mortgage according to the intention of the parties is inadmissible under S. 92: 60 I.A. 273: I.L.R. 14 Lah. 466: 65 M.L.J. 150 (P.C.).

Where the subsequent oral agreement relates merely to the mode of payment of mortgage money, evidence with respect to it is admissible. But if it is not merely an agreement as regards the mode of payment but an alteration of the mortgage itself, such as changing the original mortgage which was without possession into a usufructuary mortgage, it is not admissible: 110 I.C. 261 (L.).

Subsequent to a registered mortgage, parties entered into a contract by which the property was to be put in possession of the mortgagee for 5 years and the mortgage debt was to be deemed discharged. *Held*, that the contract to let and the letting into possession for 5 years operated as a discharge of the obligation and in no way offended the provisions of S. 92: 162 I.C. 53 (2): A.I.R. 1936 Mad. 380.

In a suit for redemption of registered zarpeshgi of 1929, the defence was that by an oral settlement of the same land in 1942 with the defendants they had discharged the liability under the zarpeshgi of 1929, by setting off the amount of salami which they were liable to pay to the plaintiffs against the due which the plaintiffs owed to them under the zarpeshgi. *Held*, that oral evidence to prove the oral settlement in discharge of the zarpeshgi of 1929 could be admitted because this was a case of total extinguishment of the zarpeshgi and not a case in which the subsequent transaction set up by the defendants amounted to or had the effect of varying or rescinding the agreement between the parties resulting in the transaction of zarpeshgi of December, 1929. Consequently, there was no question of the application of the bar under S. 92, Evidence Act. It is true that proviso (4) of S. 92, Evidence Act, also bars evidence of oral contract which has the effect of rescinding a previous written contract, but rescission of a contract means that the parties thereto agree subsequently to absolve each other from the rights and liabilities accruing to them from the previous transaction. It does not proceed on the basis of the validity and subsistence of the rights and liabilities created by the original contract, but puts an end to it or avoids it. In such circumstances, of course, the law requires that when the original contract is in writing it may not be proved to have been abrogated except by a document in writing; but this is altogether different from an arrangement between the parties subsequent to a contract whereby accepting the rights and liabilities accruing there upon they seek to fulfil the obligations arising therefrom and thereby discharge the liability of one party as against the other; that would be an extinction of the previous contract by performance and not by cancelling it or avoiding it. This is the distinction between the two. And where the nature of the subsequent contract is independent to the operation of the previous contract, it has been held that such a subsequent contract between the parties can be pleaded and proved even though that contract, otherwise valid, is oral. It is not necessary that it should also be in writing and registered to operate

effectively for the purposes of the adjustment and fulfilment of the rights and liabilities of the parties under the previous contract which is a registered instrument in writing: 1959 B.L.J.R. 397: A.I.R. 1959 Pat. 531.

A contract of simple money debt is not one required by law to be reduced to the form of a document: 26 Nag.L.R. 320: A.I.R. 1930 Nag. 298.

Where time of payment and conveyance was found to be of the essence of the contract reduced to writing and it was deposed by the plaintiff's witness that in view of another proceeding pending in the Court, the parties had agreed to postpone receipt or payment of money, *held*, it amounted to modify by oral evidence, a contract reduced to writing; it was impermissible under proviso (4) to S. 92: (1988-2) 102 Mad.L.W. 292 (D.B.).

An oral statement of a promise that he remits the interest payable under a promissory note is not an agreement within the meaning of S. 2 (*e*) of the Contract Act, but is an one-sided act on the part of the promisee, and it is, therefore, not excluded by S. 92 (4): (1942-43) 47 Cal.W.N. 213: I.L.R. (1943) 1 Cal. 101: A.I.R. 1943 Cal. 481.

Where a promissory note is payable on demand, oral evidence to prove a subsequent agreement to postpone the date of payment is inadmissible under proviso (4) to S. 92, inasmuch as the effect of the subsequent agreement is to alter the terms of the original contract in writing: 1958 An.L.T. 372.

An oral agreement by the executant of a promissory note, that, instead of money being paid, payment shall be made in the form of a transfer of land cannot be proved under S. 92(4): 151 I.C. 398: A.I.R. 1934 Rang. 228. *See* also A.I.R. 1937 Rang. 521.

S. 92, proviso (4), applies where the original transaction was by a written and registered instrument. Where the subsequent transaction averred by the mortgagee is one converting the mortgage into a sale, it is clearly a modification of that disposition and as such cannot be evidence in a law Court by anything short of deed, which like the deed of the original disposition should be registered: 1962 M.P.L.J. 423: 1962 Jab.L.J. 962.

By a registered deed by way of family arrangement, the family properties including Zamindari properties were divided between the mother and her three sons. The mother was given a life interest in 1/4th share of the properties. After the abolition of Zamindari by the Land Reforms Act, one of the sons filed a suit for payment of compensation in respect of his share. The suit was compromised and a fresh agreement modifying the terms of the family arrangement was arrived at. Under this compromise the mother agreed to forgo her interest in all the family properties including the compensation. In proceedings for compensation payable in respect of the Zamindari situated in Bihar, the mother again claimed a share therein.

Held, that the mother was entitled to claim a share in compensation money in respect of the Zamindari properties vesting in the State of Bihar in accordance with the family arrangement. Since the compromise petition filed in the U. P. Court covered properties in Bihar, which were not the subject-matter of the suit, required registration and being an unregistered document could not be put in evidence by virtue of proviso (4) to S. 92, Evidence Act: 1961 B.L.J.R. 767: A.I.R. 1962 Pat. 215.

Though an agreement for sale or reconveyance is not required by law to be registered but once written and registered, *held*, any subsequent oral evidence varying the terms of the deed would be inadmissible: A.I.R. 1973 Gau. 132 (D.B.).

An oral agreement that a registered deed of sale should be null and of no effect until the agreement of re-purchase has been executed by the vendee cannot be proved under the provisions of proviso (4): A.I.R. 1933 Rang. 310.

A document purporting to be a sale deed was presented for registration. The executant denied that he had executed a sale deed and stated that he had merely agreed to execute a mortgage deed. After some dispute, the parties agreed that the transaction should be treated as a mortgage and made statements to the Sub-Registrar, who recorded the terms of the mortgage agreed to by the parties and registered the document as a mortgage deed. *Held*, that proviso (4) did not prevent the successor-in-interest of the executant from proving that the transaction entered into between the parties was really a mortgage and not a sale: 145 I.C. 697 (1): A.I.R. 1933 Lah. 318.

Where the plaintiff alleged that he executed sale deed in lieu of loan taken from the defendant and was not to be acted upon and further alleged agreement to recovery, *held*, evidence was admissible to show those oral agreements: 1977 Mah.L.J. (Notes) 40.

Plaintiff executed a sale deed to the defendant which was registered. On the same date the defendant executed an agreement to reconvey the properties to the plaintiff which was not registered. The sale deed itself did not contain any reference to the agreement. Plaintiff having sued for specific performance of the agreement, objection was raised to the use of the unregistered agreement under S. 92(4). *Held*, that no objection under S. 92(4) could arise in view of the fact that the sale was maintained and only the covenant for repurchase was sought to be enforced: A.I.R. 1934 Mad. 703: 67 M.L.J. 635. *See* also 179 I.C. 172: A.I.R. 1939 Pat. 142.

S. 92 of the Evidence Act excludes extrinsic evidence which modifies or adds to the terms of a written instrument. While proviso (2) to that section deals with the existence of a separate oral agreement contemporaneous with the written instrument, proviso (4) deals with such an agreement entered into subsequently. The latter makes it clear that such an agreement which rescinds or modifies any registered contract cannot be proved except when it is in writing and has been registered according to law. Thus, the document embodying the terms varying or adding to the terms of the registered mortgage deed must be duly registered. In the absence of such a registered deed, no modification or addition to the transaction reduced to writing and duly registered is permissible in law.

Held, that there was no stipulation of interest at the time when the original contract was entered into. All that was agreed upon was that the mortgage would be a mortgage with possession and if the mortgagor failed to redeem on expiry of two years, the mortgagee would be entitled to get back his money due from the hypothecatee and other property and person of the mortgagor. The stipulation of interest is a subsequent feature and as such cannot be permitted to be proved or given effect to in view of S. 92(4) of the Evidence Act: (1968) 1 An.L.T. 341.

If a creditor waives his right under a contract or relinquishes his claim, such an act of grace does not amount to an agreement falling within the exception in proviso (4). A remission or relinquishment or discharge does not come within the mischief of proviso (4). An endorsement of payment on an agreement which, though not registrable, is registered; evidencing the receipt by the creditor of a smaller amount than is due and discharging the debtor, does not fall within the proviso and therefore, parole or oral evidence to prove the creditor's waiver is admissible in evidence, although the endorsement is not itself registered: 20 Mys.L.J. 160: 46 Mys.H.C.R. 516.

Oral evidence to prove satisfaction of a claim is admissible: I.L.R. 6 Rang. 191: A.I.R. 1928 Rang. 144; but not to prove an oral agreement modifying terms of a reference of a registered agreement referring matter to arbitration: 135 I.C. 230: A.I.R. 1932 All. 154.

A C.I.F. contract is not required by law to be in writing; if it is not registered, it can be legally varied by an oral agreement modifying its terms: (1932) 34 Punj.L.R. 266: A.I.R. 1933 Lah. 453.

Where an oral agreement is made by two partners to dissolve the partnership earlier than originally agreed to in their registered agreement, *held*, the oral agreement and any payment made in accordance therewith is admissible in evidence: 14 Nag.L.J. 179: A.I.R. 1932 Nag. 42.

Arbitration agreement need not be in writing within the meaning of the proviso—Existence of subsequent oral agreement to modify contract may be proved—Contract between *A* and *B*—Despatch of letter and telegram by *A* to *B* to delete arbitration clause—No response from *B*—*A* is bound by arbitration agreement—[Arbitration Act, 1940, S. 2 (*a*)]—[Contract Act, 1872, S. 62]: (1965-66) 70 Cal.W.N. 199.

No oral agreement is admissible to prove variation of the terms of a registered lease including a term as to the payment of rent, although rent at a reduced rate has been paid and accepted for many years: I.L.R. 22 Pat. 5: A.I.R. 1943 Pat. 152.

This proviso bars proof or oral agreement by lessor to release lessee from his liabilities under the personal covenants contained in a registered lease: I.L.R. 60 Bom. 394: (1936) 38 Bom.L.R. 34: A.I.R. 1936 Bom. 88. *See* also 1937 O.W.N. 477: A.I.R. 1937 Oudh 341.

Where a lease by law is not required to be in writing *or* registered but the deed embodying it is in fact registered, *held*, in either case no subsequent oral agreement to rescind or vary its terms is admissible and is hit by S. 92, proviso (4). [A.I.R. 1959 Ker. 400, Disting.]: A.I.R. 1971 Ker. 333.

Flats constructed by promoters and sold to purchasers—Purchasers had no right to open spaces, roof tops, lifts etc. under written agreement—Plaintiff alleging that before he took flats on lease from purchasers, the promoters had orally agreed that plaintiff could construct on roof-top space—*Held*, such agreement being prior to his written agreement with purchasers, is not covered by proviso (4): 1979 Rajdhani L.R. 7: I.L.R. (1979) 1 Del. 84.

A landlord is entitled to recover enhanced rent on the basis of an oral agreement between him and his lessee subsequent to Coolicharth which is evidenced by an instrument which is neither required by law to be in writing nor to be registered. Such a subsequent oral agreement will be covered by proviso (4) to S. 92, Evidence Act: 1959 Ker.L.T. 247: A.I.R. 1959 Ker. 400.

Where the tenants did not contend that they acquired tenancy rights by a subsequent, separate oral agreement with the landlord, *held*, it does not amount to varying the terms of a written deed; proviso (4) is not attracted: A.I.R. 1981 P.&H. 73: (1981) 83 Punj.L.R. 104.

Where a mortgagee is also the tenant of the mortgagor and it is agreed upon by oral agreement subsequent to the execution of the mortgage-deed that the rent is to be adjusted towards interest, without affecting the rate of interest as stipulated in the mortgage bond, the subsequent oral agreement merely creates a machinery for discharging the interest and is not hit by S. 92, proviso (4). If on the other hand, the rent is either less or more than the interest stipulated in the mortgage bond, then the subsequent oral agreement either limits or creates an interest in the mortgage security and is not admissible under said proviso: (1969) 11 Ori.J.D. 1.

Where tenancy in the shop was originally created in the name of a partner and after his retirement, it continued to be used and occupied by the reconstituted firm, *held*, it was permissible for the tenant under proviso (4) to prove the existence of a distinct subsequent oral agreement to modify the original tenancy so as to show that the tenancy was held by the partner on and for behalf of the firm; a 'lessee' or 'tenant' does not necessarily negative agency; proviso (4), however, does not extend to contracts or grants which are by law required to be in writing or have been registered according to the law in force: A.I.R. 1976 S.C. 2400: (1977) 79 Punj.L.R. 57: (1976) 4 S.C.C. 89: 1976 U.J. (S.C.) 802.

Tenancy evidenced by registered lease deed—Variation in rent—Variation must be by another registered instrument: (1969) 2 M.L.J. 8.

Subsequent oral agreement—Contractual tenancy evidenced by registered deed—Proceedings for fixation of standard rent—Tenant contending that proceedings are not with reference to deed to apply S. 92 and hence subsequent oral agreement can be admitted in evidence to prove variation which would make Madras Act (XVIII of 1960) inapplicable to tenancy—*Held*, to make Madras Act inapplicable contractual or agreed rent had to be found and it was for tenant to prove that same was different from that stipulated in lease—This he could not do except by proof of another registered instrument: (1970) 1 M.L.J. 15.

Where general management of a firm was vested by the partnership deed in the managers and the partners, by a resolution, entrusted purchase of machinery to another person, *held*, the resolution of the firm, being in consonance with the partnership deed as well as the Partnership Act, could be proved; it was not hit by S. 92: A.I.R. 1976 All. 141 (D.B.).

An oral subsequent agreement to modify the terms of a written contract may be orally proved; where there was no cogent evidence to show that the commission was agreed to reduced from 5 to $2^1/_2$ percent, *held*, on facts that variation in the written contract was not proved: (1989-1) 30 Guj.L.R. 456: (1989-1) 9 Guj.L.H. 495 (D.B.).

18. Proviso (5).—A custom is no answer to the bar under S. 92; though proviso (5) allows 'any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description' to be proved but it does not warrant demolishing the original contract by substituting new terms enabling it to escape from its obligations under the original contract: (1978) 91 Mad.L.W. (S.N.) 40 (S.C.).

Ss. 91 and 92 do not prohibit the Court from importing into the lease deed reduced to writing the convenants or conditions implied in the tenancies under S. 108 of the Transfer of Property Act; a provision of law is neither a statement of a witness nor a document produced for the Court's inspection; Ss. 91 and 92 donot purport to override the provisions of the Transfer of Property Act or any other law; besides, proviso (5) of S. 92, despite the prohibition contained in the section, expressly permits proof of any usage or custom whereby incidents not expressly mentioned in any contract are usually annexed to contracts of that description; but such usage or custom must not be repugnant to or inconsistent with the contract's express terms; it would be absurd to suggest that provisions of law whereby such incidents are annexed to contracts should be kept out: A.I.R. 1980 Pat. 120: 1980 B.B.C.J. (H.C.) 123: 1980 B.L.J.R. 255.

Sale of Goods Act, 1930, Ss. 2(2) and (4) and 18—Document of title—Pucca Delivery Orders issued by Jute Mills in accordance with customs prevailing in Calcutta Jute Market are not documents of title—Evidence of trade usage under which such orders are considered as documents of title is barred under proviso (5) to S. 92 of the Evidence Act: (1965-66) 70 Cal.W.N. 741.

19. Proviso (6).—This proviso does not apply where the document is clear and unambiguous in its terms: A.I.R. 1939 Sind 200: I.L.R. (1939) Kar. 530.

Where there is no ambiguity which needs explanation and terms of document are quite clear, evidence to explain the terms of the deed should not be allowed: 164 I.C. 463: A.I.R. 1936 Lah. 508. *See* also 18 Mys.L.J. 196: 45 Mys.H.C.R. 109; 1943 O.W.N. 325: 1943 O.A. (C.C.) 179.

Where the terms of a written contract are perfectly clear, the necessity of deducing the real terms from the conduct of the parties and the reconstituting of the contract in accordance therewith does not arise: 184 I.C. 585 (2): A.I.R. 1939 Pesh. 41; A.I.R. 1943 Oudh 492. Per *Banerjee, J.*—Under proviso (6) to S. 92 of the Evidence Act, any fact may be proved which shows in what manner the language of a document is related to existing facts. The object of admissibility of the evidence of surrounding circumstances is to ascertain the real intention of the parties, but this intention must be gathered from the language of the document as explained by the extrinsic evidence. No evidence of any intention, inconsistent with the plain meaning of the words used will be admitted, for the object is not to vary the language used, but merely to explain the sense in which the words are used by the parties. The scope and limitation of proviso (6) to S. 92 of the Evidence Act are to be gathered from Ss. 93 to 98 of the Act. Proviso (6) to S. 92 and Ss. 93 to 98 of the Act must be read together: 1958 Cal.L.J. 252; (1959) 2 An.W.R. 23.

Under proviso (6), any fact is provable which shows in what manner language of document is related to fact existing at the time of executing it: (1965-66) 70 Cal.W.N. 982.

Proviso (6) to the section is not an exception to the rule laid down in the main section, as a proviso normally is; it is a substantive provision itself laying down the law as to admissibility of extrinsic evidence as an aid to the construction of a document where it is necessary to co-relate it to the then existing facts; it has nothing whatsoever to do with the question of contradicting, varying, adding to or substracting from the terms of the documents dealt with in the main section: A.I.R. 1972 Bom. 365: (1972) 74 Bom.L.R. 509: 1972 Mah.L.J. 756.

Extrinsic evidence admissible under S. 92, proviso (6) is for the purpose of ascertaining the meaning of the words used, that is by translating the documents' language by assigning definite meanings to the words used and their effect in cases where the words used may raise suspicion about the parties' real intention so as to relate them to the circumstances of the writer or to the facts then existing: A.I.R. 1972 Bom. 365: 1972 Mah.L.J. 756: (1972) 74 Bom.L.R. 509.

As S. 92, proviso (6) clearly permits extrinsic evidence of facts to show as to how the language of a document is related to existing facts and since construction of a document is a question of law, *held*, it can well be considered in a second appeal: A.I.R. 1975 Guj. 98: (1975) 16 Guj.L.R. 363.

Construction and Scope—If to be read with Ss. 94 and 95—Construction of contract — Surrounding circumstances—Extrinsic evidence—Admissibility. *See* (1981) 83 Bom.L.R. 339.

S. 92 mandates that where a document's terms are clear and unambiguous, extrinsic

evidence to ascertain the parties' true intention is inadmissible; their intention must be gathered from the document's language. However, if the language is ambiguous and admits of a variety of meanings, the 6th proviso to the section, permitting extrinsic evidence as to acts, conduct and surrounding circumstances, can be invoked to enable the Court to know the parties' real intention: A.I.R. 1990 S.C. 1833.

Proviso (6) to S. 92 is couched in general terms. It embodies an important canon of interpretation of documents. The object of the admissibility of the evidence of surrounding circumstances under this proviso is to ascertain the real intention of the parties when there is latent ambiguity in the document, *i.e.*, when its language is not, *prima facie*, consistent with the existing facts. It is difficult to define the limits of the rule of interpretation incorporated in proviso (6), but, generally speaking, evidence of surrounding circumstances is admissible only where there is some ambiguity or doubt as to the meaning of the terms of documents. Where, however, the meanings of the words of the document are plain enough and there is no dispute as to its contents are related to existing facts, no extrinsic evidence, inconsistent with that plain meaning, will be admitted. Under this proviso, the terms of an unambiguous document cannot be controlled by the conduct of the parties: 1968 Cur. L.J. 674: (1968) 70 Punj.L.R. 790.

Proviso (6) to S. 92 of the Evidence Act is of an exceptional nature, in so far as it is not an exception to the rule laid down in the main part of the section that no evidence of any oral agreement or statement can be admitted for the purpose of contradicting, varying, adding to or subtracting from the terms of a written document. It is a substantive provision itself laying down the law relating to the admissibility of extrinsic evidence as an aid to the construction of a document in cases in which it is necessary to find out how the document is related to existing facts. It has nothing whatsoever to do with the question of contradicting, varying, adding to or subtracting from the terms of the document with which the main part of S. 92 deals. Proviso (6) to S. 92 does not take away or qualify anything that would, but for that proviso, have fallen within the substantive portion of that section. It is significant that, unlike the main portion of S. 92, proviso (6) is not restricted to extrinsic evidence of an 'oral agreement' or statement. Proviso (6) cannot, therefore, be construed as being an exception to S. 92 and controlled by the main part of that section, or even as being a saving clause to the substantive portion of that section since it does not purport to save anything therein contained from the applicability of the substantive portion of the section: A.I.R. 1969 Bom. 231.

Ss. 94 and 95 read with the main rule of law laid down in S. 92, clearly suggest that proviso (6) to S. 92, comes into play only when there is a latent ambiguity in a document, that is, when the language of the document is not *prima facie* consistent with the existing facts or, in other words when there is a conflict in the plain meaning of the language used in the document and the facts existing or when they put together lead to an ambiguity. In case, therefore, when the language used in a document is plain and not in any way ambiguous in reference to facts, existing, there is no scope for coming into play of the rule of interpretation laid down in proviso (6) to S. 92, Evidence Act. It is doubtful whether proviso (6) to S. 92 is at all available to prove that what is on the face a mortgage document, it is in fact an absolute sale. The very terms of a mortgage deed in general are so different to those of a deed of sale that any attempt to construe such a mortgage deed as a deed of sale will inherently result in the variation and the contradiction of the terms of the mortgage deed. *Held*, that the documents in dispute were plain and unambiguous and on their face were usufructuary mortgages and apart from the names given to them in their bodies, the terms stipulated thereunder also conclusively proved that they were intended to operate as usufructuary mortgage deeds, and therefore, no parole evidence was admissible to prove that they were in fact intended to operate as deeds of sale: 1954 B.L.J.R. 486: A.I.R. 1954 Pat. 562; A.I.R. 1957 Pat. 673: 1957 B.L.J.R. 70.

What is prohibited under S. 92, Evidence Act, is that evidence of any oral agreement or statement shall not be admitted so as to contradict, vary, add to, or subtract from its terms. Proviso (6) is one of the exceptions to this prohibition, under which it would be permissible for one to establish by oral evidence that the language of the document is not what it purports to be, as it is unrelated to and contrary to existing facts of which oral evidence

can be given under the proviso. The evidence of the surrounding circumstances under which the document was brought about may, therefore, be given to show that the transaction is not what it appears to be and that the apparent tenor is not its real character: (1955) 1 M.L.J. 12: A.I.R. 1955 Mad. 78.

It is always open to show how the terms of a document are related to existing state of things and therefore, oral evidence is admissible to prove that the terms of a particular document are those given to a sub-contractor, though the word sub-contractor has not been used in the document: A.I.R. 1954 Cal. 48: (1952-53) 57 Cal.W.N. 743.

Extrinsic circumstances, showing the real intention of the parties, can be proved under S. 92, proviso (6), Evidence Act. These circumstances may be found in the contemporaneous conduct of the parties and may include the fact that the transferee in the same sitting agreed to reconvey the property before the execution of the sale deed and executed a separate document accordingly: A.I.R. 1953 Bhopal 18. Sale-deed to a dancing girl—Contemporaneous oral agreement that it was to take effect as maintenance arrangement is not admissible: 31 Mad.L.W. 516: A.I.R. 1930 Mad. 547.

Where lands sold under a sale deed comprised of *bagait* and *jirayat* kinds and dispute arose whether the vendees had the right (denied by the vendors) to use the well on the vendors' adjacent land not sold to the vendees for irrigation of the lands sold, *held*, under proviso (6), it is permissible to adduce extrinsic evidence to construe the sale deed to decide whether the use of well for irrigation of the lands sold was intended under the deed. [A.I.R. 1950 S.C. 15, Foll.]: A.I.R. 1975 Guj. 98: (1975) 16 Guj.L.R. 363.

Oral evidence is admissible to show the real nature of the transaction evidenced by the document as, for instance, that a document though styled as a gift is really a will: 117 I.C. 907 (2): A.I.R. 1929 Lah. 875 (2); but not a sale into mortgage: A.I.R. 1928 Mad. 459; A.I.R. 1928 Nag. 182; A.I.R. 1925 Bom. 501: I.L.R. 49 Bom. 662. *See* also A.I.R. 1939 Sind 200: I.L.R. (1939) Kar. 530.

It is not competent for a Court to look into the evidence of surrounding circumstances to find out whether a document which purported to be an out and out sale, was intended to take effect only as a security bond: (1959) 2 An.W.R. 23.

Where the vendor brought a suit for redemption on the basis of a document which is apparently a sale deed and contends that the document was in real fact a mortgage deed as the language used in the document had no meaning in relation to existing facts. *Held*, that the Court was right in applying proviso (6) to S. 92, read with Ss. 94 and 95, of the Evidence Act in allowing the existing facts to be proved by the plaintiff in order to show that the suit document was really only a mortgage and not sale deed: A.I.R. 1965 Manipur 31.

Misdescription in designation of Officer authorised to file complaint—Complaint written on form printed during existence of Municipal Board—Extraneous evidence to prove that complaint was made by duly authorised person—Admissibility: 1963 All.L.J. 765: (1964) 1 Cr.L.J. 626: A.I.R. 1964 All. 270.

Oral evidence, to show that at the time of the execution of the document the parties agreed as between themselves that the document was not a sale but a mortgage, will be admissible to show the conduct of the parties showing that it was only a mortgage and not a sale deed. Proviso (6) to S. 92 permits any fact to be proved which shows in what manner the language of a document is related to existing facts. Thus, where, for example, a sale deed is executed and the value of the land is found to be far more than the consideration mentioned therein, the vendee does not take possession and allows the vendor to remain in possession, and the vendor continues to pay the revenue and this state of affairs continued for a long time, evidence of these existing facts and the manner in which the language was adopted in the document in respect thereto will certainly have to be allowed. All these facts will really act as an estoppel on the vendee from claiming that the sale deed really conveyed title to him and was not a mortgage: A.I.R. 1962 Manipur 45.

A mortgage by deposit of title deeds, being an oral transaction, does not require any writing; but if the parties contemporaneously enter into a contractual agreement in writing as an integral part of their transaction which by itself is an operative and not merely evidential instrument; in order to decide whether the instrument is operational or evidentiary, the Court may admit evidence contemplated

under S. 92, proviso (6): A.I.R. 1994 Guj. 153 (S. B.).

Where a document on its face constitutes a mortgage, and the terms in the bond clearly indicate that the transaction was that of a usufructuary mortgage and not an absolute sale, oral evidence of subsequent events would not be admissible to prove the contrary. Proviso (6) of S. 92 can only be resorted to where there is any ambiguity in the document itself, that is to say, where there is any difficulty in the construction of the language of the document. In a case where the language of a document is plain and unambiguous, there is no room for examining the transaction by reference to subsequent events: A.I.R. 1957 Pat. 126: 1956 B.L.J.R. 83.

Where one rent note created tenancy in favour of one tenant and the other, executed shortly thereafter, in favour of that tenant and another, and there was nothing in them to indicate that the second note had terminated the first tenancy, *held*, it could not be concluded that they were not two separate tenancies in two portions of a single shop divided by the landlord; no oral evidence contrary to the two notes was admissible: (1993-1) 103 Punj.L.R. 291.

Where there was ambiguity in the lease deed as to whether the lease was only of land or with the building thereon, *held*, in the facts and circumstances of the case, oral evidence could be considered in terms of proviso (6) to S. 92 in order to find out the subject-matter of lease: A.I.R. 1994 Pat. 91.

Agreement by Hindu father on behalf of minor son to purchase property—Agreement reduced to writing—Suit for rescission of contract—Defendant pleading that contract was also on behalf of the entire joint family—Plea amount to variation or addition to terms of agreement—Not within proviso (6)—Defence *held* barred by S. 92: 1966 Mah.L.J. 446: (1966) 68 Bom.L.R. 891.

Contract between Board and plaintiff to carry all works of construction during time specified—Contractor also bound to construct original work of value of Rs. 5,000—Contractor doing repair works of value of more than Rs. 5,000—Limit does not apply to repair work and no sanction is required for such work which is covered by contract which is valid—Work *held* referable to contract and not subsequent agreement of plaintiff giving consent to do repair work—Applicability of S. 92, proviso (6), in matter of construction of the contract: 1969 Jab.L.J. 304: 1968 M.P.L.J. 425.

The Ruler of erstwhile Chamba State had, by a deed, made an inam grant of certain land alongwith Namasi in favour of *G* and her son *D*. During regular settlement operation, the cultivable land granted under the deed was mutated in the ownership of *D*, but Namasi was not mutated in his name and it was recorded as owned by the State Government. The application to record Namasi in his name was dismissed by the Settlement Officer on the ground that grant did not include any area in Namasidhar forest. The appeal was also dismissed. In declaratory suit filed in Civil Court, the heirs of the grantees produced the deed of grant dated 2nd May, 1893, purported to bear signature of the Maharaja, and also produced oral evidence. The deed of grant was nearly 70 years old when tendered in evidence. The respondent, did not lead any evidence to prove that the deed did not bear the signature of the Maharaja and was not properly executed. The grantees also produced the evidence that during the State regime, forest had not been measured and that, therefore, in the grant made by the Ruler, details of the forest area granted were not given and only the name of the forest was specified. *Held*, on facts that an inam grant was made by the Ruler and besides cultivable land Namasidhar was also granted under the deed.

When nearly 70 years old deed was produced in evidence by the heirs of the grantees, it was produced from proper custody and a presumption arose under S. 90 that the deed bore the signature of the ruler and that it was duly executed. The presumption was strengthened by the evidence of the witnesses. Further, a deed of grant is to be interpreted and construed according to the plain and the ordinary meanings of the words used therein. As the deed contained the words, 'alongwith Namasi' after the description of the cultivable lands, those words indicated that besides cultivable land, Namasi was also granted. Though the word 'namasi' was vague and did not by itself lead to the inference that any area, in Namasidhar forest, was granted but that ambiguity about 'namasi' was a latest one and extrinsic evidence was admissible, under proviso (6) of S. 92, for resolving the ambiguity and for showing that the word Namasi related to some existing state of things. It is also

settled rule of construction, that for clearing ambiguities, in ancient documents, resort may be had to any contemporaneous usage: A.I.R. 1966 Him. Pra. 54.

20. Miscellaneous.—Where the drawer of a promissory note mentioning consideration therefor as cash received for family and business expenses pleaded that the consideration therefor was in fact the price for the land sold to him by the drawee which on acquisition by the Government amounted to failure of consideration and rendered the drawee not liable to pay under the note, *held*, S. 92 was no bar to the plea or its proof by the drawer on whom the burden of proof lies; on facts, burden not discharged: (1994-1) 114 Mad.L.W. 151.

Where a rich lady in affluent circumstances executed a mortgage of a shop owned by her in Ludhiana for a meagre amount of Rs. 5,000 and sued for its redemption wherein the occupant contended that it was a sham transaction to camouflage what in reality was meant to let out the shop on rent to him as a tenant for which he had paid rent and the purported mortgage money was only *pugree*, *held*, the Courts below erred in decreeing the suit on the ground that the defendant had adduced no documentary evidence of tenancy or payment of rent; it is unconscionable that the lady would ever have provided documentary evidence contrary to her own stand: (1988-1) 93 Punj.L.R. 478.

Where terms and conditions for opening a cash credit account with the Bank were reduced in writing, *held*, the document so written and executed constituted the repository of the parties' rights and obligations; as no variation thereof was pleaded by the Bank, Ss. 91 and 92 completely prohibit adduction of any evidence except the document itself as proof of its terms: A.I.R. 1976 Del. 115.

Contract concluded by tender and acceptance followed by signing of printed form contract—Breach—Suit for damages—Plea of non-liability—Tender and acceptance—Admissibility in evidence—If barred. *See* (1974) 1 M.L.J. 8.

Where a licence to produce and supply electricity was, under the rules, to be granted by notification in the Official Gazette, and the licence agreement was executed after such notification, *held*, a subsequent 'interpreting statement' by both the parties clarifying that the licence would be deemed to have commenced on the day when the notification was published in the Gazette was not hit by S. 92 it amounted to a clarification of an ambiguity such statements donot always change the meaning of the word or phrase. [A.I.R. 195 S.C. 15, Foll.]: A.I.R. 1975 S.C. 32: (1975) 1 S.C.C. 199: (1975) 2 S.C.R. 42.

Where the Court is merely seeking to construe a registered document purporting to give certain lands by the elder brother to the younger brother for maintenance for himself and his lineal male descendants and finds it to be partition deed, *held*, it did not involve contravention of S. 92: A.I.R. 1979 S.C. 1880.

Where by a registered partition deed, some of the properties were divided and some others were kept joint, *held*, none of the parties thereto can be permitted to modify, add to o substract from the terms of the agreement by pleading an oral arrangement: A.I.R. 1975 Pat 336 (D.B.).

Issue of commission for examination o interrogatories of council of a deceased party in Pakistan—Evidence sought to be adduced by interrogatories not admissible under Ss. 9 and 127, Evidence Act and as being opposed to defendants' own pleading—Court acts without jurisdiction: A.I.R. 1963 Punj. 27.

Whether a particular place in a route is o is not covered by a permit has to be determined by the Transport Authority by having recourse to the permit itself. Oral admissio by the operator on this matter is inadmissible unless he is entitled to give secondary evidence of the contents of the permit. Such admissions given in ignorance of the legal rights of the operator are not conclusive proof of the matters admitted by him, nor do the operate as estoppel against him: 1967 Raj.L.W 468: I.L.R. (1966) 16 Raj. 682: A.I.R. 1967 Ra 138.

An oral agreement took place on 22n February, 1095 by which the annual patta payable in cash for the holding under th pattomchit of 2nd August, 1082 was agreed be paid partly in kind, *held*, the main terms the contract were not contradicted or varie A change was made on the mode of discharg of the obligation to suit the convenience of t parties. Instead of the whole pattom bei paid in money as stipulated in the origin document, a portion of it was commuted in paddy at the then prevailing rate and ma payable by the lessee. The agreement wou

not offend against the provisions of S. 92. *Held*, further that pattomchit of 2nd August, 1082 being for a specified period of years and that period having expired before the date of the oral agreement, S. 92 could have no application at all: I.L.R. (1955) Trav.-Co. 106: 1955 Ker.L.T. 1: A.I.R. 1955 Trav.-Co. 69 (F.B.).

Transaction contained in more than one document—Documents should be read and interpreted together—Loan secured from Bank—Letter, promissory note and deed of hypothecation executed in favour of bank by three defendants of which *B* was one—*Held*, all documents together satisfied conditions of S. 126 and that *B* was surety and not co-obligant—S. 92 of Evidence Act did not apply: A.I.R. 1965 S.C. 1856.

Statement of fact in a written instrument, if open to contradiction. *See* I.L.R. 1 Luck. 160: A.I.R. 1926 Oudh 273.

Contract of Insurance—Nature of evidence to show that terms of policy does not represent true intention can be adduced: (1969) 1 Comp.L.J. 153 (Cal.).

Intention of parties—Fire Insurance Policy—Description of building contained in policy, vague and not exhaustive—Oral evidence by agent explaining intention of parties while filling proposal form neither contradicting, varying, adding to or subtracting from terms of policy, not excluded by S. 92: A.I.R. 1965 All. 561.

Where a bond declares that money is to be repaid with interest at a certain rate, an oral contract to the effect that no interest is to be paid but the person is to be in possession of a certain piece of land and to pay himself the interest out of the usufruct cannot be proved: 122 I.C. 894 (2): A.I.R. 1930 All. 440. *See* also 1936 A.M.L.J. 107.

Oral evidence may be let in to prove an agreement to pay interest though there is mention of such an agreement in a balance struck in the creditor's book: A.I.R. 1932 Lah. 552.

Where, in a written agreement between a principal and agent, there was a term that the parties would be at liberty to reduce the rate of commission, by mutual consent, and the parties subsequently reduce the rate of commission, oral evidence of such reduction of commission by mutual consent would be admissible in evidence. S. 92 does not bar the admission of such evidence, because what is done is in pursuance of and in compliance with the original agreement or contract of agency and not to vary or modify it: 224 I.C. 273: A.I.R. 1946 All. 489.

Nature of document—Determination—Evidence—Document in respect of lands styled as dakhal—Document executed partly due to love and affection towards vendees and partly for expenses incurred by vendees in respect of their *archakatwam* service and *paditharamulu*—Document is only partly sale deed and partly settlement deed—Vendees made co-accused with vendor in proceeding under S. 62—Petition filed by vendees in enquiry before authority under Act for fixing stamp duty payable on that document—Such petition is not inadmissible in such proceeding by virtue of S. 92, Evidence Act: 1970 Cr.L.J. 276 (Andh. Pra.).

It is doubtful whether evidence is admissible in the case of consent decrees to explain the ambiguity. [A.I.R. 1927 Mad. 911, Ref.]: 144 I.C. 95: A.I.R. 1933 Mad. 516.

Where an agreement of partnership is silent as to the liability to pay income-tax due in respect of the profits of the partnership, S. 92, Evidence Act would not prevent the partners from proving that the intention was that the tax should be paid on the individual profits of the partners and not on the profits of the business. Any ambiguity in the document would be removed by the evidence of the conduct of the parties after the agreement: A.I.R. 1952 Pat. 33.

Income-tax assessment proceedings—Income-tax Officer—Right to go behind recitals in registered document as to consideration: 1944 I.T.R. 458.

There is no reason in S. 92 why the fact whether in case of a joint contract both or either of the workmen have actually, or constructively received all or part of the advance should not be proved: 44 M.L.J. 53: A.I.R. 1923 Mad. 184.

Oral evidence regarding a verbal agreement whereby the time of repayment is extended and the mode of repayment is changed, ought to be excluded: A.I.R. 1930 All. 721 (F.B.) (oral agreement to extend time for mortgage inadmissible); to explain meaning of words used in document: 93 I.C. 193: A.I.R. 1926 Nag. 301; agreement varying terms of sale deed in respect of easement (latrine): 96

I.C. 276; as between lessor and lessee: 24 All.L.J. 548: A.I.R. 1926 All. 445. Proof of condition precedent to sale deed taking effect: I.L.R. 5 Rang. 636: A.I.R. 1928 Rang. 47. But *see* 1930 All.L.J. 1066: A.I.R. 1930 All. 824. Where oral evidence to show that the document was not to take effect forthwith as mentioned in the document was held inadmissible; oral evidence to prove discharge of debt admissible: (1925-26) 30 Cal.W.N. 710: A.I.R. 1926 Cal. 906; 42 Cal.L.J. 582: A.I.R. 1926 Cal. 170; 44 Cal.L.J. 449: A.I.R. 1927 Cal. 27. But *see* (1938) 2 M.L.J. 469 (P.C.) *contra* (discharge by part-payment and partly by remission). *See* also I.L.R. 6 Rang. 191: A.I.R. 1928 Rang. 144; A.I.R. 1930 All. 721 (F.B.).

Registered maintenance deed in favour of Hindu widow—Subsequent oral arrangement putting widow in possession of land to be held for life in lieu of maintenance—Evidence of—Admissibility. *See* 24 Mys.L.J. 115.

Document in favour of two persons—Oral evidence to prove one of them alone is entitled to the amount is admissible: A.I.R. 1929 Nag. 91. When a loan is evidenced by a document, oral evidence is not excluded to show what the purpose of the loan was and especially when the document is silent on the point. By such oral evidence the terms of the document are not varied: 70 Cal.L.J. 201: A.I.R. 1940 Cal. 137.

Document silent as to interest of two joint transferees—Evidence of subsequent conduct is admissible: A.I.R. 1930 Mad. 690.

Oral evidence is admissible to prove that a debtor under a hundi, upon which the suit is based compounded with his creditors including the payee under the hundi by agreeing to pay them 12 annas in the rupee in full and final settlement of their claims: A.I.R. 1929 Sind 153. Promissory note can be proved to be conditional: I.L.R. 50 All. 754: A.I.R. 1928 All. 289.

Exclusion of oral evidence by U.P. Agriculturists' Act—Effect of: 1958 All.L.J. 436.

Suit for declaration that certain properties were joint family properties of the plaintiffs and their deceased father and their father had no right to dispose of the property by will—Documents executed by the father reciting that there was in fact no property of the joint family—Admissibility of evidence to contradict the recital in the documents was not precluded by S. 92 as the dispute in the suit did not arise between the parties to the documents but between person who claimed under the execution of the document: (1963) 3 S.C.R. 22: A.I.R. 1963 S.C. 1.

Maintenance grant by Hindu husband in favour of wife—Condition as to chastity imposed by Hindu Law—Same not mentioned in deed—Enforcing condition as to chastity whether amount to violation of the provisions of S. 92: 9 Pat.L.T. 397: A.I.R. 1938 Pat. 375.

Suit on money bond—Provision for repayment in cash—Plea that payment should be made by medical services to be rendered—Not open—Evidence to prove plea not admissible: 1936 A.M.L.J. 107.

Written contract—Plaintiff to supply *bhusa* at certain stations, in certain quantities at certain period—Agreement containing clause that non-supply of wagons not to be an excuse for non-performance—Oral agreement that Government would supply wagons—Admissibility. *See* A.I.R. 1957 Punj. 141.

Where certain terms and trade practices emanating from an agreement falling within the mischief of the Monopolies and Restrictive Trade Practices Act were clear and decisive and their meanings were unambiguous, *held*, no oral evidence could be permitted to deduce their meaning or to vary them; Ss. 91 and 92 were clearly attracted: A.I.R. 1977 S.C. 1285: (1977) 3 S.C.C. 227: (1977) 3 S.C.R. 455.

Bye-laws of East India Jute & Hessian Exchange Ltd. requiring that terms of contract are to be in writing and in the prescribed form *i.e.*, Bought and Sold Notes—Difference in Terms of Bought and Sold Notes—*Held*, for finding out the contract relating to arbitration the Court cannot go outside the terms of the said Notes and, thus, no evidence, other than that afforded by those notes, could be looked into for the purpose of finding out the terms of the agreement: A.I.R. 1971 S.C. 2289.

While considering whether a particular trade practice set out in an agreement has or may have, the effect of preventing, distorting or restricting competition so as to constitute 'restrictive trade practice' which has to be judged in the light of various relevant considerations which involve contradicting, varying, adding to or subtracting from the terms of the agreement, *held*, Ss. 91 and 92 are not attracted: A.I.R. 1979 S.C. 798.

93. Exclusion of evidence to explain or amend ambiguous document.—When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

Illustrations

(*a*) *A* agrees, in writing, to sell a horse to *B* for "Rs. 1,000, or Rs. 1,500".

Evidence cannot be given to show which price was to be given.

(*b*) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

When there was no ambiguity in terms and conditions of letters of acceptance that earnest money was to be adjusted, *held*, it was not permissible to adduce oral evidence in respect thereof: (1985) 1 W.L.N. 780 (Raj.).

Where execution of what purported to be a pre purchase agreement was admitted by the defendant but he was consistent throughout the trial that he had not taken the truck on pre-purchase and had given cogent explanation therefor and having a ring of truth, *held*, the defendant's evidence was not hit by Ss. 91 and 92: A.I.R. 1978 All. 123 (D.B.).

Where one of the parties to a deed of hypothecation contended despite opposition by other parties, that the survey numbers of the lands in the deed were erroneously mentioned and sought to adduce oral evidence to correct them, *held*, the party having entered into a wrong contract thereby representing to the other parties to the deed that he was bound by its terms is not entitled as against them to give evidence that in fact he intended something else; unless that were so, there would be no reality in written contracts; oral evidence was barred by S. 92 : A.I.R. 1972 Mys. 184.

Section 93—Notes.

Before S. 93 of the Evidence Act would apply, it must be shown that there was a latent ambiguity. S. 93 cannot possibly be a bar for showing how the challan filed alongwith an election petition is to be interpreted, when there is no ambiguity in the challan at all: A.I.R. 1958 J.&K. 54.

Where language is defective, oral evidence admissible: 1921 Mad.W.N. 519: A.I.R. 1921 Mad. 498. *See* also 80 I.C. 944: A.I.R. 1925 All. 162 I.C. 797: A.I.R. 1936 Pat. 275.

Where the language used in an instrument describing the property, which is the subject-matter, is not on its face ambiguous or defective and is plain in itself but is some what unmeaning in reference to existing facts, evidence is admissible to show to which property it was meant to apply: 76 Cal.L.J. 183: A.I.R. 1943 Cal. 460.

Opinions and intention of Government officers not legitimate materials for construing a grant. *See* 29 M.L.J. 289.

Kabuliyat—Oral evidence to explain—Interest—Rate of prior transactions—Custom. *See* I.L.R. 41 Cal. 342: (1913-14) 18 Cal.W.N. 582. *See* also 22 I.C. 844.

Patent ambiguity—Hand note—'Interest at $2^1/_2$ percent'.—Evidence admissible to show that the rate of interest was per mensem: (1909-10) 14 Cal.W.N. 1100: 14 Cal.L.J. 97: 62 I.C. 702.

Ambiguity—Oral evidence as to contents of documents—Specific Relief Act, S. 31. *See* 130 P.L.R. 1910: 8 I.C. 554.

Evidence as regards identity of property leased admissible: 20 All.L.J. 377.

Where the parties described the property as '1 acre of front land' which clearly meant 1 acre of land lying on the northern side of the Engineering College Road, it is difficult to contend that the land intended to be sold was on the extreme northern side of the entire property; the law of contract respects contractual sanctity of contract and gives effect to the reasonable expectation of an honest man; law upholds rather than destroys apparent contracts; they are not to be readily declared invalid for uncertainty or vagueness; the Court must give effect to the parties' ascertainable and determinative intention; the contract will become void only when its terms are vague, uncertain and it cannot be made certain; mere difficulty in interpretation is not synonymous with vagueness; business agreements should be construed fairly and broadly so as to promote business efficacy; as there was no reason

94. Exclusion of evidence against application of document to existing facts.—When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

Illustration

A sells to *B*, by deed, "my estate at Rampur containing 100 bighas". *A* has an estate at Rampur containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

---

for mistake as to the identity of the property intended to be sold, *held*, S. 93 was not attracted: A.I.R. 1990 Ker. 198.

Appointment of members of notified Area Committee—Latent ambiguity in the name of State Government notification—Extrinsic evidence to prove intention of Government—Admissibility: 1964 B.L.J.R. 890: A.I.R. 1965 Pat. 174.

Where two deeds on their face appear to be separate transactions, another agreement which was not evidenced by any writing cannot be proved to show that the deeds, though apparently two separate transactions were agreed to be treated as one: 175 I.C. 813: A.I.R. 1938 Pat. 242.

Clear language should be used in arbitration agreements which will have the effect of ousting the jurisdiction of the Court. If the language of the agreement is not sufficiently clear, it is not permissible to strain the language and supply words to make an indefinite agreement definite, so that the jurisdiction of the Court may be ousted and the disputes adjudicated by arbitration: A.I.R. 1959 Cal. 430.

Plea based on construction of letter—Extrinsic evidence for construction of document—Admissibility. *See* A.I.R. 1958 S.C. 512.

Where the point in dispute is as to the meaning of a particular word in the document, evidence may be admitted to show in what peculiar sense that particular word was used, and extrinsic evidence including the evidence regarding the subsequent conduct of the parties is admissible to determine the effect of the instrument as well as the intention of the parties: 1969 Raj.L.W. 473: I.L.R. (1969) 19 Raj. 340: A.I.R. 1970 Raj. 36.

Where in the remuneration clause of a deed of contract for the transport of foodgrains, the figure of minimum remuneration to be paid to the contractor was left blank and in suit for damages for breach of contract, the contractor (plaintiff) gave different oral versions regarding filling of the blank space in the remuneration clause, *held*, apart from destroying his own case the contractor's oral evidence to fill in the aforesaid blank space was inadmissible in evidence under S. 93: (1988) 2 Cal.L.T. (H.C.) 136 (D.B.).

Where a sale deed for agricultural lands by the parties' inadvertent mutual mistake did not mention two *khasra* numbers and the parties by a subsequent agreement rectified the mistake, *held*, the subsequent agreement was not hit by the prohibition contained in S. 93; if the parties could get the mistake rectified through the Court under S. 26 of the Specific Relief Act, there can be no bar to their doing so by mutual agreement outside the Court: A.I.R. 1988 P.&H. 88: (1987-1) 91 Punj.L.R. 610: (1988) 1 Rev.L.R. 307.

Where it was not possible to infer from a mere perusal of the notice as to which of the two powers of attorney was intended to be cancelled, *held*, no evidence could be given to show its meaning or supply its defect: (1977) 13 Del.L.T. 369.

Section 94—Notes.

Document Clear and Unambiguous—Section does not apply in case of misdescription: 104 I.C. 736: A.I.R. 1928 Nag. 4.

As to oral evidence of one not a party to document. *See* (1955) 57 Punj.L.R. 1915; 16 O.C. 213: 21 I.C. 429.

Where the language of a document like a deed of compromise is clear and applies without difficulty to the facts of the case, no extrinsic evidence can be admitted for the purpose of affecting its interpretation: 40 I.C. 491: 4 Oudh L.J. 313.

Contemporaneous circumstances and subsequent conduct of the parties are not admissible when there is no ambiguity in the deed

and legal construction can be put on it: 195 I.C. 242: A.I.R. 1941 Oudh 507.

Sale deed—Language plain—Mistake in boundaries—Area described correctly—Extrinsic evidence—Admissibility: 150 I.C. 363: (1934) 36 Punj.L.R. 61. On this section, *see* (1901) 3 Bom.L.R. 768; 1915 Mad.W.N. 325; I.L.R. 38 All. 103; 41 M.L.J. 475; 1939 All.W.R. (H.C.) 173: I.L.R. (1939) All. 309: A.I.R. 1939 All. 231.

Oral evidence to show that one of the executants of a bond signed it only as a surety is not admissible: I.L.R. 5 Rang. 168: A.I.R. 1927 Rang. 199.

S. 94 does not prevent a party to a document, from proving that both the parties to the document were under a mistake of fact as to the contents of the document when they signed it: 122 I.C. 493: A.I.R. 1930 Lah. 446.

Where in the case of a sale deed, it is not the seller alone who is trying to get out of the bargain but the seller and the purchaser both agree that the intention was to enter into the deed land bearing different *khasra* numbers, and that the mistake was mutual, it is open to the parties to produce evidence to show what was intended to be sold and purchased. S. 94 is not applicable in such circumstances: (1940) 42 Punj.L.R. 222: A.I.R. 1940 Lah. 236.

In construing the terms of a security bond, the language of which is plain and applies to existing facts and in which no ambiguity or inconsistency of the kind dealt with by Ss. 95 to 98 exists, it is not permissible to rely on the surrounding circumstances under which the bond came to be executed. S. 94 of the Evidence Act lays down a rule of interpretation of the language of a document when it is plain and applies accurately to existing facts. It says that evidence may be given to show that it was not meant to apply to such facts. When a Court is asked to interpret a document, it looks at its language. If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning. Sometimes when it is said that a Court should look in to all the circumstances to find an author's intention, it is only for the purpose of finding out whether the words apply accurately to existing facts. But if the words are clear in the context of the surrounding circumstances, the Court cannot rely on them to attribute to the author an intention contrary to the plain meaning of the words used in the document.

Where a surety bond stated that the defendant has been directed by the Court to furnish security to produce and place at the disposal of the Court the property specified in the schedule and that bound the surety to the Court in that the said defendant shall produce and place at the disposal of the Court, when required, the property (certain bills) or the value of the same.

Held, that the expression 'when required' could only mean 'when required by the Court' and the obligation undertaken by the surety did not arise at all till the Court made the requisition. It was well settled that a surety bond had to be strictly construed and a strict construction of the bond in question led to the only conclusion that demand of the Court on the judgment-debtor and a default made by him were necessary conditions for the enforcement of the bond against the surety. The words 'when required' cannot be confined only to a situation when the property could be produced or the value of the same could be lawfully paid by the judgment-debtor so as to exclude from its scope a case where the judgment-debtor had converted the property into cash and misappropriated it and had become insolvent, on the ground that it would be an empty formality to call upon him to do so in such a case. To accept such a construction of those words would make them unnecessary. To retain those words and yet to give them such meaning, it would be necessary to qualify them by adding 'if the bills could be produced and when the money could lawfully be paid by the judgment-debtor'. But the Court could not add those words because without adding them full meaning could be given to the words 'when required': 1963 M.P.L.J. 738: 1963 Mah.L.J. 730: (1964) 2 S.C.R. 152: A.I.R. 1964 S.C. 859.

Where the language of a document is plain and unambiguous and correctly applies to existing facts, a party will not be permitted to say that the property referred to in that document was some other property. But where the recitals in a sale certificate though plain in themselves do not fit in with the admitted facts, *viz.*, the survey number, the names of the tenants and the area of the plot of land sold and a doubt arises that either the survey number or the names of the tenants and area given must be wrong, extrinsic evidence is admissible under Ss. 95 and 97 of the Evidence Act: I.L.R. (1963) Cut. 189: 29 Cut.L.T. 666: A.I.R. 1964 Ori. 63.

95. Evidence as to document unmeaning in reference to existing facts.—When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

Illustration

A sells to *B*, by deed, "my house in Calcutta".

A had no house in Calcutta, but it appears that he had a house at Howrah, of which *B* had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the house at Howarh.

Section 95—Notes.

Though the sale deeds containing recitals that the property belongs to the vendors is not admissible under S. 13, they are admissible under Ss. 95 and 96 to explain the expression used in the documents that property is the vendor's family property: 1914 Mad.W.N. 779: 26 I.C. 747.

Release deed conditional—Extrinsic evidence of claim released admissible. *See* I.L.R. 34 Mad. 158: 20 M.L.J. 383; 21 I.C. 69.

Where the recital in the contract as to the names of the transferees in reference to existing facts was unmeaning in the context of earlier recitals and the parties' case, *held*, it is permissible for the Court to allow oral evidence to ascertain whether transfer was made to a single person having two names or two different persons: A.I.R. 1982 N.O.C. 228 (All.).

Original document in possession of defendant—Document referred to in plaint but not produced—Secondary evidence admissible. *See* 37 I.C. 794.

Contract—Construction—Offer kept open 'until' and 'up to' a certain date—Oral evidence inadmissible to explain: (1917-18) 22 Cal.W.N. 416: 44 I.C. 305.

Where the second hand note purported to have been executed for a cash consideration of Rs. 4,700 which the Court found was not executed for a fresh cash consideration but only in lieu of the previous dues of the hand note, *held*, being a clear case of latent ambiguity, oral evidence of circumstances and the existing facts was admissible to show the correct factual position: A.I.R. 1972 Pat. 87: 1971 Pat.L.J.R. 358: 1971 B.L.J.R. 784 (D.B.).

Where there is any doubt about the true construction of the security bond, the bond must be considered in the light of the order directing the security to be given: I.L.R. 61 Cal. 890: A.I.R. 1934 Cal. 569.

Where the surety bond having regard to the nature of the suit and circumstances in which the Court called upon the defendant to furnish security has no meaning, it is permissible to look into the surrounding circumstances and the order of the Court pursuant to which the bond was executed to properly construe its terms: A.I.R. 1959 Mys. 165.

A security bond must be strictly construed according to its own terms when there is no ambiguity in the terms and if there is possible contradiction in the terms of the security bond, S. 95 of the Evidence Act allows reference to the antecedent circumstances and the Court can consider the bond in the light of the order directing the security to be given. [A.I.R. 1914 Cal. 569, Ref.].

A security bond given in favour of the Court can be proceeded with in execution by the decree-holder even without an assignment. The executing Court even if it be a Court to which the decree is transferred for execution, can proceed with the enforcement of the security bond without an assignment or a specific direction from the Court in whose favour the security bond was executed: (1970) 2 M.L.J. 636: (1970) 83 Mad.L.W. 731.

Security bond—Interpretation of—Where words of terms of bond ambiguous, bond to be construed in the light of order directing security to be given: A.I.R. 1965 Cal. 242.

Transfer by mortgagee of mortgaged property—No mention in deed that only mortgage rights were intended to be sold—Latent ambiguity to remove which evidence can be given: 118 I.C. 682: A.I.R. 1929 Nag. 267.

Under Ss. 95 and 98 evidence can be allowed to show interest is payable monthly when document is silent: A.I.R. 1930 Lah. 144. Where just prior to the expiration of three years from the date of the previous pronote, the defendant executed another receipt for the amount already received, evidence is admissible to show that the receipt referred to the original consideration: I.L.R. 8 Luck. 195: A.I.R. 1933 Oudh 80.

96. Evidence as to application of language which can apply to one only of several persons.—When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to.

Illustrations

(*a*) *A* agrees to sell to *B*, for Rs. 1,000, "my white horse". *A* has two white horses. Evidence may be given of facts which show which of them was meant.

(*b*) *A* agrees to accompany *B* to Haidarabad. Evidence may be given of facts showing whether Haidarabad in the Dekkhan or Haidarabad in Sind was meant.

97. Evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies.—When the language used applies

---

Compromise decree—Conflict between description of area and measurements—Power of executing Court to ascertain property. *See* A.I.R. 1958 Punj. 13.

Place of payment or presentment of negotiable instrument should be precise, definite and certain—The maker must incorporate it in the face of the bill: A.I.R. 1966 Mad. 297.

Deed—Construction—Entire land sold to two persons—Sale deeds mentioning boundaries and extent—Difference between boundaries and extent—Duty of Court—Intention of parties to be seen—Test for identification of grant indicated. *See* (1969) 82 Mad.L.W. 142.

Order of allotment referring to accommodation situated at particular place, though in fact the accommodation is situated at another place—Parties aware which accommodation was meant—Under S. 95 allottee can adduce evidence to prove to which accommodation the order relates—Slight error in location will not make order invalid: A.I.R. 1964 All. 395.

It is settled law that in a private sale, the area within the boundaries specified prevailed over the area, on the application of the principle of *demonstration falsa non noce* (false description does not vitiate). Even in the case of sale certificates (issued in Court sales), in the first instance the area within the boundaries must be held to prevail over the extents. But, under Ss. 95 and 97 of the Indian Evidence Act, the parties could lead extrinsic evidence to show what was the true state of affairs, that is to say, whether the whole land lying within the boundaries described was taken possession of and enjoyed in fact or only the extent specified was taken possession of and enjoyed: (1965) 2 An.W.R. 366.

Where there is a conflict between the area and the boundaries as described in a deed, *held*, it is the description of the boundaries, and not the area, which would prevail. [(1913) 18 Cal.L.J. 541; A.I.R. 1934 Cal. 851; A.I.R. 1948 P.C. 207, Foll.]: A.I.R. 1979 Cal. 50.

Where measurements of land were given in minute details and the boundaries were also mentioned with far greater precision, and nobody contended that there was difficulty about the boundaries, *held*, the law is well settled that even if there is some discrepancy about the actual area, it is the boundaries which prevail: A.I.R. 1971 Andh. Pra. 74: (1970) 1 An.L.T. 192 (D.B.).

Section 96—Notes.

If the language of a document directly describes two sets of circumstances but could not have been intended to apply to both, evidence may be given to show to which it is intended to apply: 36 I.C. 7: 10 Bur.L.T. 245. Promissory note bearing both English and Malayalam dates—Inconsistency—Evidence as to date of note—Admissible. *See* (1941) 1 M.L.J. 502: A.I.R. 1941 Mad. 587.

Where a promissory note was made in favour of the Pujari as well as the Temple and the suit was filed by the Executive Officer of the idol, and pleadings and evidence both clearly indicated that the promissory note was only in favour of the temple and not the Pujari in his individual capacity, *held*, S. 96 was attracted and oral evidence was not barred: (1993-2) 112 Mad.L.W. 377: (1993) 2 M.L.J. 469 (D.B.).

Section 97—Note.

Latent ambiguity—Mortgage deed—Ambiguity in the description of land—Evidence *aliunde* to clear up ambiguity is admissible: 43 I.C. 721. *See* also 57 I.C. 2; 58 I.C. 67: A.I.R. 1920 Lah. 322; I.L.R. 18 Bom. 283; I.L.R. 30 Mad. 397.

---

partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

Illustration

A agrees to sell to *B*, "my land at *X* in the occupation of *Y*". *A* has land at *X*, but not in the occupation of *Y*, and he has land in the occupation of *Y*, but it is not at *X*. Evidence may be given of facts showing which he meant to sell.

98. Evidence as to meaning of illegible characters, etc.—Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense.

Illustration

A, a sculptor, agrees to sell to *B*, "all my mods". *A* has both models and modelling tools. Evidence may be given to show which he meant to sell.

99. Who may give evidence of agreement varying terms of document.—Persons who are not parties to a document, or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

Illustration

A and *B* make a contract in writing that *B* shall sell *A* certain cotton, to be paid for on delivery. At the same time they make an oral agreement that three months' credit shall be given to *A*. This could not be shown as between *A* and *B*, but it might be shown by *C*, if it affected his interests.

100. Saving of provisions of Indian Succession Act relating to wills.—Nothing in this Chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (10 of 1865)[1] as to the construction of wills.

---

1. *See* now the Indian Succession Act, 1925 (39 of 1925), Pt. VI, Ch. VI.

Section 99—Notes.

This section is merely an enabling provision: I.L.R. 27 Mad. 329. Evidence by strangers to show real nature of transaction is admissible: 8 I.C. 501; I.L.R. 28 All. 473; 23 Mad.L.W. 664: A.I.R. 1926 Mad. 744; A.I.R. 1928 Cal. 253 (persons not claiming through settler can show that wakf was illusory).

The principle of S. 92 cannot be applied to cases where the dispute is between a party to a document and a third party. This position is made clear by S. 99 which permits a third party to lead evidence not only to vary but also to contradict or subtract from the terms of a document: (1974) 1 M.L.J. 146.

Section 100—Note.

[*See* also Notes 9 and 10, S. 68, *supra*].

The mode of proving a will is ordinarily not different from proving any other document except the special requirement of attestation set out in S. 63 of the India Succession Act; in the absence of suspicious circumstances surrounding the will's execution and on proof of testamentary capacity and signature of the testator as required by law as also his sound and disposable state of mind, the will stands proved; suspicious circumstances arise when the will appears to be unnatural, improbable or unfair or where the propounder takes a prominent part in execution of the will which confers on him substantial benefits, the propounder must remove the suspicion by clear and satisfactory evidence; the ultimate test is, however, the balance of probabilities. It is well recognised that as for proof of other documents so for proof of wills, it would be idle to expect proof with mathematical certainty; the satisfaction of the prudent mind is the test applicable to proof of will. [A.I.R. 1959 S.C. 443; A.I.R. 1964 S.C. 529; A.I.R. 1965 S.C. 354, Rel. on]: A.I.R. 1984 All. 66.

SUBJECT INDEX

A

ABSCONDING
inference from 79
relevancy of 183

ACCOUNT
what to imply 587

ACCOUNT BOOKS (*See also* BOOKS OF ACCOUNT)
corroborative evidence, nature of 585
entries in
—admission regarding 274
—evidentiary value 589
—when relevant 585
irregularity in accounts, effect of 588
proof of accounts 589

"ACCOUNT STATED"
meaning of 597

"ACCUSED OF ANY OFFENCE"
expression in Sec. 25, what to cover 391

"ACCUSED PERSON"
meaning of 324

ACT (*See also* EVIDENCE ACT)
provisions of Sec. 350, Cr.P.Code, if not to affect provisions of Sec. 33 of the 571
Sec. 25, scope and applicability 373
Sec. 26, scope and applicability 392
Sec. 27, applicability of 411
Sec. 27, enactment of, as rider and exception to Secs. 25 and 26 403
Sec. 27, if an exception to the rule laid down in Sec. 26 395
Sec. 27, repugnancy of, to Art. 20(3) of the Constitution 402
Sec. 27, scope of 403
Sec. 27, validity, if not to offend against Art. 14 of the Constitution 402
Sec. 30, scope and applicability 455
Sec. 31, scope 475
Sec. 32, clause (1), constitutional validity of 489
Sec. 32, clause (1), scope of 487
Sec. 32, clause (2), "course of business", meaning of 544
Sec. 32, clause (2) and Sec. 34 548
Sec. 32, exhaustiveness of 483
Sec. 32, provisions of, in the nature of exceptions 483
Sec. 32, scope and applicability 483
Sec. 32 and Sec. 33, relative scope of 486
Sec. 34, scope and applicability 585
Sec. 35, scope of 598
Sec. 45, scope 665
Sec. 50, scope and applicability 718
Secs. 56 and 57, scope 735
Sec. 60, scope 755
Sec. 63, scope and applicability 771
Sec. 64, object and principle 782
Sec. 65, scope and applicability 787
Sec. 67, scope and applicability 814
Sec. 68, applicability and scope 822
Sec. 73, scope 853

Sec. 74, scope 865
Sec. 78, scope 883
Sec. 80, scope 889
Sec. 86, scope 898
Sec. 90, applicability and scope 903
Sec. 91 and Sec. 92, scope and effect of 926
Sec. 91, scope and applicability 923
Sec. 92, applicability and scope 947
Sec. 92, applicability of, if only to parties to instrument or their representatives 956
Sec. 92, proviso (5) 981
Sec. 92, provisos, applicability 966
Sec. 92, *vis-a-vis* Sec. 115, if to be read together 957

ACT ACCIDENTAL OR INTENTIONAL
facts bearing on question whether, provisions as to, 262
facts bearing on question regarding, admissibility of, in evidence 262, 263

ADMISSION(S)
account books, entries in 274
application of S. 70 only to documents duly attested 848
by accused 286
by agent, recital in a document 281
by co-defendant 284
by conduct 272
by co-owner 283
by counsels, attorneys and pleaders 285, 480
by guardian, etc. 282
by landlord 285
by member of community 283
by parties to suits 279
by partner 283
by party interested in subject-matter 279
by party to proceedings or his agent 277
by person from whom interest derived 278, 293
by persons expressly referred to by party to suit 294
by persons in joint interest 282
by persons whose position must be proved as against party to suit 293
by predecessor-in-interest 283
by representatives-in-interest, if binding 306
by suitor in representative character 277
by witness 306
conclusive proof 152
conclusiveness of proof, estoppel 474
confession to Magistrate, if amounts to 304
conflicting with other evidence, conclusion by Court 268
definition of 267
evidentiary value of 299, 476
evidentiary value, onus, shifting of 480
execution of documents 848
facts admitted need not be proved 748
if are of no value once proved untrue 268
if not conclusive unless it amounts to estoppel 270
if substantive evidence of facts admitted 268
if to be clear and unambiguous 271
if to be proved against party making it 301
if to be read as a whole 480
if to be taken as a whole 281, 303
in civil cases, when relevant 311

in criminal case, use of, in compensation case 479
in evidence before Court 479
in F.I.R. 274
in ignorance of legal rights 479
in income-tax proceedings and records 273
in pleadings/written statement 479
—if to be read as a whole 287, 288
in previous litigation 289
in previous suit 478
—by plaintiff, if binding on him in fresh suit, unless rebutted 478
—made adversely, conclusiveness 478
judicial and extra-judicial, distinction 475
kinds of 475
meaning of 267
misapprehension, made under, binding nature of 477
of a person, when binding 269
of execution
—by party to attested document 848
—of gift-deed, if need not to be proved 849
—of mortgage bond by mortgagor 849
of mere signatures/thumb-impressions, if admission of contents of documents 276
of one co-plaintiff or co-defendant, evidence against other 552
of signature, denial of execution, effect 818
of signature/thumb-impression, if amounts to execution 818
on point of law, scope of 275
oral, as to contents of documents, when relevant 311
point in issue, best evidence of 476
previous, by party, use of, procedure regarding 309
proof and validity of documents 749
proof of, against persons making them, and by or on their behalf 296
recitals in documents, relevancy as to 279
regarding contents of documents 276
regarding landlord and tenant relationship 272
regarding relationship of husband and wife 292
shifts the onus of proof 480
statements by party or agent 277
statements falling under Sec. 32 when relevant 296
to be considered in totality 474
to be taken as a whole 281
value of 273
what is 475
what to contemplate under Sec. 70 848

ADMISSION AND CONFESSION
applicability of 303
distinction between 275
scope of 274, 275

ADMISSION BY CONDUCT
what amounts to 272

ADOPTION
oral evidence, reliability of witnesses 140
proof of 140

ADULTERY
proof of 47
—evidence required 145
—Hindu Marriage Act, Sec. 17(1)(*i*) 145
wife leading an adulterous life, given birth to an illegitimate child, proof 145

"AFFECTING HIMSELF AND SOME OTHER"
expression in Sec. 30, what to suggest 459

AFFIDAVIT(S)
evidence, appreciation of 9
Evidence Act, if not applicable to 8
filed in proceedings under Sec. 145, Cr.P.Code, if not admissible 9
if not to be treated as evidence 8
of a person not produced for examination in Court, if no evidence 9
of person, died subsequently, not cross-examined, inadmissibility of 485
sufficiency of, as evidence 259
sworn in foreign country, admissibility 9

AGENT
admission by, recital in document 281
party to proceedings or his, admission by, provisions as to 277

"AGREEMENT"
used in Sec. 25 of Hindu Adoption and Maintenance Act, applicability of 252

ALIBI
evidence of, relevancy 237
plea of, where not proved 238

ANCIENT DOCUMENT(S) 902
discretion of Court to draw presumption 907
evidentiary value of recitals in documents 919
nature and extent of presumption 909
presumption in case of copies 912
presumption in case of will 915
presumption in respect of documents bearing only mark or seal 902

"ANY FACT"
if to include discovery of witness, within the meaning of Sec. 27 429

ARBITRATION PROCEEDINGS
strict rules of Evidence Act and of procedure which is followed in Court, if not applicable to 10

ARBITRATOR(S)
duties of, to conduct arbitration proceeding according to fundamental rules 10
if not a Court 14

"ASSERTED"
as used in Sec. 13(*b*), meaning and interpretation of 253

"ASSERTION OF RIGHT"
when amounts to 251, 253

ATTESTATION
account books, requirement of 825
attestator beneficially interested, document valid, proof of execution 829
by mark, illiterate witness, effect of 824
document not required for, proof of 829
evidence of one attesting witness, out of two, sufficiency of 822
identifier, as attesting witness 829
of Will
—Registering Officer, if to be witness 829
—Sub-Registrar, when to be witness 829
point if not to be raised in second appeal 845
presence of attesting witness, due attestation 827
proof of, calling attesting witness, necessity 822

ATTESTATOR
who to be 828

ATTESTING WITNESS
person, who to be treated as 823
proof, where no attesting witness found 846

B

BAD CHARACTER
relevancy 734
BALLISTIC EXPERTS
See EVIDENCE
BATWARA KHASRA
admissibility of 624
BENAMI
proof of 47
BENEFIT OF DOUBT
accused entitled to, in matter of sentence as in matter of conviction 55
dying declaration not satisfactory, evidence not conclusive 53
evidence and proof, testimony of 53
guilt of accused, proof of facts 53
hindu marriage, no evidence that second marriage solemnised according to hindu rites, proof 139
importance of, in criminal trial 54
interpretation of 53
non-production of documents, effect 54
prosecution for offences under Secs. 395 and 412, I.P.Code, suspicion circumstance, delay in lodging F.I.R. 53
prosecution for rash driving, witness cited but not examined, acceptance of evidence 104
prosecution for selling adulterated milk, delay not explained 54
prosecution under Sec. 9(*a*), of Food Adulteration Act, reports of public analyst conflicting 54
theft of a silver waist cord, charge under Sec. 379, I.P.Code, effect of 55
BIRTH AND DEATH REGISTER
entries in, admissibility of 604
BODILY FEELING OR STATE OF MIND
facts showing existence of, provisions as to 257
BOND(S)
applicability of Sec. 68 to 826
attestation
—production of attesting witness, necessity of 827
—requirement of proof by law 826
BOOKS OF ACCOUNT
corroborative evidence, admissibility of as 596
entries in
—evidentiary value of 589
—relevancy of 585, 595
—who to prove 596
ledger, entries in, probative value of 596
non-production of documents to support entries 595
objection to admissibility 597
of firms, evidentiary value 596
"regularly kept", what to mean 588
what is 588
BURDEN OF PROOF
acceptance of gratification, presumption, nature and scope of 137
fact of dishonesty, if lies heavily on the prosecution under Sec. 218, I.P.Code 41

in motor accident claim cases, if lies on Insurance Company 92
right of tenant after redemption of mortgage 91

"BY STANDERS"
meaning of, Evidence Act, Sec. 6, illustration (*a*) 159

"BY WHICH"
interpretation of 251

C

CHANCE WITNESS(ES)
credibility of 121
interpretation of 121
requirement of, corroboration of evidence by independent evidence 122

CHARACTER (*See also* RELEVANCY)
as affecting damages, relevancy of 734
evidence of, conduct, state of mind 731
meaning of 734
what to include 734

CHILD WITNESS (*See also* EVIDENCE)
acceptance and reliability of 126
below twelve years, if competent witness 122
interpretation of 122
observations of Sessions Judge, value of 124

CIRCUMSTANTIAL EVIDENCE (*See also* EVIDENCE)
abandonment of possession, a question of fact 757
all circumstances leading to the conclusion of guilt should be fully and cogently established 36
appreciation of 36, 756
—basis of conviction, when to be made 756
cases based on, found proved, conviction 49
cases found not enough to convict accused 49
charge of dacoity, occurrence on a dark night, absence of corroboration 45
clandestine carrying of a liquid in tough rubber tube, proof of 50
combination of facts creating a net work 37
conditions for 37
consideration by Court, cumulative effect 38
conviction based solely on, when can be sustained 39
corrupt practice, in election 89
credibility of, if depends upon the impression created in the Court's mind 41
disciplinary action against public servant, finding of guilt 52
discrepancies and caution, accused previous convict, prosecution, conviction 41
election matters, standard of proof required 89
exclusion of 757
facts in issue indirectly inferred, and not directly perceived 42
if proximate to the principal fact, to consider by Court 34
in criminal trial, reliance on 43
in order to furnish a basis for conviction in a criminal case 39
intention or object of, accused, if to be judged from facts and circumstances of case 41
intention
—motive or knowledge, in criminal cases, if an important consideration 42
—surrounding circumstances and conduct of accused 41
interpretation of 33
material objects, weapons recovered not sent to ballistic expert, effect of 48
meaning of 33
mere suspicion, if not enough proof to convict accused 45
motive, if of great importance in a case of 170

murder
—by poisoning, nature of 51
—purely based on, motive for crime if of importance 177
—conviction, proof of 50
—proof of, recovery of body, if not essential 47
nature of proof required, some links missing in prosecution evidence, circumstances not sufficient to warrant conviction 40
not infrequently, indicates the truth more unerringly than direct testimony 38
peculiar excellencies and defects 36
proof of guilt of accused person, cumulative effect 42
recoveries and chemical evidence, nature of 52
recovery of weapon, reliability of 46
reliability of witnesses to prove particular circumstances 33
relied on to prove fact, circumstance must be proved 35
sufficiency of 43
tested and weighed like any other evidence 34
to sustain conviction, conditions for 36
trial for murder, appreciation of, opinion of doctor 45
value of, murder, evidence 45

CIRCUMSTANTIAL EVIDENCE AND DIRECT EVIDENCE
distinction between 33

CIVIL CASES
admission in, when relevant 311

CIVIL COURT
Railway claims tribunal, if not a 15

COLLATERAL OFFENCE
evidence of 257

COMMENCEMENT OF ACT 2

COMMISSION OF ENQUIRY
proceedings before, under J.&K. Commission of Enquiry Act, if not judicial proceeding 6

COMMISSIONER'S REPORT
interpretation of 32

COMPANY
whether bogus or real 47

COMPARISON
by Court
—opinion formed on, in absence of other positive evidence, if indecisive 856
—opinion of handwriting expert 855
—signatures for ascertainment of genuineness of document 856
by whom to be made 853
Court
—competency of, for 855
—entitlement of, for 854
—if to hesitate to base its finding on its own 855
direction to person to write words or figures for 859
evidentiary value of 856
of signature, writing or seal with others admitted or proved 852
opinion of handwriting expert, evidentiary value 853
power of Court with regard to 853

COMPENSATION
case of, if to be judged on merits 55

"CONCLUSIVE PROOF"
meaning and interpretation of 149
nature and scope of conclusiveness 135

CONCLUSIVE PROOF AND CONCLUSIVE EVIDENCE
distinction between 152
CONDUCT
agent acting nefariously, presumption from 176
of accused
—hearsay evidence, inadmissibility 180
—relevancy of 177
retracted confession, conviction of, corroboration in material particulars, necessity 177
tenant whether contractual or statutory, facts, evidence of continuation of tenancy 175
CONFESSION (*See also* RETRACTED CONFESSION & EXTRA-JUDICIAL CONFESSION)
acceptance of, in part 471
acceptance or rejection of 327
—as a whole 325
accused not questioned before recording, admissibility 454
admissibility of, extent of 316
admissibility, when no ground to reject 17
admission, when to amount to 319
after removal of impression
—caused by inducement 453
—caused by promise 453
—caused by threat 453
against co-accused, admissibility of 395
by accused in police custody, proof of, against accused 392
by child 320
by one accused, under joint-trial, use of, against co-accused 456
caused by inducement, threat or promise, when irrelevant in criminal proceedings 312
coercion or inducements, *locus standi* to complain 335
conflict between medical evidence and 328
conviction, on basis of, justification 330
corroboration
—necessity for 470
—requirement of 322
—variation between confessional statement and evidence in case, variation, if not material 354
delay in retraction, effect of 356
discovery of fact, leading to 389
duty of Court, reasonable circumstances to believe, search for 342
evidence of, admissibility 345
evidentiary value of 328
extra-judicial, corroborative evidence, proof 17
F.I.R. by accused
—containing, admissibility against makers 378
—containing, admissibility of, in evidence 378
—amounting to, exclusion of, from consideration 377
in custody of police officer 431
in police custody
—admissibility 394
—inadmissibility of 331
—little value of 394
—recorded, not read or explained, effect 332
in sessions trial and Magisterial trial, distinction between 471
inadmissible, inadmissibility of the whole 337
inculpatory, corroboration, necessity, if retracted 349
inducement
—promise of being approver, inadmissibility 333
—promise of being made approver 319

involuntary, condition for making, admissibility 317
judicial and extra-judicial, evidentiary value of 321
letter to a police officer, admissibility of in evidence 374
meaning of 413, 415, 463
necessity to record, in manner prescribed 345
of accused on his oral confession, conviction, if to be unsafe 322
of accused pleading guilty 462
of accused, when not to be result of persuasion 323
of co-accused 337
—admissibility 337
—admissibility in evidence 464
—approver's evidence, corroboration, extent of, duty of Court 337
—evidentiary value 464
—if not evidence in Sec. 3 of Evidence Act 17
—if not substantive evidence 465
—if not to be treated as a substantive evidence 17
—if not to be treated as evidence against another accused 17
—if to be regarded with suspicion 467
—if weak type of evidence 456
—not to furnish corroborative evidence 468
—probative value, use and mode in joint trial 17
—relevancy of 17
—use of, for corroboration to other evidence 468
of deceased co-accused
—relevancy of 554
—under Sec. 30 457, 462
oral, proof of, by Magistrate to whom made 395
record by Excise Inspector, if to amount to, by police officer, inadmissibility of 379
record of
—absence of warning, effect on admissibility of 454
—after charge sheet, admissibility 345
—by Magistrate 343
—by Village Magistrate 343
—since retracted, corroboration 348
—time for reflection, to be given to accused 346
recording of 17
—after a short interval, weight of, voluntariness 327
recording, mode of, and procedure 345
reflection, time for 400
relevancy of otherwise, if not to become irrelevant because of promise of secrecy 453
reliability, evidence 320
scope and applicability 317
self-culpatory, use of, against co-accused 373
self-exculpatory statement of accused, if to be treated as 463
self-inculpatory extra-judicial, co-accused, implication of, corroboration, conviction, justification of 338
statement not amounting to 372
statement of, use of, applicability 319
to Custom Officer, inadmissibility 340
to Enforcement Officer, admissibility, if voluntary 341
to Honorary Magistrate, admissibility of 400
to Jail Warden, inadmissibility 340
to Magistrate of native State, admissibility of 400
to police officer, not to be proved 372
to police, when admissible 374, 422
to private person, in presence of police officer, inadmissibility 361

under inducement, threat, etc. 333
use, mode of 325
variation, effect 320
voluntariness of 321, 394
voluntary character of 395
voluntary, leading to discovery of fact, admissibility 414
what is 313, 314
what to be, law relating to 376
when proved
—consideration of, affecting others jointly under trial for same offence 454
—consideration of, affecting person making it jointly under trial for same offence 654

CONFESSION AND ADMISSION
applicability of 303
distinction between 275
scope of 274, 275

CONFESSION TO MAGISTRATE
if amounts to admission 304

CONFESSIONAL STATEMENT
acceptance of inculpatory portion alone, permissibility 17
acceptance of, if *in toto* 325
correctness, affirmation, subsequent retraction, weight of 356
F.I.R. by accused containing 377
of accused, on solemn affirmation, if not to be taken 322
of exculpatory character, if not to be acted upon 328
use of 327
value of 327

CONSIDERATION
question as to, relevancy of question 237

CONSPIRACY (*See also* EVIDENCE)
conduct in general of each individual co-conspirator 258
confession of co-accused implicating conspirators, admissibility 230
evidence of 229
proof of 47, 225
proof of criminal conspiracy, scope and applicability of Sec. 10, Evidence Act 231
scope of English and Indian Law 225
things said or done by conspirators in reference to common design, provisions as to 225

CONSPIRACY/CONSPIRATOR(S)
See EVIDENCE

CONTRACT
written contract, terms of, proof only by production of document 922
written contract, terms, proof, oral evidence excluded 947

CONSTRUCTION OF DOCUMENT
interpretation of 184

CONTEMPT OF COURTS ACT
applicability of Evidence Act to proceedings under 3

CONVICTION
accused seen running away from the place of occurrence, if not enough for 49
previous, evidence of, admissibility 258
proof for, in a criminal trial, circumstantial evidence 45
sufficiency for, validity 48
under Sec. 3 of Railway Property (Unlawful Possession) Act, based on sole testimony of sub-Inspector of Railway Protection Force 130

CORROBORATION
criminal trial, evidence when not completely reliable 62
if not an absolute requirement except for prudence and caution 62
interpretation of 61
renders other evidence more probable 62
CORROBORATION EVIDENCE
principle of, if not applicable to rape cases 62
COURSE OF BUSINESS
existence of, relevancy of 264
COURT
Accidents Claims Tribunal, if a 15
authorised officer under T.N. Land Reforms (Fixation of Ceiling on Land) Act, if a 14
Collector of Central Excise if not a 8
Collector and the appellate authority functioning under the Essential Commodities Act, if not a 15
Commissioner for Workmen's Compensation, if not a 15
Commissioner under Public Servants (Inquiries) Act, if not a 15
Consolidation authorities under Bihar Consolidation of Holdings and Prevention of Fragmentation Act, if a 14
duty of, benefit of doubt 134
Family Court constituted under the Family Courts Act, if a 15
Forest Officer under Sec. 59 of Madras Forest Act, if a 15
if to consider both oral and documentary evidence 19
includes both Judge and Jury 14
Magistrate functioning under Sec. 37 of Rajasthan Co-operative Societies Act, if not a 15
meaning and interpretation of 11
proceedings under U.P. Consolidation of Holdings Act, Consolidation authorities, if a 14
Rent Controller, acting under A.P. Building (Lease, Rent and Eviction) Control Act, if a 15
Revenue Officers and the appellate and revisional authorities under the Orissa Land Reforms Act, whether are 14
CRIME
previous, evidence of, admissibility 260, 261
CRIMINAL CONSPIRACY
proof of 47
CRIMINAL PROCEEDINGS
confession caused by inducement, threat or promise, when irrelevant in 312
CRIMINAL TRIAL
material on record justifying in favour of accused, specific ground of defence 48
onus of proof, duty of prosecution 40
CROSS-EXAMINATION
if not the only method of discrediting a witness 20
in matrimonial proceedings 21
of one defendant by another, effect of 21
of party, defendant as plaintiff's witness 21
suggestion in, evidentiary value of 21
CRUELTY
proved and not proved 147
CUSTODIAN
proceedings before, under Evidence Act 7
CUSTODY
meaning of 397, 431
CUSTOM (*See also* PROOF)
existence of, proving 240, 715

evidence regarding 244
in derogation of Hindu Law 250
opinion of persons likely to know 715
opposed to decency or morality 250
party setting up, strict proof of 250
proof of, on whom burden lies 249
value of opinion evidence 715

CUSTOM OR USAGE
appreciating evidence of proof of, general rule 251

D

DAMAGES
suit for, facts tending to enable Court to determine amount are relevant 239

DATE OF BIRTH
evidentiary value 86

DECOY WITNESS
See STOCK/DECOY WITNESS

DEFENCE
falsity of, effect of 79

DEFENCE WITNESS
interpretation of 128
often untrustworthy 128

DEPARTMENTAL ENQUIRY
against delinquent public servant, rules of natural justice, requirement of 6
principles of the "law of evidence", if not to apply to 5

DEPARTMENTAL PROCEEDING
applicability to, under Evidence Act 5
rule of evidence that accomplice if unworthy of credit has no application to 6

DESERTION
proved and not proved 147

DIRECT EVIDENCE
meaning of 33

"DISCOVERED"
meaning of 427
statement leading to, admissibility 423

DISPROVED
meaning and interpretation of 13, 132

"DISTINCTLY"
meaning of 430

DIVORCE
adultery, standard of proof, burden of proof, evidentiary value 144
petition for, on ground of cruelty, Hindu Marriage Act 146

DOCUMENT(S) (*See also* DOCUMENTARY EVIDENCE, SIGNATURE, EXECUTION, HANDWRITING, PRESUMPTION & ADMISSION)
admission by party to attested document, effect of 848
admitted under Sec. 13, effect of 251, 252
ambiguous document, construction of 989
anonymous 906
certified copies, production of, proof of 879
certified copy, presumption as to genuineness of 886
clear and unambiguous, applicability of proviso (6), Sec. 92, to 982
confessional statement, presumption 891

construction, extrinsic evidence, admissibility 989
contents of
—admission regarding 276
—person with knowledge, if to be examined, proof of 817
—proof of 764, 816
deposition given in judicial proceeding 890
dying declaration, presumption as to 892
evidence of terms of contract reduced to form of 922
evidence of terms of grant, reduced to form of 922
evidence of terms of other dispositions of property, reduced to form of 922
execution of, proof of 23, 817
intention of parties, how to be gathered 947
legally admissible, if not to be excluded on the ground of public policy 24
meaning and interpretation of 12
objection to, admissibility of, proof, mode of 846
objection with regard to the mode of proof of a, if cannot be raised after it has been exhibited 23
presumption as to 886
—thirty years old 902
produced as record of evidence, presumption as to 889
proof of execution of
—required by law to be attested 821
—if no proof of the truth of its contents 23
proof of matter of, if not proof of execution of 817
proof of signature of, if not to amount to execution of the 817
proof of, produced from proper custody and drawn upon stamped paper 23
proof when attesting witness denies execution 850
proof where no attesting witness found 846
public documents, mode of proof 879, 882
—right to inspect 876
recitals in
—between strangers, regarding boundaries of land, admissibility of 551
—relevancy as admission 279
requiring attestation, proof when attesting witness not available 846
secondary evidence 764
—permissible if non-production of original is explained 787
signature on, determination of genuineness by comparison with proved signature 857
surrounding circumstances, evidence, admissibility 947
will
—execution of, proof of 818
—valid execution of 818

DOCUMENTARY EVIDENCE (*See also* PROOF)
document if, includes foreign currency 25
documents produced in enquiry under Sec. 207-A, Cr.P.Code 25
exclusion of oral by 922
if not bound technical rules of procedure contained in Evidence Act 5
in absence of statutory guidance, right to regulate their own procedure 5

DOCUMENTS THIRTY YEARS OLD
presumption as to 902

DOMESTIC ENQUIRY (*See also* DEPARTMENTAL ENQUIRY)
leading questions put to delinquent public servant, propriety 6

DOMESTIC TRIBUNALS
applicability of Act to 3

"DULY EXECUTED AND ATTESTED"
meaning of 918

DYING DECLARATION
absence of names of eye-witnesses, if infirmity in 532
acceptance in part 510
action upon, scrutiny of, voluntary, without tutoring or concoction 492
admissibility of 489
admission of, rule of 487
and ocular/medical evidence, inconsistency between 533
appraisal of, in the context of surrounding circumstances 492
capacity of victim to make 526
contradiction in itself, inadmissibility 499
conviction
—based on, legality 504
—based solely on, correctness 542
—basis of, establishment of identity of assailants by victim 492
—if to be based on, being important piece of evidence 491
—if to be the sole basis of 500
—when not to be sole basis for 491
corroboration, requirement of 501
deceased lost all faculties after stabbing, reliability of 526
deceased, making to relative, if to be discarded 536
delay in disclosing about 533
delay in giving 533
delay in recording 533
details/particulars in 530
evidentiary value 499
evidentiary value
—conviction, basis of 507
—test of reliability, corroboration, necessity of 505
expectation of death, necessity for making 511
F.I.R. lodged by deceased, use of 513
genuineness of, exact words spoken by declarant 520
illustrative cases 534
implication of accused at later stage, weightage of 542
inconsistent statements regarding name of other accused in, importance of 541
life ebbing out fast, duty of medical jurist to record 515
maker surviving, effect 512
more than one 527
—truthfulness of earliest, reliance on 527
names of assailants, oral declaration, consideration of as evidence 523
natural, coherent, truthful, recorded by Police Officer, admissibility of 516
non-examination of scribe, effect 533
oral 521
proof of 521
proof, guilt of accused, sufficiency of 509
rape, statement shortly after, suicide three days later, inadmissibility 496
recording of
—by whom 514
—correct mode of 519
—form of 518
reliance on, safer than F.I.R. 499
sacrosanctity of 492
satisfaction of Court about reliability 493
satisfaction, as to state of mind of declarant 524
signature/thumb-mark of declarant 532
statement recorded during investigation, use of 513
statement, if to relate to injuries by which death caused 496

through signs and gestures 521
thumb-mark, taken after death, admissibility of 532
transaction of injuries inflicted and infection resulting in death, single transaction, admissibility 496
words uttered by deceased, certainty about, corroboration, not to be acted upon without 508
wrong identification, danger of, if to be borne in mind 493

E

ELECTION
interpretation of 47
ELECTION MATTERS
evidence, regarding 89
ELECTION TRIBUNAL
whether Court 6
ENDORSEMENT OF "REFUSED"
on registered cover of notice, presumption of correctness 265
ENMITY
between eye-witnesses and accused, if no ground to reject their statements totally 117
if a double edged weapon 118
relevancy 105
EVIDENCE (*See also* RELEVANCY, ORAL EVIDENCE, PROOF, PRIMARY EVIDENCE, SECONDARY EVIDENCE, CIRCUMSTANTIAL EVIDENCE, DIRECT EVIDENCE & OPINION EVIDENCE)
absconding, whether proof of guilt 182
absence of motive for committing murder, inference 156
acceptance of
—of an accomplice 81
—of witnesses of tender age 123
acceptance or rejection of, weight 113
account books, not maintained in regular course of business, if not of much value 25
adduced in prior litigation, use in subsequent proceedings 27
adduced on both sides, appraisal of 39
admissibility as *res gestae* 158
admissibility in, illegal search and seizure 154
admissibility of secondary, of a registered Will, when not to be allowed to urge 30
admissibility of, conditions of 570
admissibility, errors, effect 27
admissibility, objection to at appellate stage 153
admission of accused, effect of 574
admission of genuineness of post-mortem report, if to be read as substantive 547
admissions, appreciation of 78
adoption, Hindu Law 176
affidavits, if do not fall within the definition of, in Sec. 3, Evidence Act 8
alteration in pronote, consideration of 857
ancient adoption, absence of 141
answers given by accused under Sec. 342, Cr.P.Code 18
applicability, unnatural offence, statement by girl, victim, admissibility in, to corroborate her, Evidence Act, Secs. 8 and 157 168
appreciation of 49, 118
—and credibility of witnesses, opinion of trial Judge 65
—circumstantial, importance of 41
—confused statement of witness, inference from 102
—corroboration 62
—criminal breach of trust 26

—criminal trial, finding in one case, how far binding in another case 58
—delay in lodging F.I.R., kidnapping of minor girl 51
—discrepancies and contradictions, effect of 76
—discrepancies in testimony, Cr.P.Code (old), Sec. 367 72
—duty of Court, witness, when can be treated as hostile 127
—duty of Judge 57
—eye-witness, dacoity case, identification 202
—generally 56
—if to be weighed and not counted 59
—in criminal cases 103
—in criminal cases, complaint of rape, effect 77
—major and minor discrepancies, effect of 72
—of eye-witnesses 98
—of interested witnesses 113
—position of trial and appellate Court, consideration of factors 66
—proof of fact 96
—suit regarding land 58
—testimony of partisan eye-witnesses 117
—unlawful assembly with weapon, death of some victims, duty of Court 58
—when witness not cross-examined 21
as to application of language to one of two sets of facts, to neither of which the whole correctly applies 993
as to application of language which can apply to only one of several persons 993
as to document unmeaning in reference to existing facts 992
as to meaning of illegible characters, etc. 994
assessment based on documents or accounts seized illegally, if such documents be legally used as 32
assessment of market value, sale between two parties 185, 237
attempt to murder, use of fire-arm, proof of 100
batwara khasra
—admissibility in 624
—conclusiveness of 624
before committal Court 576
benefit of doubt, if goes in favour of accused 53
best judgment assessment in sales tax cases, quantum of escaped turnover, proof of 157
bigamy, proof of second marriage 144
birth and death register
—admissibility in 604
—entry in, proof of age, admissibility and value of 605
birth certificate, certified copy, signed by Chief Executive Officer of Municipal Corporation, conclusiveness of 608, 880
birth register, extract obtained from Municipality, if valuable peace of 606
blood group test 684
borrowing by *karta* of HUF for immoral purposes, burden 93
by spouse, accusation of adultery, establishment of, corroboration necessary 145
cases under Sec. 27, held admissible 451
certificate of guardianship, admissibility in 625
certificate or report of expert, admissibility 31
certificates, reports of experts, value of admission in 763
charge of adulteration, prosecution under Secs. 10(7), 16 and 17(1) of Prevention of Food Adulteration Act, proof and 139
charge of conspiracy, proved by legal evidence, suspicion, 134
charge of forgery of sale deed, statements made by accused before Registrar, admissibility of 176
circumstantial evidence 33
—abandonment of possession, a question of fact 757

—appreciation of 756
—exclusion of 757
civil proceedings, if finding rested on probabilities of the case 55
commissioner's report, admissibility in 627
concealment of fact by one party, effect 79
conduct of a deceased conspirator, admissibility in 166
confession to Magistrate, proof by oral 946
confessional statement 944
conflicting versions, murder case, fight between two rival groups 75
consent, waiver, irregularity, reception of 31
conspirator turning approver, admissibility and value of his 228
contents of original, proof by attesting witness 780
contradictions and discrepancies in 71
contradictions of minor nature in, effect 72
contradictory testimony of eye-witnesses in murder cases 77
conviction of public officer, testimony of arresting officer 130
copies made from or compared with original 777
copy of a copy 779
—admissibility of, if compared with original 779
copy of medical claim bill, admissibility of 781
copy of original, handwritten, issued as true copy, inadmissibility of 778
corroboration of, of an accomplice 81
credibility of 118
—police witness, value of 128
—testimony, oral and circumstantial 72
credibility of witness
—absence of inherent voice 98
—interested witness 112
credibility of witnesses in 93
credibility of, opinion of medical man, testimony of disinterested eye-witnesses, effect of 94
criminal trial
—complaint by Hindus under Sec. 298, I.P.Code, eye-witnesses 75
—credibility of witness 101
—duty of Court 57
—eye-witnesses relatives of complainant, testimony 107
—mob attack, eye-witnesses regarding persons taking part 58
—motive, proof of 156
—question of motive, positive evidence against accused clear, cogent and reliable 156
death register, entry in, certificate of death, more than 30 years old, admissibility in 608
delayed in examining a vital witness, if a suspicious circumstance 101
delegation of power to record, validity 573
deposition of a witness 944
—if not, but an expression of opinion 19
—corroboration, use of 628
determination, relevancy and admissibility of 28
direct and circumstantial 756
discovery of dead body and silver buttons stained with human blood at the instance of accused, value of 49
discredibility of 102
discrepancies and contradictions, eye-witnesses 75
discrepancies in
—duly noticed and considered by law Courts, if no interference in revision 77
—effect of 72
—prosecution, effect of 75
—statements of witnesses, testimony, effect 76
dishonest intention not proved, accused entitled to benefit of doubt 134

disposition of property
—agricultural lease, unregistered *patta*, admissibility in 933
—*benami* transaction 938
—deed
—unregistered or unstamped/under stamped 929
—unstamped, admissibility, determination of 929
—family arrangement reduced to form of document, admissibility of 932
—family arrangement, registration, necessity of 932
—gift deed 944
—gift, oral evidence, admissibility 944
—lease as to place of payment of rent 941
—lease deed/rent note, admissibility to prove collateral transaction 932
—lease for manufacturing purpose 941
—lease/rent deed 940
—mortgage deed 934, 942
— equitable mortgage, non-registration, admissibility to prove mortgage 934
— proof by entries in *jamabandi* 934
— unregistered 934
—partition deed 943
—exclusion of oral by documentary 931
—oral admission of partition, admissibility 943
—registered, proof of partition by oral, bar of 943
—use of as evidence 930
—permanent lease deed and subsequent sale deed 941
—sale deed
—suit for possession based on 939
—use of as evidence 930
—sale transaction 938
—unregistered lease deed, admissibility in 933
doctor's opinion without examination of injury, value of 678
document(s)
—admission proper, contents of to stand admitted 784
—admission upon formal proof 784
—certified by Notary, necessity of examination 778
—contents of, proof by author, if alive 783
—counterfoils of original, admissibility on proof of loss of original 780
—counterparts of 780
—exhibition without objection, admissibility in 784
—latent ambiguity in 992
—objection to admissibility 784
—oral accounts of contents of 780
—produced and proved by a witness in the Court, if regarded as 23
—referred to in plaint not produced 992
—unmeaning, release deed conditional, admissibility of extrinsic 992
—witness saw and heard it read out, admissibility 780
during *ex parte* proceedings 580
dying declaration 944
effect of signature on statement, admissibility of 28
entries in seller's books of accounts, if perfectly reliable 25
entry of parentage, evidentiary value of 608
entry to prove religion, value of 609
examination of only material witness in 63
examination of witness under Sec. 202, Cr.P.Code, before Committing Magistrate, inadmissibility in, under Sec. 33 579
examination of witnesses in murder case 64

exclusion of
—against application of document to existing facts 990
—document clear and unambiguous, applicability of Sec. 94 990
—document, language defective in 989
—document, patent ambiguity 989
—documents, contents of, ambiguity 989
—*kabuliyat*, explanation of 989
—of oral agreement 947
—plea based on construction of letter 990
—property leased, identity of 989
—sale deed, language plain, mistake in boundaries 991
—to amend ambiguous document 989
—to explain ambiguous document 989
"expense", what to be under Sec. 33 575
expert evidence 664, 710
—and direct evidence, value of 668
—corroboration, requirement of 672
—'expert', who to be 667
—necessity of 674
—palm impression 703
—report of Chemical Examiner, use of, admissibility in 687
expert medical evidence 676
—overriding effect on direct evidence 676
—proof of, conclusiveness of 676
expert opinion
—ballistic 706
—finger-print 701
—evidentiary value 702
—fire-arms, value of 707
—foot-print 703
—conclusiveness of 704
—exactness of science 704
—hair, identification of 765
—handwriting 688
—appreciation of 694
—comparison of 693
—conclusiveness of 691
—evidentiary value 699
—expert, not acquainted with language of writing, effect 700
—if to prevail over direct 698
—if weak in forgery cases 696, 697
—land, value of 709
—on foreign law 709
—public analyst, report of 709
—technical work 708
—thumb-impression 703
—trade mark/copyright 709
—type script 708
experts, examination and cross-examination of 673
eye-witnesses of the same family or distantly related to each other, necessity of corroboration 205
eye-witnesses, interestedness 114
F.I.R.
—if not substantive 18
—not signed by informant, admissibility in 626
—use of, admissibility in 626

—use of, natural death of informant, weather admissible, Evidence Act, Secs. 32(1), 8 167
—value and use of, Secs. 8 and 21, Evidence Act 178
—what is, use of, at the trial, admissibility in 167
factors in considering weight of 58
facts known to Judge, relevant facts 154
failure to examine independent witness, effect 64
family pedigree, relevancy of 619
fraud, in case of 761
habitual offender or dangerous character, proof 157
Hath chitha, proof, admissibility of 607
hearsay evidence 755
—admissibility in 757
—inadmissibility of 757
—what to be, fact and truth, distinction between 757
hospital record, public document, admissibility in 626
husband's petition for dissolution of marriage, grounds of wife's adultery and desertion, proof 145
identification during trial, if substantive 190
identification in Court, interpretation 189
identification of an accused in the Court, valuation of 190
identification parade conducted by police official instead of a Judicial Magistrate, if not admissible in 204
identification
—accused arrested during dark night, witnesses failing to identify in Court 188
—suspect in dacoity case, arrested in connection with some other offence under Arms Act 188
if includes statement of witnesses recorded by police under Sec. 161, Cr.P.Code and by Magistrate under Sec. 202(2), Proviso, Cr.P.Code 16
if may be given of facts in issue and relevant facts 153, 154
if signifies only the instruments by means of which relevant facts brought before the Court 16
if unreliable, when prosecution leading two sets of, one set condemning the other set 19
illegally obtained, admissibility 31
improvements and variations in 77
in accident cases 91
in bribe case against a Public servant 89
in cases under Sec. 27, held not admissible 452
in civil and criminal cases, distinction between 55
in civil cases, recorded under Order 18 of C.P.Code 56
in compensation cases, under Workmen's Compensation Act 93
in contempt cases 87
in corruption cases 88
in criminal trial, relevancy of 32
in cross case 580
in customs cases 244
in election matters 89
in eviction matters 91
in matrimonial matters, relevancy of 647
in record-of-rights 87
in title and possession 87
in title, proof of 87
in trial for dacoity, admissibility in trial under Arms Act 574
inadmissibility of otherwise, if not to be made admissible 574
inam register
—correctness, presumption as to 623
—entries in, admissibility 623

incapability of giving 572
income-tax documents, suit to recover business dues 237
interested party or relation, testimony 106
jamabandi, correctness, presumption as to 620
judgment
—by consent/compromise, if not collusive, admissibility of, in subsequent suit 663
—incompetency of Court, admissibility in subsequent suit 663
—non-service of summons, effect, admissibility in, subsequent suit 662
—obtained by collusion, binding nature of, admissibility in subsequent suit 663
—obtained by fraud, fraud if to amount negligence, admissibility in subsequent suit 662
—not *inter partes*, admissibility in 238, 655
"judicial proceedings", what to be under Sec. 33 575
khasra girdawari
—public document, certified copies of, admissibility in 621
—truth, presumption as to 621
khatian, entries in, relevancy of 621
land acquisition proceedings, market value of land, proof of 157
major and minor contradictions in, non-examination of independent witnesses, effect of 65
man of no means, if no ground to discredit his 59
matriculation certificate, proof of age, admissibility in 613
meaning and interpretation of 13, 16
measurement books, acceptance of as, without proof 629
medical evidence, as to age 683
—conclusiveness 683
medical evidence, proof of age, ossification test 684
medical examination, blood group test, effect of 82
medical/scientific opinion and oral evidence, conflict between 685
memorandum of identification
—if not a record of, of a witness 16
—not a record of, of a witness 203
modes of giving 756
mortgage deed
—latent ambiguity admissibility of 993
—not proved, admissibility in 842
—one attestator only examined, admissibility of, in 830
municipal record, correctness, presumption as to, admissibility in 624
murder by poisoning, facts, established by prosecution, proof by direct 155
murder case, three prosecution witnesses, relative of deceased, present near scene of offence, acceptance of 109
murder charge, eye-witness, proof of 101
murder of wife, appreciation of 46
murder trial, corroboration of witness 63
murder, child witness, the only eye-witness, victim of tutoring, two different versions 125
nautical assessors 688
news item by itself, if not constitute 33
newspaper report 779
—speech, inadmissibility of 779
—value of 779
—if not to be treated as substantive 33
no statement by any person, if, unless given on oath in the witness-box 19
non rejection of, of witnesses on ground "highly incredible 102
notice, order sheet regarding service of, entry in, admissibility in 627
objection as to mode of proof, objection to oral, waiver of 946
objection as to relevancy or admissibility of 30
objection to admissibility 31, 153
ocular version by a person injured in an incident, value of 98

of a chance witness, if not to be considered to be worthy of credence 122
of a doctor, evidentiary value of 83
of a hostile witness, if not wholly effected from the record 127
of a single eye-witness, sufficiency of 61
of a witness attesting to an agreement of sale, interpretation of 115
of accomplice, and of partisan witnesses, distinction 117
of age, evidentiary value 86
of agreement varying terms of document, who to give 994
of *alibi*, onus of proof if on accused 237
of an accomplice, reliability 81
of an expert, value of 82
of approver, corroboration in material particulars, reliance on 457
of bad character
—admissibility to prove motive for crime 733
—general tendency of accused, proof of 733
—if not relevant, except in reply 732
—of accused, relevancy in criminal proceedings 733
of character, conduct and state of mind, admissibility 165
of complainant already recorded, if evidence within the meaning of Sec. 245(3) of Cr.P.Code 16
of conduct 175
—and surrounding circumstances, interpretation of 175
—relevancy 176
—settlement entries, presumption of correctness 176
of conspiracy 229
of dishonest intention, conviction in previous judgment, relevancy of 734
of expert, in earlier case 580
of eye-witnesses, details of occurrence in statement, Secs. 161 and 164 of Cr.P.Code 98
of fact, establishment of 759
of facts in issue and relevant facts 153
of handwriting expert, appreciation of, duty of Court 857
of hostile witness, no rejection of 127
of identification
—duty of Magistrate 208
—identification parade, purpose and value of 207
of inimical witnesses 105
of interested witnesses 105
—weight of 112
of matter of public history, literature etc. proof of, judicial notice of 740
of motive 156
of partisan nature, fact and false 117
of person injured in same occurrence, ocular version of person of incident, if of great value 20
of Police Officer
—and Government servant, testimony 128
—value of 129
of previous-crime, admissibility 260, 261
of prosecution witness, truth and falsehood not separable, rejection of entire 70
of relations and partisan witnesses 105
of relations, marriage, proof of 148
of reputation, admissibility 734
of Returning Officer in election petition, Representation of the Peoples Act, Sec. 98 90
of search, if not admissible, when non recording of reasons makes search illegal 32
of single witness, proof of 47
of solicitor on behalf of his client, solicitor if interested person, rejection of 114
of subsequent occurrence and similar transactions 263

of terms of contracts, reduced to form of documents 922
of terms of grants, reduced to form of document 922
of terms of other disposition of property, reduced to form of document 922
of tracks, evidentiary value 86
of villagers', regarding time 131
of woman raped, relevancy of facts 160
Opium Act, Sec. 9(*a*) and (*b*), offence under, chemical test, if not necessary 83
opinion of Legal Remembrancer given to Government, if inadmissible in 19
opinion of the expert, when to be accepted 671
opinion on relationship, person, which to give, admissibility 723
Pardanashin lady, proof of 27
partial, if no 18
partisan witness, corroboration, necessity 116
photograph, use of in 187
photographic copies, corroboration, necessity of 77
photographs, admissibility 708
photostat copy, acceptance of, in 775
police report, if public documents, admissibility in 627
position of trial and Appellate Court 65
possession of contraband opium, proof of 83
post-mortem report and report of Chemical Examiner, evidentiary value of 677
post-mortem report, admissibility, if not substantive 548
presence of, proof and its method 87
presumption of correctness of entries in record of rights 87
presumption under Sec. 80 arises only in case of 18
previous conviction
—use of 734
—when to be proved 734
previous inquiry, admissibility 628
previous judgment, relevancy and admissibility of 628, 637
primary evidence 764
prior oral agreement, admissibility of 946
private detective agency 131
proceeding *coram* non-judice, taken in 575
produced by accused, admissibility against co-accused 27
properly admitted for one purpose, if admissible for all purposes, in the cause 28
prosecution
—deliberately producing false witness for procuring conviction, effect of 51
—if not required to produce all witnesses 63
—under Prevention of Food Adulteration Act, Food Inspector and Sanitary Inspector, if not interested witnesses 131
prostitution, nature of, required to prove offence 139
public record of *wakf* deed, kept in office of Sub-Registrar, certified copy of, admissibility in 881
quasi-judicial tribunals, if not bound by technical rules of 6
rape case, victim's statement to her mother about incident, if admissible 169
rape on minor girl, disclosing name of accused, commission of offence on her 178
reception of inadmissible, effect of 28
recital in the sale deed about existence of the necessity, if admissible in 19
recitals as to boundaries in a document not *inter partes*, if not admissible under Sec. 32, Evidence Act 236
record requisitioned, when becomes 28
record-of-rights
—entries in, conflict between entries, evidentiary value 614
—evidentiary value of 614
records of German Court prescribed by Secs. 14 and 15 of English Extradition Act, if admissible 28

recovery memo 944
register of births maintained by municipality, certified copy, admissibility in 880
registered general power of attorney, certified copies of, admissibility in 881
relationship, appreciation of 108
relevancy and admissibility of 27
reliance upon an entry, original account books to be produced before the Court 25
remarks regarding demeanour of witness, recording of, non-compliance with rule, effect 66
rent receipt, if no proof of title, only prove possession 87
report of Chemical Examiner, evidentiary value of 687
report of Chemical Examiner/Forensic science laboratory 687
reproduction of conversation, disparities, in effect 71
reservation by Committing Magistrate of cross-examination of witness *suo motu*, inadmissibility in 579
revenue officer, report of, inadmissibility of 617
revenue record, acceptance of 617
riwaj-e-am
—entries in, custom proof of, correctness, presumption as to 623
—entries in, evidentiary value of 622
school record, if to constitute official records, admissibility 610
school register
—entry in, age, proof of, admissibility in 610
—if a public record, entry in, admissibility in 610
scope and applicability 169
scope and applicability, Sec. 9, Evidence Act 185
scope, negotiable instrument 51
secondary 771
secondary evidence of documents 764
security bond, interpretation of 992
seizure of sample by Food Inspector, denial by witness, proof 131
settlement proceedings, admission of parties recorded in, effect 617
settlement record
—conflict between previous and current, which to prevail 617
—entries in, conclusiveness of 616
signature, comparison of, by Court itself, permissibility 692
statement forming
—part of a document, what to be given 635
—part of book or series of letters or papers, what to be given 635
—part of conversation, what to be given 635
statement in an inquest report, if not 18
statement made by accused, if not 18
statement of accused recorded under Sec. 108 of Customs Act, reliability 81
statement of person, neither an accused nor a witness, if admissible 28
statement of witness recorded by police after detention in police lock up, whether substantive, or reliable 167
statement to Police Officer and complaint in his presence, admissibility 179
statements made under Sec. 108 of the Customs Act, if admissible 28
statements of witness recorded during investigation, if not to be used as substantive 18
statements recorded under Sec. 161(3), Cr.P.Code, identical statements, value 16
sufficiency of, uncorroborated testimony of a single eye-witness 47
sufficient proof of, when accused guilty of murder 48
suggestions made but denied in cross-examination whether by prosecution or defence, if no 19
suggestive of accused's bad character, admissibility of 732
suppression of, interference from 78
suspicion against accused, proof, benefit of doubt 53
tape recorded conversation, corroboration of 776

tape recorded statement
—admissibility of 776
—conditions for 776
—possibility of being tampered 776
—if not reliable piece of 28, 29
—inadmissibility of 777
tape recorded voice 701
terms of contract
—construction of contract, language susceptible of two interpretations 946
—construction of document, doctrine of false demonstration, applicability 946
—*kabuliyat* not executed by lessor, invalidity of contract 945
—promissory note for debt, debt barred by limitation 938
—promissory note, inadequately stamped, suit on original loan, maintainability of 938
—insufficiently stamped 937
—joint and several liability of executants 938
—suit on 935
—unstamped, admissibility in 938
—pronote, admissibility in, suit on original cause of action, maintainability 936
—suit for specific performance 940
terms of grant 940
—ancient grant, original sanad, production of 946
test identification ordered, if violates fundamental rights 188
testimony of partially unreliable witness, value of 97
testimony of witness
—distant relationship, corroboration 108
—suit by depositor against Bank, Evidence Act, Sec. 3 101
theft case, testimony of prosecution witness, proof of 105
threatening letter, by accused, offence under Secs. 120-B, 171, 365, 398 of I.P.Code 49
threats given by accused to deceased, admissibility in 166
title, proof, sale certificate 88
tracker dogs, admissibility 705
trial for murder, eye-witnesses closely related to victim, acceptance of 108
uncertified copy of deposition, use of, as secondary evidence 778
under Prevention of Corruption Act, Sec. 4(1) 89
use of statement recorded during investigation of crime in civil litigation 27
value of, of interested witness 112, 114
village record, extract of, admissibility 632
voter's list, correctness, presumption as to, admissibility in 625
wajib-ul-arz, entries in
—custom, proof of, admissibility in 623
—correctness, presumption as to 623
—weight of 88
wakf 940
with regard to time of occurrence 86
witness dying before Sessions trial, admissibility of, in committing Court 579
witness trying to improve upon prosecution story, effect 77
xerox copy, obtained from certified copy admissibility of, as secondary evidence 775

EVIDENCE ACT
applicability of Sec. 1 of the 3
applicability of
—to contempt proceedings 3
—to departmental proceedings 5
—to enquiries before officers 7
—to income-tax proceedings 3
—to land acquisition proceedings 7
—to proceedings before Commissions of Enquiry 6

—to proceedings before custodian 7
—to proceedings before Industrial Tribunal 4
—to proceedings before rehabilitation authorities 7
—to proceedings before revenue authorities 7
—to proceedings under Foreign Exchange Regulations Act 3
construction of 1
deals with law of evidence applicable to both civil and criminal proceedings 14
enquiries before officers, strict rules of, applicability 5
Government servant, dismissal, powers of Court 6
if not apply to an enquiry under Sec. 15(1) of A.P. (Andhra Area) Estates (Abolition and conversion into *Ryotwari*) Act 3
prohibits the employment of any kind of evidence not specifically authorised by the Act itself 154
scope and object of 1
scope of Sec. 11 of the 233

EXECUTION
of document
—certificate of registration, if proof of 819
—not availability of other evidence, proof of 819
—registration of, proof of 819
—what to imply 819
what to mean and include 825

EXECUTION PROCEEDING
if a judicial proceeding 3

EXISTENCE OF COURSE OF BUSINESS
relevancy of 264

EXPERT'S EVIDENCE (*See also* EVIDENCE, OPINIONS & RELEVANCY)
conflicts of opinion between experts and oral evidence 685
evidence directly against expert opinion 710
interpretation of 82
provisions as to 664
report of government serologist and chemical examiner 687
science or art, opinion on 666
value of 709, 715

EXTENT OF ACT 2

EXTRA-JUDICIAL CONFESSION
ascertainment of actual words used by the accused 364
before Village Administrative Officer, reliability 367
by co-accused/approver, corroboration, necessity of 368
corroboration by approver, sufficiency 457
corroboration, necessity 361
evidence, weak type of 358
evidentiary value of 361
if voluntary, receivable in evidence 360
material corroboration, necessity 362
mutual affeary between deceased and accused, reliability on 388
oral, exact state of mind, unsafe to deduce 372
proof of, if like any other fact 366
reliability, if to depend on exact words used by the accused 365
retraction subsequently, admissibility 363
retraction, also, if to hit by Sec. 26 395
threat or coercion, made under, inadmissibility 360
to a respectable person of the town, admissibility 366
to Panch of Gram Panchayat, admissibility 339

to quasi-official, if not to be discarded 369
to whom to be made 365
unreliability 371
value of, if to depend upon veracity of witness to whom made 366
EXTRANEOUS EVIDENCE
proof of, complaint if made by duly authorised person 984
EXTRINSIC EVIDENCE
extrinsic circumstances, showing real intention of parties 984
of facts, admissibility 982
EYE-WITNESSES
See EVIDENCE

F

FACT(S) (*See also* RELEVANCY OF FACTS)
admission by legal advisor 749
admission in pleadings, conclusive between parties 750
admission of, alleged in plaint, not denied in written statement 752
admission
—absence of specific denial 750
—in pleadings 748, 750
—in witness-box 750
—in written statement 750
—judicial, made at or before hearing 748
—of execution in pleadings, grant of relief 751
—what to be, kinds of, judicial and extra-judicial 749
—written statement, mortgage in 751
admitted fact 748
decision of questions 153
disclosing similar fraudulent transactions, if admissible to prove intent 236
existence of, and statement as to existence, difference between 483
in suits for damages, Sec. 12, Evidence Act 239
judicial notice
—permissibility 735
—which Court to take 734
meaning and interpretation of 11
meaning of 15, 153
mental condition, if a 16
narration concerning a prior event, if can be statement under Sec. 6, Evidence Act 159
necessary to explain or introduce relevant facts, provisions as to 184
occasion, cause or effect of facts in issue 163
opinion of expert, bearing upon, relevancy of 710
part of same transaction, relevancy of 158
printing and possession of infringing material at one place, inference 163
proof by oral evidence 753
proof of which not needed 734
proof of, report of Court of enquiry 154
relating to horoscope 236
relating to police report 236
relevancy of 153
—forming part of same transaction, Evidence Act, Sec. 6 158
—provisions as to 153, 154
relevant when right or custom if in question 240
relevant, scope of, Sec. 13, Evidence Act 240
relevant, thing said or done by conspirator 225
scope and applicability of Sec. 7 of the Act 163

scope of, Sec. 9, Evidence Act 184
showing state of mind or body, relevancy 257
statement made to police, admissibility of 160
tape recorded conversation, whether admissible 164
when not otherwise relevant become relevant 233
when relevant, 11, 153, 163
wrong interpretation of notifications under Secs. 3, 4 and 5 of Minimum Wages Act by Labour Welfare Officer, relevancy of 167

FACTS ADMITTED
if need not be proved 748

"FACTS IN ISSUE"
conduct of parties, relevancy 166
if evidence may be given of, and relevant facts 153
meaning and interpretation of 12
non-existence of 153
occasion, cause or effect of 163
when necessary to explain 184

FACTS SHOWING EXISTENCE OF STATE OF MIND
or of body or bodily feeling, provisions as to 257

FALSUS IN UNO FALSUS IN OMNIBUS
applicability of, in proper case in India 71
if not applicable in India 67

FAMILY ARRANGEMENT
reduced into writing, proof, mode 922

FIRST INFORMATION REPORT
admission in 274
by accused
—containing confession, value and use of 426
—part only covering by Sec. 27, admissibility of in evidence 426
followed by discovery, admissibility under Sec. 27 426
relevancy of, under Sec. 11, Evidence Act 238
use of, for purpose of Sec. 27 426
what is, use of, in trial 305

FOREIGN EXCHANGE REGULATION ACT
applicability of Evidence Act to proceedings under 3

FOREIGN JUDICIAL RECORD(S)
presumption of accuracy 898

G

GOOD FAITH
proof of 257
standard of proof 49

H

HANDWRITING
comparison by Court itself 852
evidence of non-experts 711
genuineness, determination, personal character of writer unfailing guide 857
of person who wrote document, proof of 814
person acquainted with, value of his opinion 711

HANDWRITING EXPERTS, ETC.
See EVIDENCE

HEARSAY EVIDENCE (*See also* EVIDENCE)
admissibility in 757
admissibility of, when actually heard by witness 758
applicability of 264
bar of, but Sec. 32, an exception thereto 487
corroboration of, necessity of 758
exclusion of, rule of 760
if opinion evidence, is 758
if rule against, patently unclear 758
inadmissibility of 757
newspaper report, presumption of genuineness 759
rule against 759
statement of by standers, admissibility 161
what to be, distinction between fact and truth 757

HOSPITAL RECORD
admissibility of 626

HOSTILE WITNESS (*See also* EVIDENCE)
interpretation of 126

I

IDENTIFICATION (*See also* TEST IDENTIFICATION PARADE & EVIDENCE)
by one out of four persons, if not sufficient for conviction 215
by voice, if a weak type of evidence 202
facts establishing identity of things, incriminatory article of common use 219
failure to identify accused by witnesses, creates doubts about presence of accused 223
of accused by ocular witness at police station, weight of, if no consequence 224
of accused by voice, reliance of 201
of an article at trial, if substantive evidence 219
of articles, recovery of articles subject matter of a dacoity, whether, articles recovered stolen or not, depends on circumstances 207
of land, suit regarding land, survey plot No. if important 219
of washerman's mark on the clothes of the deceased, test identification, if not essential 200
precautions to be taken, interpretation of 209
right of accused 184
solitary evidence of, if not reliable for conviction 216
value of 221

IDENTIFICATION MARKS
covering of, interpretation of 217

IDENTIFICATION TEST
purpose of, to test the memory and veracity of a witness 203

IDENTIFICATION OF PROPERTY
interpretation of 219

"IN PURSUANCE OF COMMON OBJECT"
applicability of 135

INAM REGISTER
entries in, relevancy of 623

INCOME-TAX OFFICER
if not a Court 14

INCOME-TAX PROCEEDING
applicability of rule of evidence to 3

INCOME-TAX PROCEEDINGS AND RECORDS
admission in 273

INDIA
meaning and interpretation of 13
INDUSTRIAL DISPUTE
proceeding regarding, before Labour Court, nature of, under Evidence Act 4
INDUSTRIAL TRIBUNAL
applicability of proceedings before, under Evidence Act 4
INFORMATION
by accused leading to discovery 419
by accused to police, leading to relevant fact, admissibility of 411, 413
by accused, evidentiary value of 415
concrete or material fact, discovery of, admissibility of 408
discovery of weapons, if to be made relevant factor, use of, against accused 418
extent of, admissibility 422, 423
from person "accused of any offence" 426
from two persons, admissibility of only leading to discovery 435
leading not to discovery 435
receiving from the accused, establishment of exactness before Sec. 27, to be resorted to 410
receiving of, from accused, how much to be proved 401
synonymity with the word "statement" 416
to police, already known 439
INIMICAL
interpretation of 117
INTENTION
inference of, question as to 258
proof of 257
INTERPRETATION CLAUSE
provisions of Sec. 3 of the Act 11
INTERESTED EVIDENCE
meaning of 112
INTERESTED WITNESS(ES) (*See also* EVIDENCE)
credibility of 112
if not necessarily false 113
interpretation of 110
reliability of 111

JAGIR COMMISSIONER
under Rajasthan Act, if not a Court 14
JAMABANDI
entries in, admissibility 620
"JOINT DISCOVERY"
admissibility of 437
JOINT TRIAL
one accused absconded, Sec. 30, if not attracted 462
JUDGMENT(S)
admissibility of recitals and findings 650
admissibility to prove custom 650
admissibility to prove matters of public nature 650
adoption, validity of, question of previous judgment 244
civil Court's finding, how far binding on criminal Court 642
civil Court's judgment, admissibility in criminal proceedings 636, 651
collusion in obtaining 657

evidentiary value of 637, 650
given by foreign Court, validity 244
if and in what respect conclusive 244
inter partes admissibility 654
matrimonial jurisdiction 647
not *inter partes*, relevancy and value of 636, 655
on a question of custom, relevancy and admissibility of 247
other than a judgment referred to in Secs. 40 to 42, when admissible 244, 245
probate jurisdiction 642
referring to illegitimacy of a person, admissibility of 247
relevancy and effect of, other than those mentioned in Sec. 41 650

JUDGMENT IN WRIT PROCEEDINGS
binding character of 638

JUDGMENT OF CRIMINAL COURT
applicability in proceedings in civil Court 244, 245
proceedings or, if constitute no evidence in civil proceedings 244

JUDGMENT OF HIGH COURT
ex parte, effect of 246
admissibility of 245, 246

JUDGMENTS NOT *INTER PARTES*
admissibility of 245, 246
if admissible for certain purposes 248

JUDGMENTS OF COURT OF JUSTICE
relevancy of 636

JUDICIAL CONFESSION
admissibility without examining Magistrate 315

JUDICIAL DECISIONS
recognising a custom, relevancy and admissibility of 247

JUDICIAL NOTICE
facts judicially noticeable, if need not be proved 734
facts of which Court must take 734
facts, of which Court to take, first proviso, Sec. 60, satisfaction of the test 761
of facts
—agricultural debtors weaker and oppressed 747
—all matters of common knowledge 741
—appointment of Drugs Inspector 739
—custom, existence, if to be taken 748
—customary law 748
—right of privacy, nature of, custom proof of 748
—customary rights 745
—decree in case of maintenance allowance 745
—different ages of retirement 746
—District Magistrate's signature 739
—family pension, payable to family of deceased, enhancement in pay scale and pension 746
—historical events
—communal disturbances in August of 1947 744
—partition of India 744
—proclamation of emergency 738
—Honorary Magistrate's signature 739
—hostilities 740
—Houses of Parliament 738
—industrial dispute
—most of industrial workers illiterate 743
—revision of wages, commodity of prices 743

—limitation of words "Notary public" 738
—news item being in the nature of hearsay or secondary evidence 746
—notable events 742
—notification by Government 737
—of general knowledge 744
—of sovereignty 745
—provisions of law 738
—public nature, ancient, proof of 740
—refusal to take by trial Court 735
—rent escalated every where 747
—report of Parliamentary Commissions 736
—rule for return of old and obsolete stamps 745
—signature of persons filling public office 739
—statutory notification 737
—whether a particular territory part of India 740
—which Court to take 734
of historical events, consideration of, in enacting statutes 735
of notorious facts, entitlement of by Judges 735
public history 740

JUDICIAL PRECEDENTS
binding nature of 638

JUDICIAL PROCEEDINGS
what constitutes 575

K

KHASRA GIRDAWARI
entries in, admissibility 621

KHATIAN
entries in, relevancy of 621

KNOWLEDGE
proof of 257

L

LAND ACQUISITION PROCEEDINGS
exercise of power, onus of proof under Evidence Act 7

LANDLORD TENANT RELATIONSHIP
admission regarding 272

LAW
admission on point of 275

LAW BOOKS
presumption as to 585
relevancy of statements as to any law contained in 635

LEGITIMACY
of child, proof of 148

M

"MAGISTRATE"
what not to include, within the meaning of Sec. 26 392

MAPS, CHARTS AND PLANS
admissibility of 632
presumption of accuracy as to 895
relevancy of statements in 632

MARRIAGE
celebrated according to Hindu rites, proof of ceremonies 147
proof of 147
proof, evidence of relations 148
MATRIMONIAL CASES
principles of 144
MATRIMONIAL OFFENCE
divorce case, standard of proof, satisfaction of Court by applicant 144
"MATTERS BEFORE IT"
meaning and interpretation of 134
"MAY PRESUME"
interpretation of 149
MEDICAL EVIDENCE (*See also* EVIDENCE)
appreciation of 85
heirs, use of as an identification evidence 139
if an opinion evidence 85
oral evidence, conflicting with, effect of, 85
reliability of 84
MELEE
meaning of 115
MENS REA
proof of 47
MENTAL OR BODILY STATE
facts showing existence of, provisions as to 257
medical examination 260
MIND
proof of, state of 257
MOTIVE
for crime, I.P.Code, Sec. 302 173
if a piece of circumstantial evidence 170
if not a decisive test for criminal character of human acts 173
if not evidence 169
preparation and previous or subsequent conduct, evidentiary value 165
proof of 169, 256
—if not necessary 169
prosecution, if not bound to prove, of any offence 173
MUNICIPAL RECORD
entries in, admissibility of 624
value of 87
MURDER
overwhelming direct and circumstantial evidence for prosecution 48
proof of, recovery of body, if not essential, circumstantial evidence 47

N

NEED FOR HOLDING
interpretation of, in case of test identification parade 197
NEGLIGENCE
proof of 257
NEWSPAPER REPORT
admissibility of 779
evidentiary value of 33
interpretation of, evidence 33

NOT PROVED
meaning and interpretation of 13
meaning of Evidence Act, Sec. 3 123
proof in civil and criminal cases 134
NOTICE BY POST
service of, presumption 265, 266
NOTICE TO PRODUCE (*See also* SECONDARY EVIDENCE)
rule as to 811
NOTICES
postal endorsement of "refusal" in registered cover of 265
NOTIFICATION
statement in, relevancy of 634

O

"OFFENCE"
what to mean, as used in Sec. 30 455
OFFICIAL DOCUMENTS
certified copy, admission of, without any formal proof 887
Government Gazette, notification not published in, as required by law, proof of 884
Indian Acts, authorised text of, presumption as to 884
Khatauni, certified copy, issue of in manner not provided by law, presumption as to 887
Reserved Forest, notification as to, genuineness, presumption as to 885
resolutions of Parliament, proof, mod of 885
ONUS OF PROOF
essentials of 40
in criminal trial, duty of prosecution 40
OPINION(S) (*See also* EXPERT)
as to handwriting expert, admissibility of, in evidence 714
as to handwriting, relevancy of 711
ground of opinion, also relevant 730
of experts 664
OPINION EVIDENCE
as to relationship 718, 760
—evidence of conduct, proof of 760
as to usages, tenets, etc. 717
by non-expert witness 759
expert opinion 667, 710
handwriting 711
medical certificate, not by medical man 760
proof of 759
religious or charitable foundation 717
relationship
—determination of 760
—quality of oral evidence 760
relevancy of 711, 715, 717, 718
right or custom 715
usages or tenets 717
who to give 759
ORAL ADMISSIONS
as to contents of documents, when relevant 311
ORAL AGREEMENT
contract of simple money debt 979
deed, variation of terms of, admissibility 979, 980

exclusion of evidence of 947
for dissolution of partnership, admissibility 980
in proviso (4), Sec. 92, scope of 977
modification of agreement reduced to writing by 976
mortgage debt, discharge of, proof of 960
mortgage deed, registered, terms of, subsequently varying by, recognition of 961
proof by, contract of debt, modification of terms of 977
redemption of share, between one of several mortgagors and mortgagee, admissibility 978
registered mortgage deed, terms of, modification by 977
sale deed, re-sell by, proof of 963
tenancy, variation in rent 981
written instrument, statement of fact in, if open to contradiction by 987

ORAL CONFESSION
conduct if not to amount to 316

ORAL EVIDENCE (*See also* PROOF)
admissibility of, to validate document 966
admissibility to show real nature of transaction 984
adoption deed 966
agreement varying terms, who may testify 994
as to recital in registered sale deed being false, admissibility of 964
ambiguous document, evidence to explain or amend 989
application of document to existing facts, evidence against 990
appointment to public office 922
bar to admissibility, only when contract is concluded 947
benami transactions, permissibility to show as to contracting parties 954
consideration not passed, admissibility of 969
date of performing contract, extension of time, admissibility of 951
demand pronote, collateral agreement, proof of, admissibility of 965
direct
—meaning of 755
—must be 755
distinct subsequent oral agreements, proof of 947
document
—nature of, determination 987
—recitals in constituting admissions, admissibility of 953
—silent as to interest of two joint transferees, admissibility 988
documents produced after, effect of 23
exclusion by documentary evidence 922
exclusion of, by U.P. Agriculturists' Act, effect of 988
fact invalidating document, proof of 947
fraud, intention of parties, proof of by 951
—proviso (1) to Sec. 92 967
gift deed 965
gift, in favour of member of HUF, admissibility of 966
in civil proceedings 19
inadmissible when contract is reduced in writing 947
income-tax proceedings, right to go behind recitals in registered document 987
intention of parties, fire insurance policy 987
language of document, evidence as to applicability 993
language partly applicable to several sets of facts, evidence as to 993
latent ambiguity in document, circumstantial evidence of 992
lease deed/rent note 957
lease, finding out subject-matter of, admissibility of 985
matter required to be in writing 923, 947

mistake in fact or law, proviso (1) to Sec. 92 970
mortgage deed 959
—conditional sale, contradicting terms of document, admissibility of 959
—payment of interest at one per cent, omission of words 'per cent' inadvertently, admissibility of 961
—showing deed in reality sale deed, admissibility of 960
oral agreement or statement, proof of 947
partnership deed, terms of, exclusion of 959
partnership or lease, transaction if to be lease, rejection of 959
prior statement, mode of proof 755
promissory note 965
—plea of want of consideration, proof of 968
—postponement of date of payment, subsequent agreement, admissibility 979
proof of
—collateral oral agreement, promissory note 975
—contemporaneous agreement, promissory note 975
—contemporaneous oral agreement 974
—deed, execution of by fraud or existence of oral agreement invalidating the deed 974
—document registered, terms in document ambiguous 976
—facts by 753
—mistake in fact 970
—deed of transfer silent 972
—document not silent but recites particular consideration 973
—document of informal nature 971
—loan transaction, mention of interest not made in writing 974
—mutual mistake, not unilateral mistake 970
—oral contract for sale 972
—oral representation of quality silent in written contract 974
—original instrument silent on subject-matter of agreement 971
—palpable error 971
—specific performance to resell, suit for 973
—subsequent oral agreement 972
—surety bond executed under a mistake 971
—mistake in law 970
—sale deed, effect of sale on condition precedent 976
—satisfaction of claim, admissibility 980
question, one of fact and not of law, discretion of Court 19
registered maintenance deed, subsequent oral arrangement, admissibility 988
sale deed
—only a mortgage 963
—payment of full consideration, admissibility of 970
sale transactions 961
saving of provision relating to wills 994
separate oral agreement, proof of 947
suit in *forma pauperis*, admissibility of 953
terms of agreement clear and unambiguous, permissibility of 950
terms of contract, evidence of 922, 947
terms of document not ambiguous, subsequent conduct of parties, admissibility of 950
terms of grant or of other dispositions, evidence of 922, 947
want or failure of consideration, proviso (1) to Sec. 92 968
will 966
will admitted to probate 922
written contract, non-performance, admissibility 988
written lease, conditions in, not intended to be acted upon, admissibility to show 958

P

PANCH WITNESS
interpretation of 126
PARTISAN WITNESS (*See also* EVIDENCE)
if not necessarily untruthful 116
interpretation of 115
PARTY TO PROCEEDINGS
admission by 277
PARTY TO SUITS (*See also* ADMISSION)
admission by 279
admissions by persons whose position to be proved as against 294
PATERNITY
acknowledgment, effect of 256
determination of, between parties, proof 148
PEDIGREE
admissibility, proof of, person making not known 567
family, relevancy of 619
filing of, for purpose of preparation of *khewat*, admissibility 565
in settlement Court, admissibility of 565
of settlement, admissibility 566
presumption of genuineness of 567
reliance on, in suit of, inadmissibility of 565
statement in family, relationships 563
PERMIT
concellation of, on refusal to review it on grounds of conviction 47
"PERSON IN AUTHORITY"
who to be under Sec. 24 338
PLEADINGS
interpretation of 81
POLICE CUSTODY
commencement of, for the purpose of Sec. 26 397
meaning of 397, 431
"POLICE OFFICER"
if not to include Custom Officer, within the meaning of Sec. 25 383, 385, 386
jailor, if not to be, for the purpose of Sec. 26 399
persons invested with police powers, if to include 381
what to mean under Sec. 25, liberal construction 388
who to be
—for the purpose of Sec. 26 399
—within the meaning of Sec. 25 379
—within the meaning of Sec. 27 433
POLICE WITNESS
See EVIDENCE
POSTAL ENDORSEMENT OF "REFUSAL"
presumption of 265
PRESUMPTION
accused pointing out stolen property, recovery from place assessable 166
against misconduct 59
as to collection of laws and reports of decisions 896
as to correctness, of municipal record admissibility in evidence 624
as to documents 886
—produced as record of evidence 889

as to genuineness of certified copies 886
as to private Acts of Parliament 893
books, maps and charts 899
document(s)
—admissible in England without proof of seal 894
—ancient registered, certified copy, admissibility of 914
—deposition given in judicial proceeding 890
—not signed by Judge 891
—read by witness himself in Court 890
—dying declaration 892
—gazette, publication of 893
—newspapers, private Acts of Parliament 893
—identification memo 892
—legal effect, test identification parade 892
—newspaper reports 893
— genuineness of 893
—reports and gazetteers 893
document/confessional statement 891
documents 30 years old 902
—admissibility of, objection to 919
—anonymous 906
—bearing only mark or seal 906
—certified copy, due execution and attestation, proof of 913
—computation of period of 30 years 919
—copies of 912
—discretion of Court to draw 907
—due execution 910
—due execution and attestation, testamentary capacity of testator 915
—"duly executed and attested", meaning of 918
—entry in settlement record 911
—genuineness, if to include executant's authority 905
—nature and extent of 909
—production of, from proper custody
—due execution of 915
—genuineness and validity of execution 915
—proof of contents, not of execution 913
—proper custody 918
—rebuttal of 910
—recitals in, evidentiary value of 919
—registered gift deed 911
—settlement pedigree-tables, truth of relationship 911
—unregistered, recitals in, proof 904
—will 915
—certified copy, justification of due execution 916
—copy of, execution or attestation 917
documents not produced
—after notice to produce 901
—due execution, etc. of 901
—merely summons issued to appear with documents 901
entries in record-of-rights, Sec. 65 creating only refuttable 157
evidence given by witness 889
evidence in judicial proceeding 889
foreign judicial records, certified copies of 898
Government gazette 893
land unfit for actual enjoyment in usual mode, proof 152

maintenance of unmarried daughter, age and health of daughter about capacity to earn and to maintain 151
maps and survey plans, prepared by government admissibility 895
maps
—plans prepared by *patwaris*, accuracy 895
—made by authority of government 895
—relevancy and accuracy of 896
may presume 149
of postal endorsement of "refusal" 265
possession of instrument of offence, recovery from house of joint family 237
possession of stolen property, conviction 45
power-of-attorney 896
—authentication 897
—by natural or artificial persons, distinction between 897
—execution of 897
Prevention of Corruption Act, scope of the section and applicability 151
record of evidence on 889
reports of decisions 896
shall presume 149
survey record, correctness of, conclusiveness of, proof of 615
telegraphic message(s) 900
—applicability to radio messages 900
—person who delivered message for transmission 900

PREVIOUS ATTEMPTS TO COMMIT OFFENCE
admissibility of, in evidence 262

PREVIOUS CONVICTION
evidence of, admissibility 258

PREVIOUS CRIME
evidence of, admissibility of 260, 261

PREVIOUS DEPOSITION
admissibility of 569
mode of proof 482
nature and use of 569

PREVIOUS JUDGMENT(S)
when relevant to bar a second suit or trial 636

PRIMARY EVIDENCE
copies, not to be held as 768
copy
—photostat, of power-of-attorney 769
—with carbon
—certificate by a lady doctor 770
—of permit 769
—of will 769
document, production of 781
—for inspection before the Court 782
general principle 782
meaning of 23, 768
production of original document
—best evidence 768
—for inspection of Court 768
tape, embodying recording of statement 769
what to mean 768

PRIVATE DEFENCE
right of 58

PRIVATE DETECTIVE AGENCY
evidence of 131
PRIVATE DOCUMENTS
what are 876
"PROCEEDINGS"
meaning of 277
PRIMISSORY NOTE
proof, mode 935
PROOF (*See also* EVIDENCE & CUSTOM)
applicability of 137
attesting witness not found 846
—if to be sufficiently accounted for 846
by certified copy(ies) 774
—assuming character of primary evidence 774
—of a judgment 774
—of decree 774
—of deed, admissibility of 775
—original deed lost 775
by copies made from original by mechanical process 775
contents of documents, evidence of attesting witness 765
contents of letter, effect 759
conviction, Evidence Act, Sec. 3 134
document, execution of
—attesting witness turning hostile 850
—denial by attesting witness 850
genuineness of sale 148
Hindu joint family, self acquisition 151
in case of fraud and undue influence 141
in matrimonial matters 143
infringement of copyright, complaint by another person, duty of Court 139
joint family breaking of, division of property for convenience 157
kesari dal, prohibition of, for human consumption, Notification under Rule 44-A, of Food Adulteration Rules 41
mode of
—customary right, claim for, consideration of facts 555
—for handwriting 857
—objection in second appeal 820
—objection to 773
—permissibility to be raised 773
—when to be raised 773
mortgage deed, attestation not made, mortgage, if invalid 830
nature of
—charge of unchastity 145
—requirement for "valid attestation" 827
"no attesting witness found", if necessary 846
of account books, mode of, objection as to 820
of admissions as against persons making them, and by or on their behalf 296
of admitted fact 280
of adoption 140
of ancient facts of public nature 761
of contents of documents 764, 766, 816
—truth of correctness to be ascertained 765
—by primary or secondary evidence 764
of contents of letter, person writing letters dead 545
of date of birth 603

of deed
—execution of, not specifically denied 845
—of relinquishment 845
of document by an illiterate person, thumb-marking, if not 824
of document produced from proper custody, propriety of 766
of document(s)
—attestation of, not required by law 851
—attestation required by law 823
—mode of, objection regarding 820
—not required to be attested 829
—by primary evidence 781
—by production of certified copies 879
of execution of 814
—attested document 824
—certified copy obtained from Registrar's office 822
—document required by law, to be attested 821
—document, not of truth of contents 765
—handnote, validity of 821
—of registered document 840
—registered document, mere placement of certified copy 841
of facts admitted 748
of facts by oral evidence 753
—conflict between oral, eye-witness and medical evidence 754
—credibility of oral testimony 754
—non-production of documentary, rejection of 753
—of a solitary witness 753
of factum of mortgage, and terms of mortgage, not the same 766
of foreign law 635
of gift-deed 831
—due execution, attestation and registration, validity of 831
—grounds of misrepresentation, undue influence and fraud 831
—not specifically denied 831
of handwriting, genuineness, admissibility 821
of legitimacy of child 148
of marriage 147
of *mens rea*, applicability of maxim *"actus non facit nisi mens sit rea"* 256
of mortgage deed 830
—attestators not examined 830
—denial of genuineness, validity or truth of, not of execution 831
of mortgage, only one witness called, sufficiency of 831
of motive 256
of mutation in landlord's rent-roll 767
of negligence 137
of other official documents 882
of registered document, specific denial of, meaning of "specific denial" 841, 842
of religion 143
of residence 143
of sale deed 832
of signature of at least one witness, requirement of, under S. 69 846
of signature, identification of, by illiterate person 824
of statement, how much of it to be required 635
of translation of judgment, certified copy of 880
of warrant, by production of certified copy 882
of Will 142
—admittance of execution of, need of examination of attestors 836
—applicability of proviso to Sec. 60 761

—attestation, scribe and sub-Registrar as attesting witness 835
—denial of one attesting witness, acceptance of two others 838
—due registration of, if not to dispel suspicion 837
—examination of one attesting witness, if enough 834
—examination of, meaning of 837
—execution of, non-examination of scribe 837
—execution otherwise proved, adverse inference, if to be drawn 839
—general principles 832
—mode of, onus, principles, Court, when to grant probate 834
—proved in earlier proceeding 838
—question about truth and genuineness of 834
—signature of testator, vital matter 836, 847
—suspicious circumstances attending execution, test of 840
plaintiff challenging existence, genuineness, and validity of arbitration agreement 154
registered document
—specific denial of execution, what to amount 843
—specific denial of, if to be by party to litigation 843
right of privacy, nature of 138
standard of
—in civil cases, money suit 136
—in regard to the plea of *alibi* as well as in regard to prosecution evidence 237
when circumstances suspicious, conclusiveness of 816
where no attesting witness found 846

PROOF OF CUSTOM
on whom burden lies 249

PROOF OF POSTING
interpretation of 140
service of summon by post, defendant *pardanashin* lady, acknowledgment bearing thumb impression 140

PROPER CUSTODY
meaning of 918

PROSECUTION
depending upon identification witness, identification of witness by committing Magistrate 197
for possession of opium, analytical examination, if not necessary in every case 48
not examining any witness, effect of 47
omission of, to send blood-stained earth for chemical examination, reasonable doubt on 48

PROVED
appreciation of evidence 133
concept of 133
criminal trial, proof of charge 133
meaning and interpretation of 13
meaning of, Evidence Act, Sec. 3 132
part of prosecution story disbelieved, evidence as to other part, credibility 134

PUBLIC DOCUMENT(S)
adangal 869
assessment record 871
certified copies of
—admissibility in evidence 880
—admittance in evidence 876
—decree of Court, formal proof, if not needed 880
—issue of, person to issue to mention official designation 876
copies of, to be as good as original in certain cases 884

death register 868
—entry in, correctness, presumption of 888
election record 869
first information report 873
medical/post-mortem report 873
original of, proof, requirement of 887
pariwarik register 869
post office record 869
proof of, by certified copies 870, 879
record of facts noted by police officer 866
record of *gram panchayats* 869
record of municipality 870
record of Registrar 871
record-of-rights 869
sanction given by District Magistrate under Sec. 29, Arms Act 868
settlement record 869
uncertified copies, admissibility 876, 879
village record 869
visa 872
voter's list 869
warrant 873
what are 867
what are not 873
—assessment order 874
—entry of marriage in village register 873
—Inspection Book of Lands and Buildings 874
—letter written by manager of District Co-operative Bank 873
—*Naib Tahsilidar's* report of spot inspection made to *Tahsildar* 873
—plaint/written statement 874
—settlement maps 868
—test for determination of 866
when not public documents 876
when not to be
—medical/post-mortem report 875
—record of Registrar, original document not kept by registering authority 875
—statement recorded by Police during investigation 875
—voter's list, in the absence of author's examination 875
—warrant 875
—will, even after registration 875

UBLIC RECORD
entry in, relevancy of 597

R

APE
benefit of doubt in case of 44
offence of, when not proved against the accused 44

ECITALS IN A DOCUMENT
as to ownership, admissibility of 254
relevancy as admission 279

ECITALS IN MORTGAGE DEED
evidentiary value against third party 254

ECORD-OF-RIGHTS
entries in, relevancy of 613

RECOVERY
delay in, effect of 445
from fields, accessible to all, formation of basis of conviction 443
of articles
—absence of human blood on, effect of 444
—commonly used 446
—if to have some connection with crime 445
—presence of human blood on, effect of 444
place of 441
police remand for effecting 434
presumption as to robbed property 450
presumption as to stolen property 450
procedural defects in 449
witnesses to 447
"REFUSED" OR "REFUSAL"
in registered cover of notice, presumption of correctness 265
REGISTRATION OFFICER
if not a Court, in the proceedings for registration of a Will 14
REHABILITATION AUTHORITIES
proceedings before, applicability of Act 7
RELATIONSHIP(S) (*See* RELEVANCY)
by adoption
—factum of adoption, statement of adoptive father, admissibility 560
—statement of deceased adoptive mother, admissibility of 560
existence of, statements regarding legitimacy made after dispute, inadmissibility of 559
fosterage, if not within Sec. 32 560
legitimacy 724
nature of evidence admissible 720
person whose evidence is admissible 723
proof of, statement of deceased mortgagor, admissibility of 557
statement as to commencement of, admissibility of, if and when 559
RELEVANCY
Insolvency Court, order of 649
of certain evidence for proving, in subsequent proceedings, the truth of facts therein stated 569
of certain judgments in probate, etc., jurisdiction 642
of character 730
— imputation of conduct, proof of, in civil cases 730
of character as affecting damages 734
of criminal Court's judgment in civil case 639
of criminal Court's judgments
—in case for damages 640
—in departmental enquiry 640
—in motor accident claims case 641
of decision of Admiralty Court 648
of entries in books of account 585
of entries, non-examination of maker of 602
of evidence in matrimonial matters 647
of expert medical opinion 677
of facts, bearing opinions of experts 710
of family pedigree 619
of foreign judgments 645
of grant of letters of administration 646
of judgment in land acquisition cases 657

of judgment *in personam*, inadmissibility of 643
of judgment *in-rem* 643
of judgment of Probate Court 646
of judgments, etc., other than those mentioned in Secs. 40 to 42 651
of judgments of Courts of justice 636
of judgments, other than those mentioned in Sec. 41 650
of letters passing between officials before final decision reached, admissibility 603
of Magistrate's judgment under Sec. 145/144, Cr.P.Code 641
of opinion
—as to usages 717
—as to existence of right or custom 715
—as to handwriting 711
—as to tenets 717
—grounds of 730
—on relationship 718
—adoption 727
—if to be "opinion expressed by conduct" 721
—marriage 724
—paternity 728
of opinions of experts 664
of opinions of third persons 664
of orders or decrees, other than those mentioned in Sec. 41 650
of previous good character, in criminal cases 731
of public record made in performance of duty, entries in 597
of report of *patwari*, non-examination of *patwari* 603
of statement as to fact of public nature contained in certain Acts or notifications 634
of statements as to any law contained in law books 635
of statements in maps, charts and plans 632
previous conviction, effect of 734
special means of knowledge 717

RELEVANCY OF FACTS
provisions as to 153, 154

RELEVANT
meaning and interpretation of 11

RELEVANT FACT(S)
facts necessary to explain or introduce, provisions as to 184
if evidence may be given of facts in issue and 153

RELIGION
proof of 143

REPRESENTATIVE CHARACTER
suitor in, admission by 277

REPRESENTATIVES-IN-INTEREST
admission by, if binding 306

REPUTATION AND HEARSAY
distinction between 81

RES GESTAE
statement by person robbed immediately after robbery and assault, if admissible as part of 179

RESIDENCE
proof of 143

RETRACTED CONFESSION
by one of co-accused, use of against other 473
co-accused, admissibility against 472

conviction, if to form legal basis of 347
conviction on
—accused fully alive to consequences, concession unexplained 350
—legal bar, if voluntary made 349
corroboration
—absence of, conviction, solely based on, illegality of 353
—requirement of, standard of 353
corroboration by another retracted confession 474
evidentiary value of 347
extra-judicial, value of independent corroboration, necessity of 352
if not rule of law, but of prudence 400
proof of 356
reliance upon 348
use of
—against co-accused 354
—corroboration, nature and extent of 354
—conviction to base on other evidence available 348
value of, corroboration, necessity 349

REVENUE AUTHORITIES
proceedings before, under Sec. 1 of Evidence Act 7

REVENUE RECORD
entries in, admissibility 617

REVENUE OFFICER
if not a Court 14

"RIGHT"
assertion of, when amounts to 251
existence of proof 240
interpretation of 242
opinion of persons likely to know 715
value of opinion evidence 715

RIGHT OR CUSTOM
See RELEVANCY

RIWAJ-I-AM
entries in, relevancy of 622

RULES AS TO NOTICE TO PRODUCE
See SECONDARY EVIDENCE

S

SALE
genuineness of, proof of 148

SALE DEED
proof, mode of 938
property passing under, identity, deed is the best evidence 961
registered sale deed, agreement varying terms, admissibility 964

"SAME OFFENCE"
meaning of 462

SAME TRANSACTION
relevancy of facts forming part of 158

SCOPE
of Sec. 14 of the Act 257
of Sec. 15 of the Act 263
of Sec. 17 of the Act 267
of Sec. 17 *vis-a-vis* Sec. 145 of the Act 276

of Sec. 18 of the Act 277
of Sec. 21 of the Act 296, 297
SCHOOL RECORD
entries in, admissibility 609
SCRIBE
as attesting witness 828
SECONDARY EVIDENCE
comparison with original, absence of, objection on, when to be taken 778
deed
—compulsorily registerable but unregistered, admissibility in 791
—of mortgage, registered, certified copy, admissibility as 805
—registered, copies of, admissibility 805
—unregistered, compulsory registration, requirement of 791
document(s)
—account books, original, non-production of, inadmissibility 808
—admissibility of, objection as to, certified copies, inadmissibility in 809
—in second appeal 809
—proper procedure not followed 809
—to be raised at the trial 810
—want of notice, inadmissibility in 809
—when to be taken 808
—certified copies of, admissibility 774, 785
—certified copy of registered, admissibility in 806
—admissibility 789
—contents of, non-production of, if binding on Court to receive 794
—copies of *hundies* and contents, if to be received as 799
—copies of original, inadmissibility in 790
—destruction of original 796
— existence and contents of original, admission, admissibility 795
—existence or contents of, admissibility 789
—insufficiently stamped, non-production of, before Court, admissibility 791
—latter by government to Commissioner, copy of original, inadmissibility in 793
—loss of original 796
—admissibility of 797
—evidence of person deposing to loss, sufficiency to allow 798
—from custody of Court, admissibility of 801
—gift-deed not 30 years old, proof not of execution and attestation, inadmissibility 801
—modes of proof 797
—mortgage deed executed in England, admissibility of 800
—production as evidence, proof of 799
—proof in absolute terms before proof by 797
—proof of loss not satisfactory, admissibility of 808
—will, proof of, by 798
—lost, insufficiently stamped, inadmissibility in 791
—true copy, admissibility 785
—non-availability of 771
—non-production of original within time 796
—original, admission by opposite party, admissibility 795
—non-registration of 791
—original not proved, copies, inadmissibility of 787
—unstamped/under stamped 790
meaning of 771
mortgage deed, original not filed, maintainability 790
notice to produce, document, rules as to 811

notice, document
—non-production of, despite notice, permissibility of 811
—production of, certified copy, admission of, without notice 813
—if not essential in certain cases 813
—not given, admissibility of copies of original 812
—of original document necessity of 811
—refusal, effect 811
—rules as to 811
—service on brother of *pardanashin* lady living with her, sufficiency of 812
—without issuing, effect 812
notice, production of 794
—requirement of 795
notice, requirement of, deed of *wakf*, certified copy, admissibility of 795
Patwari's list, entries in, inadmissibility of 807
presumption under Sec. 90, necessity of 792
probate, grant of, admissibility 790
public document
—certified copies of income-tax returns, admissibility of 803
—certified copy of sale deed of disputed land, admissibility of 803
—certified copy, admissibility 793
—copy of the plaint, admissibility of 803
—decree, proof by certified copy, admissibility 804
—memorandum of Association of a company 804, 806
—original order of authority of an officer, certified copy, basis of 800
—production of original, necessity of 802
—public record of exchange deed, certified copy, if allowable 802
relating to documents, cases in which, to be given 787
rule as to notice produce 811
robokari, certified copy of, admissibility in 805
what to mean and include 771
will, registered, certified copy of, evidence of 790

SELF-IMPLICATION
if guarantee for truth, of accusation against co-accused 460

SERVICE OF NOTICE BY HOST
presumption of 265, 266

SETTLEMENT RECORD
entries in, relevancy of 616

"SHALL PRESUME"
indicates a presumption in law 151
meaning and interpretation of 149

SIGNATURE (*See also* SPECIMEN & COMPARISON)
comparison of, by the Court 819, 852
comparison with admitted or proved 711
of attesting witness, necessity of, for due attestation 827
of person who signed document, proof of 814
proof of
—if only by literate person 815
—method of 700, 814
—modes of 814
—which person to prove 816

SIGNATURE AND HANDWRITING
acquaintance with, presence of witness, proof of 816

SIMILAR TRANSACTIONS
evidence of 263

ECIMEN
accused let on bail, compulsion by Magistrate to give 863
direction to "any person", for giving, "any person", scope of 863
direction to give 858
—during investigation, validity of 861
—exercise of power, if not to be one in course of enquiry or trial 863
—if to be for Court purpose only 860
—whether unconstitutional or illegal 860
handwriting or signature, entitlement of Court to direct accused to give 859
obtainment of, in Court, sending of, to expert 863
of hair 864
of handwriting or finger-print, if testimonial compulsion 860
of signature
—or handwriting, if protection under Art. 20(3) violated 860
—taking of, if to amount compelling to be a witness 860
of thumb-impression 864
of voice 864

ATE OF MIND
when relevant 257

ATEMENT(S)
admissibility, how much of a 422
admissible under Sec. 27
—if to be used against only maker of 421
—use against whom to be used 421
after discovery, pointing out property, value of 438
after dispute arose, inadmissibility of 556
against interest, Sec. 73, Cl. (3) 549
against interest of maker, use against third person 483
against pecuniary interest, part of, admissibility of entire 552
as to age of adoptive son by adoptive father, admissibility 561
as to cause of death or any circumstances of transaction resulting in death, admissibility of 493
as to child's age by deceased father, admissibility 561
before Registrar, applicability of 546
by deceased
—actually made, relevancy of 488
—before Magistrate not competent to record, relevancy of 488
—circumstances of transaction, resulting in death, admissibility of 493
—relating to purchase of shops, admissibility 568
by person, not examined, not proved to be dead, inadmissibility of 485
by persons, when not to be called as witness 482
cause of death 482
course of business 483
conversation 635
deceased seriously injured resulting in death, disclosure of circumstance by, admissibility 495
discovery of dead body and confession, evidentiary value 417
factum and truth, distinction between 762
n will
—executed by deceased, admissibility 568
—if to be taken as made in course of transaction 568
aw books 635
'leading to discovery", admissibility 426
natter of general interest 483
neaning of 272

of accused
—leading to discovery admissibility against him only 428
—to police, proof of, mode of 409
—under Sec. 342, Cr.P.Code, if not binding on co-accused 456
of dead person, as to the cause of his death, admissibility of 495
of deceased
—as to the existence of family custom, admissibility of 555
—inadmissibility 485
—not against his pecuniary interest, inadmissibility of 549
—to doctor regarding his age, admissibility of 547
of deceased's grandfather as age, admissibility of 547
of living persons, inadmissibility of, under Sec. 32 484
of person, as to the circumstances resulting his death, subsequently dying, admissibility of 494
of police, recording of, duty of 433
of relevant fact, made by several persons, expresses feelings relevant to matter in question, relevancy of 484
person who is dead or cannot be found 482
recital of boundaries in sale deed by third party, if made in ordinary course of business 551
relevancy of, test of, under Sec. 32(1) 494
series of letters 635
special circumstances, made under 585
under Sec. 162, Cr.P.Code, permission to prove under Sec. 27 441
vagueness of prior, subsequent lead to discovery, admissibility of subsequent 428
without recording under Sec. 27, power of police to conduct search and recovery 413

STOCK/DECOY WITNESS
credibility of, Prevention of Corruption Act, 1947, Sec. 5(2) 120
criminal trial, credibility of 120
interpretation of 119
need for corroboration, of 120

SUBSEQUENT CONDUCT
relevancy of 175

SUBSEQUENT OCCURRENCE
interpretation of 263

SUIT
See PARTY TO SUIT

SUITOR IN REPRESENTATIVE CHARACTER
admission by 277

SURVEY RECORD
entries in, value of 615

SUSPICION
if not a substitute for proof 39

T

TAPE RECORDED STATEMENT
admissibility of 776

TEST IDENTIFICATION PARADE (*See also* EVIDENCE)
assessing the value of, held within a reasonable time 196
covering of identification marks for 217
criminal trial
—identification proceedings, conduct of 194
—investigation by police 207
duty of Magistrate in 212

dentification, value of 213
f held after long delay, no reliance by the prosecution 196
f not necessarily fatal, as observed by Supreme Court 199
f not substantive evidence 193
oint identification parade for two occurrences on different dates, result of parade, discarded 205
bject of 192
performance of witnesses in 203
precautions token in 209
principles regarding 200
proportions of outsiders to be mixed with suspects, in 211
suspects known to eye-witnesses, if farce and unreliable 199
value and importance of 207
STIMONY
of unreliable witness, value of 97
INGS SAID OR DONE BY CONSPIRATORS
n reference to common design, provisions as to 225
RANSACTION"
nterpretation of 242
meaning of 251
AP WITNESS
f not an accomplice or approver, necessity of corroboration 120
RIED JOINTLY"
meaning of 461

U

AGE, TENETS, ETC.
See RELEVANCY

W

ZIB-UL-ARZ
entries in, relevancy of 623
EAPON
of offence
—non-seizure of when direct evidence available, effect of 447
—seizure of, when direct evidence available, effect of 447
HETHER AMOUNTS TO CONFESSION OR NOT"
what to mean under Sec. 27 430
LL(S) (*See also* PROOF)
attestation of, proof required 143
attesting witness, calling of 821
by son of one of members of joint family, admissibility to show partition 550
improbabilities in, testimony 143
intention of testator, words used in Will is best evidence 966
oral evidence, exclusion of 922
proof of 142
saving of provisions of Indian Succession Act relating to 994\
THOUT PREJUDICE
documents marked as, admissibility 312
TNESS(ES) (*See also* EVIDENCE)
attesting witness 821, 846, 850
cross-examination of, tests of truth 20
low status of, if not sufficient to discredit him 58

man of no means, if no ground to discredit his evidence 59
mistakes in identification by, if no reason for discrediting his evidence in other matters 59
tendency towards enemies 118
to be weighed and not counted 60

WORDS AND PHRASES
"absconder" 183
"accused person" 324, 426
"admission" 267
"*alibi*" 238
"asserted" 253
"attestation" 822, 823, 824
"attestator" 828
"*benami*" 47
"bills of lading" 23
"*bona fide*" 163
"by standers" 159
"by which" 251
"chance witness" 121
"child witness" 122
"circumstantial evidence" 33
"conclusive proof" 149
"confession", 313, 314
"cost" 11
"decoy witness" 119
"defence witness" 128
"direct evidence" 33
"discovered" 427
"disproved" 13
"distinctly" 430
"document" 12
"evidence" 13
"execution" 825
"extreme care and caution" 123
"F.I.R." 305
"fact" 11
"facts in issue" 12
"facts" 153
"*factum probandum*" 33
"*falsus in uno falsus in omnibus*" 66
"hostile witness" 126
"in pursuance of the common object" 135
"India" 13
"information as to fact" 16
"inimical" 117
"interested witness" 112
"leading to discovery" 426
"legally authorised" 15
"matters before it" 134
"may be true" 40
"may presume" 149
"*melee*" 115
"*mens rea*" 47
"not proved" 13
"panch witness" 126
"*persona designata*" 15

"persons in authority" 338
"police officer" 379
"primary evidence" 23, 768
"private documents" 876
"proceedings" 277
"proof and its method" 87
"proved" 13
"public documents" 865, 866
"relevant" 11
"*res gestae*" 178
"right" 242
"secondary evidence" 771
"shadow of doubt" 38
"shall presume" 149
"similar transactions" 263
"statement" 272
"stock witness" 119
"subsequent occurrence" 263
"transaction" 242, 251
"trap witness" 120
"written statement" 32
WRITTEN STATEMENT
interpretation of 32

Purchased :
Approval :
Grants :
Acc. No. : 1858
Price :
National Law School of
India University Library
Bangalore